E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 16512
CM ETO 17698

VOLS. 31-32

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 31 B.R. (ETO)

including

CM ETO 16512 - CM ETO 17167

(1945)

Office of The Judge Advocate General

Washington : 1946

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

BOARD OF REVIEW NO. 5

12 OCT 1945

CM ETO 16512

U N I T E D S T A T E S	)	6TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Gross Ostheim, Bavaria, Germany,
Technician Fifth Grade WILLIAM	)	23 August 1945. Sentence: Dis-
E. ROWLAND (35265848), Company	)	honorable discharge (suspended),
A, 128th Armored Ordnance	)	total forfeitures, and confine-
Maintenance Battalion	)	ment at hard labor for one year.
	)	Delta Disciplinary Training
	)	Center, Les Milles, Bouche du
	)	Rhone, France.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the sentence in part. The record of trial has 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 93rd Article of War.

Specification: In that Technician, fifth grade, William E. Rowland, Company "A", 128th Armored Ordnance Maintenance Battalion, did, at Gross Ostheim, Bavaria, Germany, on or about 15 August 1945, with intent to do him bodily harm, commit an assault upon Corporal Anthony J. Fish by shooting him in the right shoulder with a dangerous weapon, to wit, a pistol.

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

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Specification: In that * * * did, at Gross Ostheim, Bavaria, Germany, on or about 1 August 1945, in violation of standing orders, wrongfully fail to turn in to the Unit Supply Room for safe keeping a pistol not issued to him by the U.S. Government.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, but reduced the period of confinement to one year, suspended execution of that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No. 59, Headquarters 6th Armored Division, dated 27 August 1945.

3. Evidence introduced by the prosecution shows that accused was a Technician Fifth Grade, Company A, 128th Ordnance Maintenance Battalion, stationed on the dates mentioned in specifications at Gross Ostheim, Bavaria, Germany (R9,14). About 28 July 1945, orders having been issued out of Division Headquarters requiring all foreign weapons be "turned in" for safekeeping, a bulletin to this effect was posted on the company board where it remained for the next ten days and was also read to the men at a company formation. On 1 August a supplemental notice required that such weapons be turned in by 1300 hours that day (R8,11). On 15 August, accused had a .32 German or Russian gun (pistol) in his possession. With it he shot Corporal Anthony J. Fish of his company (R11,18,19,21; Pros.Ex.1).

Corporal Fish testified that on 15 August 1945, he was a little drunk, entered accused's tent and struck him on the shoulder. Accused, as a result, dropped a fountain pen. An argument followed and the two went outside and wrestled around. Some of the men separated them; Rowland, who was sober, left; while Fish, who was being held, yelled to be let go and called accused "'son of a bitch' and so forth" (R11, 12,14,16,22). Fish was restrained for about five minutes during which time he was struggling, using vile names, cussing accused and threatening to kill him (R12,13,16). While this was going on, accused was in the neighborhood (R16). Then he appeared from behind his tent and started to walk away, whereupon Fish broke loose and started after him (R13,16,25,27). Accused turned around and told Fish to stay away, not to come any closer, that he did not want any trouble (R16,25,27). Fish continued toward accused and accused exhibited a gun. He again told Fish to stay and then fired a shot in the ground, telling Fish to stop; but the latter "didn't stop", and accused shot him in the shoulder (R12,16). Fish said that at the time he was still "calling him [accused] names" (R12). According to one prosecution witness, Fish was six or seven feet from accused when the warning shot was

fired. After that accused backed up "maybe two paces", raised the gun and told Fish "to not come any further. Fish went forward and he fired".

4. Advised of his rights as a witness, accused elected to take the stand and testify under oath (R30,31). He was in his tent when Fish entered and knocked a fountain pen from his hand, he then told Fish, "For Christ sake, take it easy", and Fish said, "What are you trying to do? Get tough?" (R31). He then told Fish that he was drunk and should take it easy, whereupon Fish invited accused outside. He was reluctant to go because he knew Fish was a dangerous man to fight with, but Fish called him a yellow-bellied bastard; so accused went out and a wrestling match ensued, which was broken up by other soldiers present. The other soldiers told accused to leave, which he did. He went away for about 5 minutes and returned to find Fish still raging and being held by the other soldiers. The moment Fish saw him he became wild, and the other soldiers told accused to leave again, which he did. Accused wanted a cigarette because he was nervous, and having none on his person he went to the rear of his tent to get some. At this time he could hear Fish calling him a yellow-bellied bastard and a fat son-of-a-bitch (R31). When accused got the cigarettes he also got a small pistol from the same box because he was afraid of Fish, knowing that Fish could inflict bodily harm because he had seen Fish beat a Technical Sergeant in Camp Pickett within an inch of his life and put him in the hospital for two months. Accused stood in back of the tent to see if Fish would quiet down. At that time it seemed to him that 10 or 15 minutes had elapsed since the original scuffle. He then started for the orderly room and was nearly past Fish when Fish saw him again. Fish broke loose and came rushing toward accused with his right hand behind his back. Accused took his pistol out, cocked and loaded it, and told Fish not to come any closer. Fish did not stop; so accused fired into the ground. Fish still did not stop; so when he was nearly on accused, accused fired, hitting him in the shoulder, then gave the gun to a Sergeant and reported to the First Sergeant. Accused shot only to wound Fish and not to kill him (R32). At the time of the shooting a number of soldiers, most of them drunk and celebrating VJ Day, were on the company street (R35). Accused has known Fish for three and a half years and has never had any trouble with him because he always stayed away from him. Fish is a dangerous man and had every man in the tent intimidated. He had the mess sergeant so intimidated that the mess sergeant would not turn Fish in for stealing butter (R33). Accused got the gun because he was afraid of Fish, who threatened to kill him several times during the above incident (R35). When Fish advanced on him with his hand behind his back, accused thought he might have a club or some other weapon (R35). Accused backed up from Fish and warned him, but he did not run because it is not right to run from a man (R35). However, he believes that he did everything in his power to avoid him (R35).

Accused also testified with respect to Charge II and its Specification. He was not present at the formations when the announcement concerning foreign weapons was made because his duty as a mail orderly required him to be away (R33,34). He did not see the notice on the bulletin board because he looked at little there except to find

out if he was on pass or on company duty (R33).

Defense witnesses testified with respect to Charge I and its Specification that Fish had been in fights before to their knowledge. He was a very good fighter and a dangerous one (R36). He had sought to intimidate others in the company and had picked fights (R37). Fish's reputation in the company was that of a "bully" and "a pretty mean man" (R38).

On cross-examination Fish, a prosecution witness and the man shot, admitted that while being held he said "Let me go and get that other son-of-a-bitch and I'll kill him". He testified that he was "hollering pretty loud" and was "pretty much in a rage". He also said on cross-examination: "If he didn't have the gun, I would have whipped him pretty bad" (R13,15).

5. All the evidence shows that Fish was the aggressor, that he had a reputation as a very good fighter, a dangerous fighter and a bully, that accused left after the preliminary skirmish outside his tent but remained in the vicinity of his tent where he saw Fish in a rage and heard him threaten his life. Accused then went into his tent, armed himself against eventualities and then started to leave the neighborhood. But, as accused was going away, Fish broke loose and started after him. Accused turned around, warned Fish not to advance, supplemented his warning by firing a shot into the ground, retreated a couple of steps and then as Fish continued to advance shot him in the shoulder from a distance of six feet or less. The circumstances so proven show a complete defense to Charge I and its Specification. We have here every element of real self-defense:

> "A person unlawfully assaulted, when without fault, may stand his ground and repel force with force to the extent which to him seems reasonably necessary to protect himself from injury" (4 Am. Jur., Assault and Battery, sec.38, p.147).

There is not a scintilla of evidence that accused intended to take Fish's life. This accused, a soldier for over three years, an experienced combat man could have killed Fish at six feet if he so desired.

> "Circumstances * * * may be such in a particular case as to justify a person assailed in using a dangerous weapon to repel the assault" (4 Am.Jur., ibid, sec. 51, p.153).

Here Fish's known ability as a mean fighter, his very threats (admitted), to kill accused, excused accused's conduct; and in any event the pistol in accused's hands was not used as a lethal weapon. He used it just as he would have used a club, to disable not to kill. He repelled

accused's threats upon his life by using such force as to him seemed reasonably necessary to defend himself against being killed or of suffering serious bodily injuries. The self defensive measures as herein shown are legally justified (4 Am.Jur., Sec.38, p.147; Shields v. State, 187 Wisc.448, 204 N.W., 486, 40 A.L.R. 947; CM 231675, Johnson, 18 B.R. 267; Dig.Op. JAG, 1912-1940, sec.451(9), p.313). There is no substantial evidence in support of the findings of guilty of Charge I and its Specification.

With respect to Charge II and its Specification, there was a clear violation of Article of War 96. Accused testified he was not present when the order to turn in foreign weapons was read to his company. He said he did not read the bulletin on the company bulletin board. This defense removed the willful element from accused's failure to turn in his weapon. However, it was accused's duty to read the bulletin board and to be posted with respect to all matters appearing thereon which imposed on him a military duty. Since the offense here is charged under Article of War 96 it was not necessary to prove a specific intent. He was guilty of a neglect of duty and was not excused by his failure to read the bulletin board (CM 248497, III Bull. JAG 233; CM ETO 3416, Conyer; CM ETO 7553, Besdine). The offense of accused, as proved under Charge II and its Specification, most closely resembles that of failing to obey a lawful order of a superior officer in violation of Article of War 96, for which offense the maximum punishment is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (MCM, 1928, par.104c, p.100).

6. The charge sheet shows that accused is 30 years of age. He was inducted 10 February 1942, at Fort Thomas, Kentucky, without prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Other than those noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of pay per month for six months.

Judge Advocate

Judge Advocate

Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater. 12 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, ~~U. S. Army~~. c/o Postmaster, N.Y. N.Y.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat.724;10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 U.S.C. 1522), is the record of trial in the case of Technician Fifth Grade WILLIAM E. ROWLAND (35265848), Company A, 128th Armored Ordnance Maintenance Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the finding of guilty of Charge I and its Specification in violation of Article of War 93, and that portion of the sentence in excess of confinement at hard labor for six months and forfeiture of two-thirds of pay per month for six months, be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of that portion of the findings of guilty so vacated, viz; assault with intent to do bodily harm, be restored.

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

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

IN 10 NOV 1945 AGO USFET

(Findings and sentence vacated in part in accordance with recommendation of The Assistant Judge Advocate General. As thus modified unexecuted portion remitted. GCMO 3, USFET, 10 Jan. 1946).

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

BOARD OF REVIEW NO. 1

10 OCT 1945

CM ETO 16516

U N I T E D S T A T E S	)OISE INTERMEDIATE SECTION, COMMUNICA-)TIONS ZONE, EUROPEAN THEATER OF
v.	)OPERATIONS
Technician Fourth Grade DWIGHT S. SHAFFER (35244634), Technician Fifth Grade ALPHONSE L. SARAFIN (31416706), and Privates CARL E. HUMPHREYS (35297010), VERNON EDRINGTON (35176578) and STANLEY W. PARKER (39925980), all of 6977th Reinforcement Company (Provisional), Detachment 6930, Ground Force Reinforcement Command	)Trial by GCM, convened at Chateau)Thierry, France, 26 June 1945. Sentence)as to each accused: Dishonorable)discharge (suspended), total forfeitures)and confinement at hard labor,)EDRINGTON for 7 years, all other accused)for 5 years. Delta Disciplinary Train-)ing Center, Les Milles, Bouches du)Rhone, France.

OPINION by BOARD OF REVIEW NO. 1
BURROW, CARROLL and O'HARA, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the sentences. 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 were tried upon the following Charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Technician Fourth Grade Dwight S. Shaffer, 6977th Reinforcement Company (Provisional), Detachment 6930, Ground Force Reinforcement Command, and Technician Fifth Grade Alphonse L. Sarafin, 6977th Reinforcement Company (Provisional) Detachment 6930, Ground Force Reinforcement Command, and Private Carl E. Humphreys, 6977th Reinforcement Company (Provisional), Detachment 6930, Ground Force Reinforcement Command, and

(8)

Private Stanley W. Parker, 6977th Reinforcement Company (Provisional), Detachment 6930, Ground Force Reinforcement Command, and Private Vernon Edrington, 6977th Reinforcement Company (Provisional), Detachment 6930, Ground Force Reinforcement Command, acting jointly and in pursuance of a common intent, did, at Mailly-le-Camp, Aube, France, on or about 29 April 1945 unlawfully enter the apartment of Jeannie Gervasoni with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that * * *, acting jointly and in pursuance of a common intent, did, at Mailly-le-Camp, Aube, France, on or about 29 April feloniously take, steal and carry away

1	Jacket, leather, button front, new	value about Sixty Dollars	($60.00)
1	Jacket, leather, used, zipper front	value about Ten Dollars	($10.00)
1	Pair of gloves, leather and crocheted	value about Five Dollars	($5.00)
1	Pair of leather gloves	value about Sixty Cents	($0.60)
1	Leather bag	value about Six Dollars	($6.00)
1	Alarm Clock	value about Five Dollars	($5.00)
1	Cigarette Lighter	value about Three Dollars	($3.00)
1	Pack of cigarettes	value about Thirty Cents	($0.30)
1	Pair of sandals	value about Four Dollars	($4.00)
1	Pair of white shoes	value about Six Dollars	($6.00)
1	White Shoe	value about Three Dollars	($3.00)
1	Shoe, red leather	value about Three Dollars	($3.00)

property of Jeannie Gervasoni.

Each accused pleaded not guilty to and was found guilty of the Charge and both specifications. Evidence was introduced against accused Humphreys of one previous conviction by summary court for breach of restriction in violation of Article of War 96; against accused Edrington of three previous convictions by special court-martial, one for absence without leave for four days and breach of restriction in violation of Articles of War 61 and 96, one for absence without leave for one day and willful disobedience of a superior officer in violation of Articles of War 61 and 96, and one for willfully discharging a carbine in his bunk in violation of Article of War 96; and against accused Parker of two previous convictions one by special court-martial for failure to obey the lawful order of a superior officer in violation of Article of War 96, and one by summary court for absence without leave for three days in violation of Article of War 61. No evidence of previous convictions was introduced against accused Sarafin or Shaffer. 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, Humphreys for seven years, Edrington for 11 years, Parker for nine years, and Sarafin and Shaffer each for five years. The

reviewing authority, as to each accused, approved only so much of the findings of guilty of Specification 2 as involved a finding of guilty of larceny, at the time and place alleged, of the goods as alleged, of a value of less than $20, except that in the case of Edrington he approved only so much of the findings of guilty of Specification 2 as involved a finding of guilty of larceny, at the time and place alleged, of a value of less than $20. As to accused Humphreys, Parker, Sarafin, and Shaffer, he approved the sentences and ordered them executed, but suspended the execution of that portion of each sentence adjudging dishonorable discharge until the soldier's release from confinement. He reduced the period of confinement of accused Humphreys from seven to five years and the period of confinement of accused Parker from nine to five years. As to accused Edrington, he approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for ten years and six months, reduced the period of confinement to seven years, ordered the sentence as thus modified executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. As to all accused, he designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France as the place of confinement. The proceedings were published in General Court-Martial Orders Number 301, Headquarters Oise Intermediate Section, Theater Service Forces, European Theater, APO 513, U. S. Army, 19 August 1945.

3. Evidence for the prosecution.

On 29 April 1945 at 1745 hours Madame Jeannie Gervasoni left her apartment, located on the first floor of the Hotel St. Eloi, Mailly-le-Camp, France, to visit her mother-in-law (R10-11). When she left, the apartment was locked, but when she returned at 1930 hours the lock on the door had been broken and a number of personal items were missing from the apartment, consisting of two leather jackets, one worn and one badly worn, one pair of woman's white tennis shoes, one man's canvas shoe, one alarm clock, one red shoe, badly worn, one leather sandal, badly worn, one cigarette lighter, one pack of cigarettes, one pair of gloves, and one leather brief case, very badly worn (R11-15;Ex.A-H). Madame Gervasoni had not authorized anyone to take the property (R17). Her father, Emile Foy, operated a cafe on the ground floor of the building in which the apartment was located (R23-24). On the day in question he heard someone knocking on the door of the apartment (R23). It was then around 1900 hours and he was in his cafe (R24). He attempted to investigate, but a soldier was holding the door of the cafe closed against him, and another was standing near the telephone to prevent his leaving or telephoning (R23-24). He could not identify either soldier. Accused Parker, Sarafin and Shaffer were in the place of business either immediately before or during the time that Foy attempted to leave (R24). When Foy was able to get out of the cafe, he noticed that a gate providing egress from the building's courtyard had been broken, and from the first floor of the building he saw two or three soldiers running through the gate, but did not see them carrying anything (R24-25). Prior to the above incident,

the five accused were in Foy's cafe. They brought three or four bottles of cognac with them and bought three bottles of wine from Foy. Six or seven soldiers consumed the liquor (R28). Foy called the military police because the soldiers drank too much, were making too much noise, and wanted to get in behind the counter, and because he thought they did not know what they were doing (R25). Foy saw Parker on the stairway leading to the rooms on the first floor (R29). This stairway was on the inside of the building, while the stairway leading to his daughter's apartment was on the outside (R30).

On the evening of the 29th of April a military police corporal called at Foy's place of business, investigated, and found the five accused in a field lying on their stomachs in tall grass (R31). The two leather jackets taken from Madame Gervasoni's apartment were lying near them, as were the alarm clock and the worn brief case (R32-33). Edrington's pockets contained a pair of woman's tennis shoes and one man's canvas shoe. Parker's pockets contained one red shoe and one leather sandal, both badly worn (R32). The military police had to help Edrington over a fence when arresting him because he refused to climb over it himself (R40). Later Parker was found to have in his possession a cigarette lighter and a pair of woman's gloves (R33-34). When they were apprehended, one accused said: "Be quiet, don't cause any more trouble, they have nothing on us" (R36). One of the military policemen who made the arrest testified that he asked all of them as to who owned the property and they did not answer his question (R33).

4. Evidence for the defense:

a. After an explanation of their rights, each accused elected to be sworn as a witness (R41-43) and testified in his own behalf. Accused left camp together to take a shower but changed their minds and went into town to get something to drink (R54,63). First they stopped at a cafe and drank two bottles of wine, and then they went to the cafe operated by Foy (R44). There they bought four bottles of cognac and three bottles of wine, drank it, sang and talked. There were 15 or 20 soldiers in the cafe (R44,49). Edrington, Parker and Shaffer became drunk and did not remember what happened during the latter part of their stay in Foy's cafe or how and when they left there (R44,50,56). Sarafin and Humphreys remained in possession of their faculties (R68,76). Sarafin became sick and went to the latrine (R68). Humphreys stayed in the cafe with the other three accused, who became involved in an argument with the bartender (R76). Fearing trouble, Humphreys summoned Sarafin to his assistance and together they removed the other three accused, referred to as the "three drunks", from the cafe (R68,76). In leaving they went through the broken gate and found the property mentioned above lying on the ground (R68,76-77). The three who were drunk started picking up some of the articles over the objection of Humphreys and Sarafin; they persisted, however, and carried some of the property with them into a field (R68,77). Shortly thereafter, the military police were seen, and Humphreys and Sarafin had everybody lie down in the grass, hoping that they would not be seen because they did not want to be

arrested for being drunk (R69,77). Humphreys had a pair of gloves in his pocket when arrested (R77).

b. Matters brought out on cross-examination of accused by prosecution and court:

In the cross-examination of accused Shaffer the prosecution referred to several bars of "G.I. soap", which were apparently in the court room but which had not been introduced in evidence or mentioned previously during the trial (R58). The following examination occurred:

> "Q. Have you ever seen that before? (Indicating several bars of G.I. Soap).
> A. No, sir.
>
> Q. Isn't it a fact that you bought the cognac at the first place you went to and that you traded soap for it?
> A. No, sir; that is not a fact. We paid French money for it" (R58).

Shaffer was questioned further concerning the soap and the possibility of his having traded soap for cognac (R58-59,61). The court then took up the questioning of accused relative to the price paid for cognac and the probability that accused had already procured it before entering Foy's cafe (R64). Accused Sarafin and Humphreys were also cross-examined by the prosecution relative to the "G.I. soap" and its possible use in barter for cognac (R72,73-74, 82-83). Accused Humphreys testified that soap had not been used for black market barter but that it was in the brief case which was found near the accused in the field when they were apprehended by the military police (R82-83).

When Parker was on the stand, a member of the court brought out the fact that the accused had no pass (R54). The same was brought out when Shaffer was examined by the court (R65).

During Humphreys' cross-examination by the prosecution, the following occurred:

> "Q. Did you five men stop at a farmhouse after you left the cafe?
> A. Yes, sir. It wasn't a farmhouse - it was a barn.
>
> Q. What happened there?
> A. Well, these three drunks wanted to buy some more wine and so I guess they believed they could get some wine from this farmer and so they started arguing with this farmer and finally I got them away from there with the help of Sarafin.

Q. Did you see any one of the men seize that farmer by the throat?
A. No, sir; I did not.

Q. You are sure of that?" (R79).

An objection was then made by the defense, which was sustained (R79).

In the cross-examination of Sarafin and Humphreys the prosecution brought out the fact that the two accused had refused to make a statement during the investigation of the case (R73,83).

5. The prosecution's evidence established that accused were in the vicinity of the apartment at about the time it was broken into and rifled; that shortly thereafter some of accused were in possession of some of the stolen articles; and that when accused saw the military police coming they attempted to hide. Unexplained possession of recently stolen property in these circumstances raises a presumption that those who were in possession of it stole it. (MCM, 1928, par. 112a, p.110; CM ETO 1201, Pheil; CM ETO 1486, MacDonald and MacCrimmon). Similarly, since the evidence showed that the property was stolen from an apartment which was burglarized, the possession of this property was sufficient to warrant a finding that the possessors of it were guilty of housebreaking (CM 157982 (1924), Dig. Op. JAG, 1912-40, sec. 451 (32), pp.321-322; CM ETO 2840, Benson).

In reviewing records of trial, the Board of Review in the ordinary case is limited to ascertaining whether the record contains substantial evidence as to the existence of each element of the offense charged, and in determining the substantiality of the evidence we do not judge of the credibility of witnesses or evaluate the weight to be accorded their testimony (CM ETO 895, Davis et al). If, however, the court erroneously admits or excludes evidence of a vital character, or commits other vital error, not sufficient to require the proceedings to be set aside, then we require its findings of guilty to be supportedby compelling evidence (CM ETO 1201, Pheil; CM ETO 11905, Howse; CM ETO 12210, Black; CM ETO 15272, Nichols et al).

Errors were committed by the court in permitting inquiry into the commission of other offenses by accused. Thus Parker and Shaffer were interrogated by a member of the court as to their absence from camp without a pass. This was not relevant to any question then before the court and its only tendency was to create prejudice in the minds of the court against accused. It was incompetent (MCM, 1928, par. 112b, p.112; CM 114908 (1918), Dig. Op. JAG, 1912-40, sec. 395 (7), pp. 200-201; CM ETO 2644, Pointer; CM ETO 3213, Robillard) and nonetheless so because it was elicited on cross-examination of accused (Weiner v. United States (CCA 3rd 1927), 20 F (2nd) 522). For the same reasons inquiry by the prosecution, and then by the court, as to accused's bartering of "G.I. soap" for cognac was improper. They were not charged with wrongful disposition of government property and the implication of that effect from the extended interrogation to which

accused were subjected along those lines, an implication readily seized upon by the court, could not be other than harmful. Similarly, the trial judge advocate's cross-examination of accused Humphreys in reference to his assault and battery upon a farmer, which was alleged to have occurred after the commission of the offense for which they were being tried, was improper.

In view of the conflict in the cases asserted in Raffel v. United States, 271 U.S. 494, 70 L. Ed. 1054 (1926), we do not decide whether reference to accused's failure to make an extra-judicial statement was wrong.

Both of the offenses with which accused were charged involved the formulation of a specific intent. Whenever in such a case the record reveals that an accused has been drinking at the time of the commission of the alleged offense it is always a question whether the drunkenness was so severe as to preclude his entertaining the requisite specific intent (MCM, 1928, par.126a, p.136; CM 151742 (1922), Dig. Op. JAG, 1912-40, sec. 451 (40), p.325). Whether that incapacity exists in a particular case is, under the principles set forth above, ordinarily a question for the court (CM ETO 3679, Roehrborn; CM NATO 774, II Bull JAG 427), whose findings we will not disturb, if they are supported by substantial evidence.

We conclude, however, that absent compelling evidence of guilt, accused's substantial rights were prejudiced by the evidence as to other offenses allegedly committed by them, and by the prosecution's and court's reference to the same. As we have said, whether or not accused committed these other offenses was totally irrelevant to any inquiry then before the court and evidence of, and reference to, their commission had a distinct tendency to bring about their conviction on the grounds that their conduct in general deserved punishment without much regard to whether they actually committed larceny or housebreaking. In this connection, we are considering the cumulative effect of these errors. We need not, and do not, decide whether any thereof standing alone would constitute prejudicial error, in the absence of compelling evidence of guilt. Since vital error was committed, we accordingly search the record for compelling evidence of accused's guilt.

The prosecution's evidence showed that accused had three or four bottles of cognac which they consumed with the assistance of one or two other soldiers. In addition they consumed three bottles of wine, all in the space of a little more than one hour. Foy, the cafe owner, a witness for the prosecution, testified they had drunk too much and that, he did not believe they knew what they were doing. The military policeman testified that he had to assist Edrington over a fence when he arrested him. In addition, the aimless character of their thieving tends to support the conclusion that they were drunk. Some of the items stolen were introduced as exhibits and, although they were withdrawn, the reporter's description of them sufficiently indicates their character. These items were a leather jacket "worn along seam of sleeves with a rip under left arm pit, pockets worn and breaks around the elbows"; one very badly worn leather jacket;

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one pair of woman's white tennis shoes; one rubber-soled, canvas shoe; one alarm clock, with bent leg; one red shoe; one pair of badly worn leather sandals; and one leather brief case very badly worn. Other articles not introduced as an exhibit were two pairs of gloves, a cigarette lighter, and a package of cigarettes. None of these articles, with the exception of the cigarette lighter and the cigarettes, appears to be of any conceivable value to a soldier. They represent the products of just the sort of silly plundering which one would expect of those whose judgment is impaired by alcohol.

In addition to this evidence these accused testified that they were so drunk that they had no remembrance of the pertinent events of the day. Another accused testified he became sick as a result of drinking. While the court was not required to believe this evidence, it was their province to give it such weight as they saw fit in view of the fact that there was corroboration in the prosecution's evidence.

In this state of the record it can scarcely be said that the evidence as to accused's ability to formulate and retain the requisite specific intent has the "robust quality of moral certainty and determinativeness which will sustain the finding" in the face of these vital errors. It accordingly follows that the record is legally insufficient to sustain the findings of guilty and the sentences (CM 127490 (1919); CM ETO 1201, Pheil; CM ETO 13317, Parker et al).

6. The charge sheet shows that accused Humphreys is 26 years 11 months of age and was inducted on 9 December 1943 at Columbus, Ohio; that accused Edrington is 31 years two months of age and was inducted 19 April 1941 at Fort Wayne, Indiana; that accused Parker is 27 years four months of age and was inducted 18 January 1944 at Pocatello, Idaho; that accused Sarafin is 23 years four months of age and was inducted 20 December 1943 at Springfield, Massachusetts; and that accused Shaffer is 27 years four months of age and was inducted 7 March 1944 at Fort Benjamin Harrison, Indiana. All accused were inducted to serve for the duration of the war plus six months. None of accused had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. Errors injuriously affecting the substantial rights of accused were committed at the trial. For the reasons stated, the Board of Review is of the opinion that the record is legally insufficient to sustain the findings and the sentences as modified.

Wm. F. Simons Judge Advocate

(ON LEAVE) Judge Advocate

Jared Hoffman Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Technician Fourth Grade DWIGHT S. SHAFFER (35244634), Technician Fifth Grade ALPHONSE L. SARAFIN (31416706), Privates CARL E. HUMPHREYS (35297010), VERNON EDRINGTON (35176578) and STANLEY W. PARKER (39925980), all of 6977th Reinforcement Company (Provisional), Detachment 6930, Ground Force Reinforcement Command.

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 sentences as modified be vacated, and that all rights, privileges and property of which they have been deprived by virtue of said findings and sentences 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 GCMO.

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

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(Findings and sentences as modified vacated. GCMO 558, USFET, 27 Oct 1945).

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

BOARD OF REVIEW NO. 5

4 OCT 1945

CM ETO 16536

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Gutersloh, Germany, 3, 19 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOHN CURTIS (38222377), Attached-Unassigned Detachment 97, Ground Force Reinforcement Command	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that John Curtis, attached-unassigned, Detachment 97, Ground Force Reinforcement Command, did at Munster, Germany, on or about 16 April 1945, forcibly and feloniously, against her will have carnal knowledge of Hanna Schroeder.

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 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

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

3. The evidence for the prosecution shows that on 15 April 1945 accused was attached to the 228th Reinforcement Company which organization was located in Munster, Germany (R17). At about 6:00 o'clock on the morning of 15 April accused entered the house of Frau Johanna Nadermann situated about seven kilometers from accused's camp (R18). He was armed with a rifle and pistol and, upon being admitted into the house, ordered Frau Nadermann and a Polish resident there to go upstairs. He threatened them by pointing his pistol at them (R7,8). After following the German woman and Polish man upstairs, accused separated them by making each one go into different rooms. He tried to lock the doors to the rooms but was unable to do so and when Frau Nadermann attempted to return to the lower floor, accused pointed his gun at her and motioned for her to return upstairs (R7,8). He then went into another bedroom where Hanna Schroeder, a fifteen-year-old girl who worked in the Nadermann home, was sleeping. He awakened the girl by pulling the covers from her bed, and after she pulled them back over her, accused "ripped" them off again while opening his pants. The girl called for Frau Nadermann whereupon accused hit her with both his hand and his rifle. He pinned the girl down on the bed by holding her hands, got on top of her, inserted his penis into her vagina and engaged in sexual intercourse with her (R13,14). Upon completing the act, accused got up, "wetted his two fingers", placed them in the girl's vagina, and then quietly left the room, taking his rifle with him (R14). During the time accused was assaulting her, she tried to free her hands but was unable to do so. She did not consent to, but resisted his advances. At one time accused held his rifle against her breast and during the entire period of time that he was in the room with the girl he kept his rifle near him beside the bed (R13).

At an investigation parade held a few days after the intercourse took place, the victim, Hanna Schroeder, identified accused as her assailant (R14). She had previously seen him with both white and colored soldiers on other occasions and readily recognized him (R14,15). He was also identified in court (R6,12). Frau Nadermann testified that "quite a few" white soldiers had been around her house since the arrival of the American troops in Munster on 1 April (R7), but that the first time she ever saw a negro soldier was on the evening of 14 April 1945 (R8), when accused entered and searched her house for schnapps (R9). She also saw and recognized him on the afternoon of 16 April when he passed her house on a bicycle (R10,11). She was within ten meters of him when he went by and not only recognized him but saw the ring that he was wearing and recalled that it was the same one she had observed on him on a preceding occasion (R11).

4. Accused, after his rights as a witness were explained to him,

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elected to be sworn as a witness in his own behalf (R21). He testified in substance as follows: On the evening of 14 April 1945 he remained in camp and after "chow" watched a softball game until about 9:00 o'clock when he went to bed (R21). He denied being present at the scene of the alleged rape and stated that he did not leave camp on the morning of 15 April until about 10:00 o'clock. The first time he ever saw the two German women who testified against him was on the evening of 17 April while riding on his bicycle. They stopped him and about this time a lieutenant appeared on the scene and demanded to know his business there and further inquired if he knew the German women. He denied knowing them, but was nevertheless, placed under arrest and questioned concerning an alleged attack on the young girl. The following day he was taken to several German farmhouses where various people looked at him but failed to identify him as the colored American soldier who had killed cows, swine and poultry in the community. He was, however, identified as the soldier who attacked the German girl (R23,24). He admitted on cross-examination, that he had no regular duties in the replacement company and that he spent much of his time riding a bicycle around the sparsely settled country side (R25).

A Private First Class Alva N. Dailey, who was attached to the same company as accused on 14 April 1945, testified that he saw him making his bed around 10:00 pm on this date and that he also recalled seeing him the next morning outside their quarters about 7:30 and in the late chow line (R27,28).

5. Competent uncontradicted evidence establishes the commission of the crime of rape by a colored American soldier, at the time and place and under the circumstances as alleged. No question is presented by the record of trial concerning the use of force or want of consent. The only question presented for consideration is that of the identification of accused as the person committing the crime. Accused denied being the soldier who engaged in the act of sexual intercourse with the German girl. He attempted to establish an alibi by producing evidence showing that he was seen in his quarters preparing to go to bed at about 10:00 o'clock on the evening prior to the commission of the assault and that he was also observed in camp between 7:30 and 8:00 o'clock the following morning, shortly after the time when the rape occurred. The evidence produced by the prosecution on the other hand positively identified accused as the girl's assailant and convincingly established that he was the negro soldier responsible for the commission of the crime alleged. He was seen by the prosecutrix and Frau Nadermann on several occasions and "picked out" by them at the identification parade held for the purpose of identifying the rapist. He was also identified in court. As accused was present in the German home on the evening of the 14th and the morning of the 15th of April these witnesses had ample opportunity to see and observe him. Conceding the truth of the defense testimony that accused was seen in camp between 7:30 and 8:00 o'clock on the morning of the 15th, this fact is not inconsistent with his presence in the German home from 6:00 to 6:30 am

that morning when the rape occurred. The distance between the girl's home and accused's camp was shown to be only seven or eight kilometers and accused possessed a bicycle and was accustomed to riding about the countryside. It is therefore not unreasonable to conclude that he was able to travel this distance during the time interval indicated. The issue of his identification and of accounting for his presence at the time of the rape was essentially a question of fact for the court's determination. Questions concerning the credibility of witnesses and the resolving of conflicts of testimony are issues for the exclusive determination of the court and its findings, when supported by substantial evidence, will not be disturbed by the Board of Review (CM ETO 4194, Scott; CM ETO 5561, Holden and Spencer). The finding by the court of accused's guilt of the crime of rape is sustained by the evidence (CM ETO 6224, Kinney and Smith; CM ETO 9611, Prairiechief; CM ETO 12205, Jones; CM ETO 12552, Long).

6. The charge sheet shows that accused is 24 years and four months of age and was inducted 7 September 1942. He had no prior service.

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

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

_____ Judge Advocate

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

BOARD OF REVIEW NO. 3 24 SEP 1945

CM ETO 16555

U N I T E D S T A T E S	) 9TH AIR DIVISION
v.	) Trial by GCM, convened at Brussels, Belgium, 22 May 1945. Sentence: Dismissal and total forfeitures.
Second Lieutenant HERBERT L. KNEETER (O-575226), 302nd Station Complement Squadron (Sp), 9th Bombardment Division (M)	)

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

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

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

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

Specification: In that Second Lieutenant HERBERT L. KNEETER, 302nd Station Complement Squadron (Sp), 9th Bombardment Division (M), then assigned to Headquarters, 387th Bombardment Group (M), did, at AAF Station A-71, APO 140, U. S. Army, on or about 17 January 1945, wrongfully, knowingly and without proper authority, dispose of one flying jacket, parka, type B-11, of the value of about $12.00, property of the United States furnished and intended for the military service thereof, by mailing the same in the United States mail to R. Kneeter, Radio Store, 106 East 167th Street, Bronx, New York.

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

Specification: In that * * * did, at AAF Station A-71, APO 140, U.S. Army, on or about 15 February 1945, with intent to deceive MAJOR JOHN G. ROOKS, AC, officially state to the said MAJOR JOHN G. ROOKS, that a flying jacket, parka, type B-11, of which the said Second Lieutenant HERBET L. KNEETER had unauthorized possession, had been returned, which statement was known by the Second Lieutenant HERBERT L. KNEETER to be undrue in that the said Second Lieutenant HERBERT L. KNEETER had mailed the said flying jacket in the United States mail to R. Kneeter, Radio Store, 106 East 167th Street, Bronx, New York.

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

Specification: In that * * * did, at AAF Station A-71, APO 140, U. S. Army, on or about 17 January 1945, wrongfully and in violation of Section 340, Title 18, United States Code, deposit in the United States Mail for mailing to R. Kneeter, Radio Store, 106 East 167th Street, Bronx, New York, intoxicating liquors, to wit: One bottle Montebello Champagne, one bottle Benedictine and one bottle Martel Cognac.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, the 9th Air Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Accused was "Officers Club Officer" of the 387th Bombardment Group (R12,18,34). On 17 January 1945 the Group S-4 saw accused in connection with a trip the latter was to take (R8). During the course of their conversation the S-4 reminded accused to turn in, as prescribed by an ETOUSA directive (R8), a certain "B-11" parka type jacket (R8,12) which he was not authorized to wear (R8,35). Accused replied that he did not get the jacket at that base (R8) and that he would turn it in where he received it (R8,12). When the S-4 departed, accused remarked to a sergeant that "if he couldn't wear the jacket, he had a brother in the Bronx that would" (R13). Thereupon accused instructed a private to obtain a box suitable for mailing a jacket (R13,18). When the box was brought, accused had a corporal pack a green hooded flying jacket therein and prepare it for mailing. The package was then given to

accused (R13,22) who opened it, wrapped three full, sealed bottles, being respectively champagne, benedictine and cognac bottles, in the jacket (R13,15,18) and placed them all in the box. Then he wrapped the box (R13,19), addressed the package (R13) and gave it to another corporal for mailing (R13,19,24-25) who posted it at the field post office (R25,27,29) where it was observed to bear accused's signature (R31,33). According to the Air Corps Stock List, the value of this jacket was $12.00 (R8).

About the middle of February 1945, accused was transferred to another organization (R18). In the process of obtaining a clearance from the post, he was asked about the jacket by the adjutant, Major John G. Rooks. Accused replied, in effect, "that he returned it to the station or person where he got it", i.e. "to its source" (R35,41).

4. After his rights as a witness were explained (R49), accused testified that he obtained the jacket, which was property of the United States Army Air Forces (R55), from a sergeant in the supply section who said it did not come from that base (R54). After wearing it for some time and after receiving much kidding, he decided to mail it home so that he could use it in the Army in the States (R50). He couldn't return it to the party from whom he obtained it because he was gone. (R57). He denied telling the adjutant that he had returned the jacket (R51,54). Instead he told him, "I'm sorry, Major, but I haven't got it. It's gone" (R51).

He packaged the jacket with a bottle of champagne, a bottle of benedictine, and a bottle of cognac, and mailed them all to his home address in care of his brother at 106 East 167th Street, New York (R53). At the time he was unaware of the ETOUSA directive requiring that such jackets be turned in and he had never received an order to turn in the jacket (R52-53). Later he realized he should not have mailed the jacket. At the time he didn't think he was doing anything wrong (R55-56). While he had been postal officer for a number of months (R58), he thought it was all right to send liquor to the States (R51,55). He understood that the liquor had been turned over to his brother by the customs officials and that the jacket had been delivered to the army (R51).

An administrative inspector testified that accused, when with the 394th Bomb Group, had done an excellent job as post exchange officer and that his reputation for character in that unit was above reproach (R43-45). The adjutant of the 409th Bomb Group testified accused came to that organization on 18 February 1945, and since then had performed his duties as Officers' Club Officer in a superior manner and his reputation was in keeping with the best tradition of an officer (R45). The chairman of the Board of Governors of the club testified that accused had "discharged his duties as well as any officer could do" (R46).

5. a. By its own witnesses and by cross examination of prosecution witnesses, defense adduced evidence of animosity existing between

accused and a Major Smith, Inspector of the 387th Bomb Group, who investigated the matter, presumably as Inspector General. Major Smith was not the investigating officer and did not appear as a witness. The evidence adduced concerning this contended animosity has not been set out herein for no purpose would be served in so doing.

b. The record supports the findings of guilty of Charge I and Specification (CM ETO 9986, Goldberg). Accused's testimony constituted full and complete proof of the Charge and Specification as did also the evidence presented by the prosecution.

The record also supports the finding of guilty of Charge II and Specification (CM 153703, Dig, Op. 1912-40, Sec. 453 (18) p. 345; CM ETO 2777, Woodson, Dig. Op. ETO Sec. 453 (18) p.586). Whether accused made the alleged statement was a question of fact for the court.

The record likewise supports the findings of guilty of Charge III and Specification. The mailing of intoxicants in the United States mail is prohibited by Sec.340, Title 18, U.S. Code.

6. The charge sheet shows that accused is 29 years three months of age and was appointed a Second Lieutenant 3 March 1943. No prior service is shown.

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

8. The penalty for violation of Article of War 95 is dismissal (AW 95); for misappropriation and violation of Article of War 96, such punishment as a Court Martial may direct (AW 94,96).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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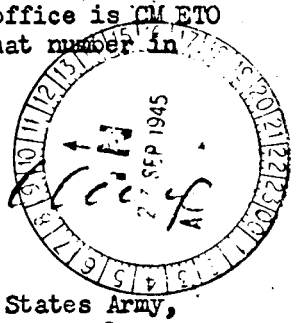
1st Ind.

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

1. In the case of Second Lieutenant HERBERT L. KNEETER (O-575226), 302nd Station Complement Squadron (Sp), 9th Bombardment Division (M), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16555. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16555).



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

(Sentence ordered executed. GCMO 451, USFET, 3 Oct 1945).

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

BOARD OF REVIEW NO. 2 — 24 SEP 1945

CM ETO 16565

U N I T E D S T A T E S	66th INFANTRY DIVISION
v.	Trial by GCM, convened at Nantes, France, 16 May 1945. Sentence: Dismissal, total forfeitures, confinement at hard labor for six months. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Major WILLIAM K. KING (O-314642), Field Artillery, Headquarters, 66th Infantry Division	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Major William K. KING, Headquarters 66th Infantry Division, did, without proper leave, absent himself from his organization and station at Nantes, France, from about 0800, 25 April 1945, to about 2100, 27 April 1945.

He pleaded guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, accused 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 a period of three (3) years. The reviewing authority, the Commanding General, 66th

Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that only that portion of the sentence relating to dismissal be approved and ordered into execution. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in this case, reduced the period of confinement to six (6) months. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York was designated as the place of confinement and the order of execution withheld pursuant to Article of War 50½.

3. On 23 April 1945, accused, a member of the Civil Affairs Detachment 66th Infantry Division, stationed at Nantes, France, telephoned his chief, and requested a pass to visit Paris beginning 25 April 1945. The chief of section, after investigating quotas, telephoned accused and told him the available quota would not permit him to go to Paris. Whereupon accused requested permission to visit Paris for forty-eight hours on personal business to which the section chief replied that he did not have permission(R12). Late 24 April 1945, accused informed the adjutant of the section that he was going on a trip and gave him an emergency address, the Printemps Hotel, Paris. He was not seen in his office on 25 and 26 and until about 2030 27 April (R8,10,13). He was not in his quarters nor was he seen at his mess (R13,14,16). Accused was seen in the Printemps Hotel, Paris, about 2300, 25 April 1945. (R15).

Extract copy of morning report of Headquarters 66th Infantry Division was admitted in evidence, without objection, showing accused "Fr Dy to AWOL as of 0800 25 April 45" and "Fr AWOL to returned to hands of military control 2100 27 April 1945" (R14,Pros.Ex.1).

4. a. The accused, his rights as a witness having been explained to him by the Law Member, was sworn and testified substantially as follows:

He was commissioned on 30 May 1934, was on active duty with the Civilian Conservation Corps for three years as a company commander and came on active duty 14 February 1940. He attended Military Government School in the United States and was further trained in Military Government in France (R16). While stationed near Paris, or in recreational trips, he became acquainted with a number of very nice French people. His present duty is to coordinate any of the functions that affect the tactical operations of the Troops - to coordinate these with the French civilians. Major Brown, of whom he has seen very little, is the senior civil affairs officer of the division (R17). He requested a pass from Major Brown but was told it was not possible (R18). Major Brown also refused him a forty-eight hour pass (R19). Some Paris acquaintances had gotten word to him that they needed assistance (R18), so on the morning of 25 April, he

left for Paris without permission, telling Lieutenant Atchison that he would be back the next day and leaving with him an emergency address (R20). He did not return on the 26th because the officer with whom he planned to ride could not clear his vehicle on that day (R19,20). He could not reveal his purpose in going to Paris because it would reveal the personal business of French friends (R20). His business was of a nature that, had it been within the jurisdiction of his division, would have constituted civil affairs work (R20). He transacted the business and engaged in no entertainment or social functions (R20,21). He did not request a pass from any higher authority than his section chief. He had never received any instructions from anyone in the Division as to the manner he was to function and was free to operate wherever necessary (R21). He desired a pass in order to be covered in case of accident and to obtain transportation (R21,22). His official activities might include Paris and Marseilles but were usually limited to the tactical and administrative area of the 66th Division (R22). In his own mind, he felt that he was doing the right thing to help the people he wanted to see. The business was official for the people involved but not official business for the Army (R23). When he returned, he found that everyone had taken the attitude that he did not have the authority to make the trip (R25). Major Brown had made an issue of it. He had asked to go and was not given authority but he thought it best to go (R24).

b. An officer of accused's detachment testified that his character was excellent. The witness also stated that an officer of the Section was not authorized to make a trip to Paris without specific permission of the Chief(R26,27). Stipulated testimony of other witnesses was admitted to the effect that accused is industrious, conscientious, loyal and devoted to the best interests of the service; that he is of unquestioned integrity, learns rapidly and well, and has been recommended to be group executive (R28).

5. When an accused is charged with absence without leave in violation of Article of War 61, the necessary elements of proof are (a) that the accused absented himself from his command, guard, quarters station, or camp for a certain period as alleged, and (b) that such absence was without proper authority from anyone competent to give him leave (MCM 1928, par.132, p.146). Aside from accused's plea of guilty and testimony consistent therewith, the prosecution's evidence fully established his place of duty and absence therefrom as alleged. The evidence not only establishes lack of permission but also clearly establishes that accused asked permission which was specifically denied. The necessary proof is complete and undisputed as to each element of the offense charged.

6. The charge sheet shows that accused is 35 years and two months of age. He has held a commission in the Officers Reserve Corps since 31 May 1934 and entered on extended active duty 14 February 1940 as a First Lieutenant.

(30)

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. An officer convicted of a violation of Article of War 61 is punishable as a court-martial may direct (Article of War 61). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42, Cir.210,WD, 14 Sept.1943, sec.VI, as amended).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Major WILLIAM K. KING (O-314642), Headquarters, 66th Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have 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 16565. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16565).

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

(Sentence ordered executed. GCMO 474, USFET, 9 Oct 1945).

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

BOARD OF REVIEW NO. 1

22 SEP 1945

CM ETO 16573

U N I T E D S T A T E S)	3RD INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at Salzburg,
)	Austria, 29 June 1945. Sentence: Dis-
Private CHARLES M. SABELLA)	honorable discharge, total forfeitures
(12125898), Company G, 30th)	and confinement at hard labor for life.
Infantry)	Eastern Branch, United States Disciplinary
)	Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private CHARLES M. SABELLA, Company "G", 30th Infantry, did, at or near Anzio, Italy, on or about 1 February 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty to wit: combat with the enemy, and did remain absent in desertion until he was apprehended at or near Paris, France, on or about 28 December 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 Charge and Specification, except the word, "apprehended", substituting therefor the words "returned to military control". No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

A duly authenticated extract copy of the morning report of Company G, 30th Infantry, was received in evidence (R8), containing the following entry (Pros.Ex.A):

> "6 February 1944 Le Ferriere, Italy
> 12125898, Charles M. Sabella, Pvt.
>
> Reasgd fr hosp unknown sc 1 Feb, AWOL fr date of asgmt & drpd fr rolls as an absentee.
>
> /s/ Robert F. Farrell, Capt., 30th Inf. Comdg."

The 3rd Infantry Division Staff Judge Advocate testified that on 1 February 1944 he told a group of men, of whom accused was one, "that they were being returned to their unit which was then in combat on the Anzio Beachhead" (R9). On cross-examination, he testified that he knew accused was a member of the group because he knew his name was on the list, and that as the last names were called the men responded with their first names and serial numbers (R10). On 1 February accused's place of duty was with a group that was being taken to be equipped and then to board a vessel to go to Anzio (R11). The officer appointed as investigating officer testified that, having been warned of his rights, accused made a statement containing the following:

> "He stated to me that on or about 1 February at the port of Pozzuoli, he was to be returned to his company then on Anzio and that he wasn't feeling very well and that he didn't feel like he could take it * * * about

the 6th of June he said he was in Rome and turned in there to an M.P., a Lieutenant. The Lieutenant told him his outfit was somewhere around and released him to find his own outfit * * *. Later on he heard they were in France somewhere and finally in Paris he turned himself in to the M.P.'s /Witness thought that this was sometime around the first of the year 1945/" (R12).

On cross-examination, this witness stated that accused gave him a slip of paper, apparently torn from a notebook and signed by a lieutenant, written in pencil, which stated that accused was released to return to his unit; it was agreed that this slip of paper had been lost (R13-15).

4. Having been fully advised of his rights (R16-17), accused elected to make an unsworn statement. In this statement he relates harrowing combat experience commencing October 1943 in detail, concluding that, "I was never the same after that experience" (R17-19).

5. a. The extract copy of the morning report of accused's organization was properly received in evidence, since it did not contain "entries obviously not based on personal knowledge" (MCM, 1928, par.117, p.121; memos for the JAG, 30 March 1945, Washington, D. C.; IV Bull. JAG pp. 86-88). This entry, together with the other evidence in the record established the commencement of accused's absence and that it was unauthorized. The original entry was signed by the company commander. It was his unqualified duty to know the men assigned to the company and their status, and there is no suggestion in the record that he did not perform that duty.

It was alleged that his absence was terminated by apprehension; the only testimony on his return to military control indicated it to have been by voluntary surrender, and the court by appropriate exceptions and substitutions (in accordance with MCM, 1928, par.78c, pp.64-65), made the findings conform to the evidence. The only testimony as to such termination is that it was "around the first of the year of 1945". Unauthorized absence, once shown to have existed, will be presumed to have continued "in the absence of evidence to the contrary", until a return to military control is effected (MCM, 1928, par. 130a, p.143). Even if accused's assertion in his pretrial statement that he "turned in" to a military police lieutenant in Rome on about 6 June 1944 were accepted as evidence, it is not shown thereby whether at such time he revealed his true status as being "absent without leave". Under the reasoning, then, of a recent opinion, the period during which accused was under military control in Rome would not

interrupt or terminate the period of absence without leave begun on 1 February 1944, for the purpose of the present charges (SPJGA 1944/13317, 7 December 1944; IV Bull.JAG, p.10). At any rate, the actual date of the termination of accused's absence is not decisive so far as concerns the legality of a conviction in a case involving desertion under the circumstances set forth in Article of War 28.

> "The offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent (MCM, 1928, par.67,p.52; par.130a, p.142), and proof of the duration of the absence is not essential to sustain a conviction of the offense" (CM ETO 9975, Athens and Haberern; see also CM ETO 2473, Cantwell).

b. The remaining question presented by this record is whether substantial evidence sustains the court's finding that accused had the requisite intent to avoid hazardous duty at the time that this unauthorized absence began. Judicial notice will be taken that at the time accused absented himself fighting of the fiercest nature was in progress on the Anzio beachhead (CM ETO 12007, Pierce; CM ETO 8358, Lape and Corderman; CM ETO 7413, Gogol). It is established that accused was told that he was joining a unit then "in combat" on this beachhead; knowledge on his part that there was action at this place and that he was going there was virtually admitted by accused in his pretrial statement, ("He didn't feel he could take it" (R12)) and in his unsworn statement (when, upon relating combat experiences he said, "I was never the same after that", and detailed his fear on hearing gun fire, etc. (R19)). The record of trial shows beyond all reasonable doubt that hazardous duty, of which he knew, was imminent, and the court was justified in inferring that he had the intent to avoid the dangers he feared (CM ETO 12007, Pierce, and cases therein cited).

c. Although the point was not specifically raised, accused in his unsworn statement suggested mental instability. The court would have been justified in causing an inquiry into his sanity made, but on this record it did not become incumbent on the court to do so (MCM, 1928, par.75a, p.58; par.63, p.49; CM 124538 (1918), Dig. Op. JAG 1912-40, par.395(36), p.225). The question as to accused's legal responsibility for his acts was one of fact for determination by the court, which by its general finding of guilty found him to be legally responsible mentally (CM ETO 2023, Cocoran).

d. Trial was held two days after notification thereof to accused and defense counsel, both of whom signed waivers, and accused

consented in open court to trial at that time; the prosecution stated the case was brought to "trial at this time because of the redeployment situation" (R7). In view of these facts, and the additional fact that the present record is of a rehearing, the original trial having been more than a month earlier, no injury to accused's rights resulted from trial on the date held.

6. The charge sheet shows that accused is 23 years of age and that he enlisted 14 August 1942 to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errorsinjuriously 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 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 proper (Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1 15 SEP 1945

CM ETO 16581

U N I T E D S T A T E S	)	70TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Weilburg,
	)	Germany, 22 August 1945. Sentence:
Private JOHN M. ATENCIO	)	Dishonorable discharge, total for-
(39245569), 138th Ordnance	)	feitures and confinement at hard
Heavy Maintenance Company	)	labor for life. United States
(Field Army)	)	Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John M. Atencio, 138th Ordnance Heavy Maintenance Company (Field Army), did, at Nieukerk, Germany, on or about 27 March 1945 with malice aforethought, wrongfully, deliberately, feloniously, unlawfully, and with premeditation kill one Augusta Roskens, a human being by shooting her with a carbine.

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

Specification: In that * * * did, at Nieukerk, Germany, on or about 27 March 1945, commit an assault upon Agnes Johnson, a female child eleven years of age by wrongfully and unlawfully grabbing the hand

of the said Agnes Johnson and attempting to place it upon his penis.

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 specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 19 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification of the Additional Charge as involved a finding that accused did at the time and place alleged commit an assault upon Agnes Johnson, a female, in the manner alleged, approved all other findings of guilty and 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 was substantially as follows:

Theodor Johnson, a German boy 13 years old, after being qualified as a witness, testified that on 27 March 1945, he was living with his sister, Agnes Johnson, and his aunt, Augusta Roskens, in a house in Nieukerk, Germany (R9). At about 1900 hours, from an upstairs window, he saw accused standing outside the house, wearing leggings, a field jacket, a steel helmet, and other apparel, and carrying a carbine. He, his sister, and his aunt were cleaning a room. He went downstairs and, while witness was standing in the door, accused took his carbine from his shoulder, pointed it at him, and motioned for him to move away. Witness returned upstairs. His aunt then went downstairs and was heard to say "don't shoot, don't shoot" in German. She returned to the room with a broom and was sweeping, when a shot was heard, apparently from downstairs. They stopped sweeping, and he and his sister, Agnes, backed slowly into a corner of the room, while his aunt remained where she was standing. Another two shots were heard fired in rapid succession, this time much louder. His aunt got out a white handkerchief and said, "don't shoot, don't shoot" in German (R9-11). It was dark at this time and, although witness did not see the soldier, he did see a few inches of the barrel of a rifle sticking through the door. A shot was fired from the gun and went into the wall next to the head of his aunt, who put her head between her hands. A few seconds later another shot was fired, which struck her in the stomach to the left of the navel, and blood spurted out. Witness, until he saw accused with the rifle, never lost sight of the barrel of the gun, which moved backward and forward (R12, 13). About two or three minutes later accused, with his helmet tipped to one side, entered the room (R13), walked along the wall, made circular motions to witness and his sister, said some words in English, including

"mother, mother", and pointed at the woman (R14,17). He then went to the wall, opened his pants, exposed his sexual organ, and grabbed Agnes by the hand three or four times - "she was supposed to touch his sex organ" - but she pulled back her hand (R14). Witness looked out of the window, saw three American soldiers on the street, and told accused that comrades of his were outside. Accused then looked out of the window (R15). A board was "leaning down" from the window to the floor. He tried to sit on this board, fell off and lost his rifle, but he got up right away. No one helped him up, though he had trouble getting off the floor. He picked up his carbine (R16,18). He was about to leave the room when a soldier came up the staircase. Apparently blinded by the soldier's flashlight, accused covered his face with his hands (R15). He appeared to witness to be drunk when he came into the room. He could not stand up steady. He moved back and forth, and once almost tipped over (R16).

Three American soldiers, who entered the room shortly after the shooting, testified concerning the actions of accused. One soldier testified that after he had seen accused put his head out of the window (R22), he went up to the room, and accused tried to get them to leave by motioning with his hand and telling them to move on (R20). Accused seemed to him very drunk. Another soldier tried to take the carbine from him but accused would not turn it loose and put up "some struggle". A few minutes later he started to throw up. He was not standing straight. While he was trying to get the woman who was shot, by grabbing hold of her wrist, to look at another woman, he fell down. Witness was able to grasp a few words accused said, but he was "pretty well under the weather" (R21-22).

A second soldier testified that after hearing shots he saw accused put his head out of the window and heard him tell them to go away because there was nothing wrong. He then went up into the room (R23,24), saw accused talking to "some of the boys", and understood what he was saying. Accused recognized the men from his organization and called some of them by their names. He did appear, however, to be very drunk, judging from the way he was walking, staggering, and talking, although he did not fall (R24,25).

A third soldier, Technician Fourth Grade Fred Demman, Jr., saw accused in the room, staggering and trying to say something, but his speech was not coherent and was not understood. When asked what happened, he was unable to give any answer (R26).

It was stipulated that a doctor would testify that, after being called between 1900 and 1930 hours, he found Augusta Roskens in the room lying in a pool of blood, with a bullet wound at the left side of the stomach near the navel and that she died five minutes later, the basic cause of her death being the bullet wound resulting in internal bleeding (R18;Pros.Ex.A).

4. Accused, after his rights as a witness were explained to him, elected to be sworn as a witness, and testified substantially as follows: During the afternoon he started drinking with some of his friends in his room. What he drank was white, and stronger than wine. It might have been four or five cups, but not full cups (R28). He also drank some more, both white and red "stuff" (R31). One time, when he went downstairs, he could not go down the steps so he had to take hold of the sides of the wall. The last thing he remembered was going after supper time to a latrine, a few doors away from his room. He did not remember leaving his billet. He then remembered getting out of a jeep and being told he was in a "hell of a fix" and later he was told he had shot a woman (R28,29). He also testified regarding his past experiences, during which he became drunk and later did not recall what he had done while he was drunk (R30).

A defense witness testified that at about 1800 hours accused was not actually staggering, but he was not sober and one could tell he had been drinking(R37).

Demman, recalled as a witness for the defense, testified that when he entered the room he saw that accused's face was flushed. He could not stand up straight or speak well. Witness saw him kneel down on the floor, although he could not kneel straight, but was going back and forth (R38). The morning after the shooting he asked witness why he was guarding him and acted surprised when told what had happened (R39).

It was stipulated that a soldier would testify that he and Demman were the first soldiers on the scene and that shortly after they arrived, accused made this statement: "I put three slugs in that Jerry; she is not a woman but a man" (R41;Def.Ex.2).

5. A rebuttal witness testified that when he went to supper at about 1800 hours, he saw accused and "would not say" that accused was drunk, though he thought he was "pretty happy". Accused was doing a "lot of talking" (R48).

It was stipulated that the findings of a Board of Officers on 28 June 1945 were that accused at the time of the alleged offense was free from any mental defects, disease or derangement, and that accused "is sufficiently sane or intelligent to conduct or cooperate in his defense" (R49).

6. a. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM,1928, par.148a,pp.162-164). The law presumes malice where a deadly weapon is

used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec.426, pp. 654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

Clear, uncontradicted evidence establishes that accused shot and killed Augusta Roskens at the time and place alleged. His use of the carbine in the manner shown by the evidence gives rise to the presumption of malice, and his intent to kill is inferable from his conduct, which manifests a reckless disregard of human life (Cf: CM ETO 11958, Falcon; CM ETO 12377, Graham; CM ETO 14380, Hall).

A very serious question arises, however, as to whether accused's intoxication, at the time of the fatal shooting, was of such a severe quality as to render him incapable of possessing the requisite malice.

That accused had been drinking prior to such time is established by the evidence. It is equally well established that he was, to some extent, at least, under the influence of intoxicants. While much of the testimony indicates that he was very drunk at or about the time in question, there is a considerable body of evidence in the record from which the inference may properly be drawn that he was not in such a state of drunkenness as to be unable to entertain malice. Among the evidentiary matters appearing in the record that may give rise to this inference are: he was able to proceed from his billet to the house and upstairs to the room where the shooting occurred; he apparently was able to aim his rifle, the first shot striking the wall near the victim's head and the second shot, fired a few seconds later, striking her in the stomach; he looked out of the window when his attention was called to soldiers outside and told them to go away as nothing was wrong; when he fell off the board, he arose immediately without any help, and picked up his carbine; he tried to get the soldiers to leave the room by motioning and telling them to move on; he struggled to keep his rifle; he recognized the men from his organization and called some of them by their names; he talked to some of them and he was understood; he told one soldier that he put "three slugs in that Jerry; she is not a woman but a man"; a witness who saw him at 1800 hours "would not say" he was drunk at that time. While there is conflicting evidence in the record as to some of these matters, the evidence enumerated does constitute a sufficient body of substantial evidence to support the court's implied finding that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite malice and to support the court's finding that accused was guilty of murder under Article of War 92 (CM ETO 1901, Miranda; CM ETO 11958, Falcon; CM ETO 12850, Philpot; CM ETO 12855, Minnick). It was the function and duty of the court and reviewing authority to weigh the evidence, and since there is sufficient evidence in the record to sustain the findings, the Board of Review is without power to disturb such determination (Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); CM ETO 6682, Frazier; CM ETO 11958, Falcon).

b. The evidence in the record consisting of the testimony of Theodor Johnson, was sufficient to sustain the court's findings under the Additional Charge and its Specification, as approved by the reviewing authority (assault upon Agnes Johnson).

6. The charge sheet shows that accused is 33 years seven months of age and was inducted 19 June 1942 at Los Angeles, California, to serve for the duration of the war plus six months. No previous service is shown.

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

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

Wm. J. Sumner Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 3

27 SEP 1945

CM ETO 16585

U N I T E D S T A T E S	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Neustadt, Germany, 31 July 1945. Sentence (suspended): Dishonorable discharge, total forfeitures and confinement at hard labor for ten years.
	)	
Private First Class ROBERT H. THOMPSON, JR. (34827013), Company E, 357th Infantry	)	
	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private First Class Robert H. Thompson, Jr, Company E, 357th Infantry, did, without proper leave, absent himself from his organization in the vicinity of Sentzich, France, from about 8 November 1944 to about 26 December 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 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 ordered the execution thereof suspended.

The proceedings were published by General Court-Martial Orders No. 110, Headquarters 90th Infantry Division, APO 90, U. S. Army, 23 August 1945.

3. The only evidence of accused's initial absence on 8 November 1944, as alleged, is contained in a true extract copy of the morning report of his organization, which was received in evidence, the defense stating "No objection * * *". The original was signed by "Roy G. Mosher, 1st Lt. Inf, Pers O." and recited as to accused "Dy to AWOL 0030 8 Nov 44". The certificate, dated 11 November 1944, is also signed by "Roy G. Mosher, 1st Lt Inf. Personnel Officer", certifying that he is the "Personnel Officer of 357th Inf. and official custodian of the morning reports of said command, etc." (R7; Pros. Ex.1).

Accused's return to military control on 26 December 1944, as alleged, is indicated in an extract copy of his organization's morning report under date of 3 March 1945, stating as to accused "AWOL to conf 1630 26 Dec 44 MP Seine Sec CZ, ETO US Army APO 887" and signed by "Roy G. Mosher, Capt, Inf.". The certificate recites 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 company submitted at Grosskampenberg, Germany for the dates indicated * * *" (R7; Pros.Ex.2).

4. For the defense, a non-commissioned officer of accused's company testified regarding accused's service in combat prior to 8 November 1944 (R7-8).

5. After his rights were explained, accused elected to remain silent (R9-10).

6. The extract copy of the morning report of accused's company (Pros. Ex.1) purporting to show his initial absence on 8 November 1944 was improperly received in evidence since the regimental personnel officer had no authority under Army Regulations to sign the original on that date (AR 345-400, 1 May 1944, sec. VI, par. 42; CM ETO 9597, Jusiak; CM ETO 11693, Parke, and authorities therein cited). There was therefore no proper evidence of his alleged absence on 8 November 1944.

Regarding the extract copy of the company morning report reciting accused's return to military control on 26 December 1944 in Paris (Pros.Ex.2),

this information was obviously hearsay and not within the personal knowledge of the officer making the entry. It was therefore not competent evidence of the facts therein stated (CM 143629 (1921), CM 155032 (1923), CM 161011, 161013 (1924), Dig. Op. JAG, 1912-40, sec. 395 (18), pp. 213-214). It follows that the record of trial contains no competent evidence that accused was absent without leave.

7. The charge sheet shows that accused is 19 years eight months of age and was inducted 10 August 1943 at Fort McPherson, Georgia. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence, as suspended.

B K Sleeper Judge Advocate

Malcolm C Sherman Judge Advocate

B. L. Geary Jr Judge Advocate

(48)

1st Ind.

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

1. 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 ROBERT H. THOMPSON, Jr. (34827013), Company E, 357th 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 as suspended 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. Records of trial such as this are inexcusable. The prosecution's case consisted solely of two morning reports, both obviously incompetent as evidence. The defense called the squad leader of accused. It is evident that the offense could have been properly proved.

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~~ GCMO.

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

(Findings of guilty and sentence as suspended, vacated. GCMO 513, USFET, 16 Oct 1945).

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RESTRICTED

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

BOARD OF REVIEW NO. 2

13 OCT 1945

CM ETO 16589

U N I T E D S T A T E S	)	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
Private First Class WILLIE C. LANE (34750115), 791st Engineer Dump Truck Company	)	Trial by GCM, convened at Mannheim, Germany, 5 June 1945. Sentence: To be hanged by the neck until dead

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willie C. Lane, 791st Engineer Dump Truck Company, did, at Leonberg, Germany, on or about 14 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one, Private First Class Willie L. Dumas, 791st Engineer Dump Truck Company, a human being by shooting him in the neck and leg with an automatic pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial; one for absence without leave of 10 days in violation of Article of War 61 and one for careless discharge of a service carbine in Barracks in violation of Article of War 96.

All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, The Commanding General, Continental Advance Section, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution. On 14 May 1945 the accused was a member of the 791st Engineer Dump Truck Company and attached to Company "F" of the 1321st Engineer General Service Regiment located at Leonberg, Germany. About 0030 hours that day accused and PFC Willie L. Dumas a member of the same organization engaged in a fist fight in the presence of 17 men, after an altercation concerning a light socket (R6) which accused demanded of Dumas (R10), Sergeant Weathers separated them (R7). Dumas sat on his bunk and reached for a carbine (R9) but did not secure it (R17). Accused reached in his coveralls and pulled out a pistol and pointed it at Dumas. Weathers took the pistol away from accused. Then he took accused out of the room and talked to him. Accused said he would forget about it. He returned to the room and went to his foot-locker. Weathers asked him if he had another gun. Accused said he had. Weathers asked him to give it to him, but accused reached in the locker, withdrew a .32 caliber pistol, turned around and shot Dumas four or five times with it (R8,12,15,18) as Dumas sat on the bunk (R10,12) facing the accused (R13). Accused was disarmed. Dumas grabbed his stomach and fell on the bed and began to "holler". Captain Pahl arrived and the accused said to him, "I just shot a man and I meant to kill him". (R8). Accused struck the first blow in the beginning of the fight (R17)

The medical officer who examined Dumas that same morning found that he had been shot four times; one shot was in his leg, three shots in and about the face and neck. His condition was critical (R20-21, Ex.2). The "Report of Burial" admitted in evidence (R24, Ex.3) showed that accused died 17 May 1945, in a hospital plane enroute to a hospital, as a result of gunshot wounds. On 3 June 1945 an autopsy was performed on Dumas's body and in the opinion of the medical officer who performed the autopsy Dumas's death resulted from gunshot wounds in the neck (R22,23).

4. The accused having been fully advised as to his rights as a witness elected to testify in his own behalf. In defense he stated:

> "On May 14, 1945, I goes over and asks Willie Dumas for a light socket that belonged to me and from one word to another we got into a fight and he hit me and when he hit me we had a struggle and then the boys rushed to us and separated us and pushed me one way and he another. Sergeant Weathers, he took the Luger from my pocket and at that time I looked over my shoulder and saw Dumas reaching for a carbine so I snatched away. My foot locker was already open and I got this thirty-eight pistol and then I started to let him have it". (R25)

5. a Accused was convicted of the murder of Willie Dumas. Murder is defined as the unlawful killing of a human being with malice aforethought.

"Unlawful" means without legal justification or excuse (MCM, 1928, par. 148a, p. 162-3). Malice aforethought may exist when the act is unpremeditated. It may mean an intention to cause the death of, or grievous bodily harm to, any person (ibid). It may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill's Criminal Evidence, (4th Ed. 1935), sec. 557, p. 1090).

The evidence showed that the accused deliberately pointed a gun at the deceased, shot him four times. - Three of the shots were found in a vital part of the deceased's body. Accused then openly declared that he had intended to kill him. The deceased died as a result of the wounds received. There was therefore substantial competent evidence of the unlawful killing of the deceased with malice aforethought to support a finding of guilty of the charge (CM ETO 1901, Miranda; CM ETO 4497, De Keyser; CM ETO 6229, Creech; EM ETO 6682, Frazier; CM ETO 10740, Rollins; CM ETO 12850, Philpot).

b. Accused, in his testimony asserted that he saw the deceased reach for his carbine, thereupon he (accused) removed a 38 calibre pistol from his foot-locker "and then I started to let him have it" (R25). This evidence suggests that the homicide was committed by accused in self defense.

> "To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * *. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM, 1928, par. 148a. p. 163).

Assuming, but not deciding, that accused's story, if believed, constituted a legal defense sufficient to excuse the killing of Dumas, it was contrary to all of the evidence introduced by the prosecution. That evidence did not in any way tend to support any such defense but showed that accused shot deceased as the latter sat on his bed unarmed and quiescent, an issue of fact was therefore created. The determination of such issue was exclusively within the province of the court. Its decision thereon, being based on substantial evidence, will not be disturbed on appellate review by the Board of Review (CM ETO 4154, Scott; CM ETO 14824, Barber; CM ETO 16581, Atencio and authorities therein cited).

6. The charge sheet shows that the accused is 23 years and eight months of age and was inducted 6 May 1943 at Fort Benning, Ga. He had no prior service.

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

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

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

EARLE HEPBURN Judge Advocate

DONALD D. MILLER Judge Advocate

JOHN J. COLLINS Judge Advocate

A TRUE COPY:

DOUGLAS N. SHARRETTS,
Captain, JAGD

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater 13 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private First Class WILLIE C. LANE (34750115), 791st Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16589. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16589).

3. Should the sentence as imposed by the court and confirmed 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.

B. FRANKLIN RITER
Colonel JAGD
Assistant Judge Advocate General.

A TRUE COPY:

DOUGLAS N. SHARRETTS,
Captain, JAGD.

(55)

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

BOARD OF REVIEW NO. 2

11 OCT 1945

CM ETO 16616

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Darmstadt, Germany, 19 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life, United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class CLAYTON F. AUSTIN (31352001), Company C, 36th Armored Infantry Regiment	)	

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

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

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

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

Specification 1: In that Private First Class Clayton F. Austin, Company C, 36th Armored Infantry Regiment, did, at Dessau, Germany, on or about 21 April 1945, forcibly and feloniously against her will have carnal knowledge of Edith Meissner, German civilian.

Specification 2: In that * * *, did, at Dessau, Germany, on or about 21 April 1945, forcibly and feloniously against her will have carnal knowledge of Irmgard Samuel, German civilian.

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Specification 3: In that * * *, did, at Dessau, Germany, on or about 21 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Inge Mohrmann, German civilian.

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

Specification 1: In that * * *, was at Dessau, Germany, on or about 21 April 1945, found drunk on duty as a rifleman of a unit actively engaged in an attack.

Specification 2: In that * * *, was at Dessau, Germany, on or about 24 April 1945, found drunk while on duty as a rifleman on outpost duty.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Armored Division, approved the sentence, recommended that it be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution, as accurately summarized by the Staff Judge Advocate, United States Forces, European Theater, is substantially as follows:

a. (As to rape of Edith Meissner): On 21 April 1945, at noon, or shortly thereafter, Edith Meissner, aged sixteen, was one of a group of German civilians who had taken refuge in the air raid shelter of an apartment house located at Dessau, Germany (R29,30,38). An American soldier, identified as the accused by Fraulein Meissner and another of the German occupants of the shelter (R30,38), entered the shelter, seized Fraulein Meissner by the arm, and led her out of the shelter, despite the attempts of her mother to intervene (R29,30, 38). The accused was armed with a pistol and threatened the girl and her mother by reaching for it (R29,30,38). After leaving the shelter, holding Fraulein Meissner by the arm (R32), and investigating other portions of the cellar and the ground floor, which were either unsuitable or inaccessible (R30), he entered the living room of the second floor apartment of Frau Dickhut, located in the same building (R30,36). The accused ordered Fraulein Meissner to seat herself on a couch, started

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to unbutton her dress, and then made motions that she was to finish the process herself, holding his pistol to her breast while she disrobed (R30,35). She was afraid he would shoot her (R30). He then laid his pistol on a table in the room, put a rubber on his penis, and had intercourse with her, "laying on" her for twenty to thirty minutes (R30,32,35). Penetration was effected (R31,35). She had never had intercourse before and suffered severe pain (R35). After the act she returned to the shelter; "she was crying and it was impossible to talk to her" (R37). Frau Dickhut returned to her apartment about three hours later, at which time her living room was in some disarray, with marks of occupancy upon the couch and the paper container of a rubber lying on the floor (R37).

b. (As to rape of Irmgard Samuel): At about 1800 hours (R25,27), on 21 April 1945, Irmgard Samuel, her mother, Margaret Samuel, and other German civilians were standing in a hallway leading to the cellar of a house at 120 Grossring Strasse, Dessau, Germany. An American soldier, whom Fraulein Samuel identified as the accused, entered, asked for girls, and then ordered everyone except Fraulein Samuel, whom he held, into the cellar. Fraulein Samuel attempted to run back to her mother, but the accused "came after (her) with his pistol" and her mother told her, "You had better go" (R22,23,24,26,27). Fraulein Samuel, who is fourteen, tried to tell the accused that she "was only a child", and attempted to "back out" when he tried to touch her body; the accused then pointed to his pistol (R23). After inspecting and apparently rejecting as unsuitable the "wash kitchen" in the cellar, he took her into a small room where "there was just enough room to lay down". He then either undressed Fraulein Samuel or made her undress herself and engaged in three acts of intercourse with her, the first while standing up and the last two while lying down on her overcoat; he used a rubber during the first and third acts. He wore his pistol during the entire transaction. Penetration was effected on each occasion (R23). Fraulein Samuel did not cry out because she "thought there would not be anybody around to come to (her) aid. It would not help". She did not assist the accused in putting the rubber on nor in effecting penetration. She was not in fear of her life. She had never had intercourse before (R24,25). When she returned to the cellar she cried for about fifteen minutes and then told her mother what had happened (R27).

c. (As to rape of Inge Mohrmann): Shortly before 1400 or 1415 on 21 April 1945 (R43) Inge Mohrmann, age 14, her mother, Frau Hildegard Mohrmann, and a number of other German civilians were in the cellar of a house on Grossring Strasse, Dessau, Germany (R10,12,13,17). An American soldier, identified as the accused by Frau and Fraulein Mohrmann (R14,18), entered the cellar, having a drawn pistol in his hand, asked for schnapps and after receiving some, grabbed Fraulein Mohrmann's hand and led her from the cellar (R12,17,18). He closed the cellar door and took Fraulein Mohrmann to a nearby hallway, then walked off and returned with two small mattresses, upon which he ordered her to lie. She cried and at first refused, but then complied, believing that she "had no choice".

The accused ordered her to remove her pants and, when she refused, performed this operation himself. He then spread her legs, and "laid on" her, effecting penetration (R17,18). The accused had replaced his pistol in its holster, but wore it on his side. Fraulein Mohrmann was unwilling to submit to intercourse, but made no outcry "because there was nobody in the house to come to my help". She resisted only a little because "there would not be much use — there was nothing else I could do". When he took her out of the cellar she was in mortal fear. Fraulein Mohrmann is fourteen and had never had intercourse before (R17,18,19,20). When she returned to the cellar she was crying (R12).

"Later in the afternoon", about 1700 or 1715, the accused returned to the house, Frau and Fraulein Mohrmann being in the kitchen at that time. He ordered Frau Mohrmann to stay in the kitchen and, although she attempted to make him understand her daughter's age, he took her (Fraulein Mohrmann) into the bedroom, locking the door of the apartment (R12,19,20,43). He indicated that Fraulein Mohrmann was to lie down on the bed and ordered her to remove her nether undergarments. She refused and although she held her legs tightly together, he then removed her undergarment himself, and "laid on" her, affecting penetration (R19,20). She did not "have the power" to resist him and was in "extreme fear" (R20). When she returned to her mother she was "crying and helpless" (R12).

d. (As to drunkenness on duty, 21 April 1945): On 21 April 1945, Company C of the 36th Armored Infantry Regiment had been ordered to go into the town of Dessau, Germany. On the outskirts of town they met resistance on their right flank. The accused, Private First Class James J. Storey and two other soldiers were detailed - apparently at 0630 in the morning of 21 April 1945 although the evidence may refer to 1830 hours on 20 April 1945 - as flank guards. The four, after making contact with D Company, had been instructed to keep their position until relieved by the company commander (R7). Private First Class Storey testified in part as follows (R7):

> "The men decided among themselves that we had been up quite a while and all of us were in need of rest. Four of us took it upon ourselves to set up just a two man flank security. Austin and myself were on for the first hour and the other two men were on for the next two hours, and so on until about 3:00 am. After our relief came up, Austin went over to visit some members of D Company on their outpost and it was about forty-five minutes later when he returned. He had been drinking. His speech was thick and he could not walk straight".

The accused's company commander, First Lieutenant Robert J. Cook, testified that to his knowledge there had been no relief of the accused's platoon on 21 April 1945, that the unit remained on duty at the

same point overnight, and that an emeny counterattack across the Mulde River on C Company's positions was regarded as probable (R41,42).

Fraulein Samuel testified that the accused had a bottle of liquor in his pocket at about 1800 hours on 21 April 1945 (R23,25). Fraulein Meissner testified that the accused appeared to be drunk" about 1:30, at noon" on 21 April 1945 (R31).

e. (As to drunkenness on duty, 24 April 1945): First Lieutenant Robert J. Cook, accused's company commander, testified that on 24 April 1945 the entire company, including the accused, was on duty "outposting the left bank of the Mulde River" on the outskirts of Dessau (R40). The accused was summoned by his company commander. He had a bottle with him and, in the opinion of the witness, he was drunk (R40,41). Accused had been a good soldier, had performed his duties satisfactorily, and had once been wounded (R40,41).

4. After his rights as a witness had been explained to him, the accused elected to remain silent, and no evidence was introduced in his behalf (R43).

5. a. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). The undisputed evidence in the instant case establishes the commission of the three offenses charged under the 92nd Article of War. Though the evidence of resistance on the part of the victims is not strong, it is substantial, and when considered in the light of the circumstances, clearly reveals a lack of their consent. A combat situation existed in the town of Dessau on the day in question, and a strongly overriding fear of the conquering army undoubtedly pervaded the minds and thinking of non-combatant civilians there. The conduct of the complaining witnesses reflects this situation. Accused was in battle dress and armed, and in each case either brandished his weapon, or threatened to use it. The youth of the girls in question must also be considered. In view of these facts, the court's conclusion that the acts of carnal knowledge were in fact without the consent of the complaining witnesses was clearly proper (CM ETO 11590, Nelson; CM ETO 11621, Trujillo, et al; CM ETO 9083, Berger et al).

b. To establish the charges that accused was drunk on duty, it was shown that he was detailed in each case to a specific place of duty, and that before he was returned therefrom, he was found to be drunk. The evidence convincingly established the necessary degree of intoxication (CM ETO 4339, Kizinski; CM ETO 5453, Day).

6. The charge sheet shows that accused is 20 years of age and without prior service, was inducted 21 September 1943, at Bangor, Maine.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

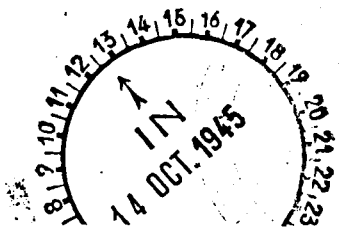
(61)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private First Class CLAYTON F. AUSTIN (31352001), 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 16616. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16616).



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

(Sentence as commuted ordered executed. GCMO 532, USFET, 1 Nov 1945).

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

BOARD OF REVIEW No. 1

9 NOV 1945

CM ETO 16617

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Corporal WILLIAM J. HAYNES (32908153) and Private ROBERT YOUNG, JR., (34840316), both of 82nd Chemical Smoke Generator Company	Trial by GCM, convened at Mannheim, Germany, 28 May 1945. Sentence as to each accused: To be shot to death with musketry.

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

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

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

HAYNES

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

Specification 1: In that Corporal William J. Haynes, 82nd Chemical Smoke Generator Company, CWS, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Ludwig Emmert, a human being by shooting him with a carbine.

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Specification 2: In that * * *, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs Magdalene Messberger, a human being, by shooting her with a carbine.

Specification 3: In that * * *, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs Anna Wippel, a human being, by shooting her with a carbine.

CHARGE II: Violation of the 93rd Article of War. (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

YOUNG

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Robert Young,Jr., 82nd Chemical Smoke Generator Company, CWS, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Ludwig Emmert, a human being, by shooting him with a carbine.

Specification 2: In that * * *, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Mrs Magdalene Messberger, a human being, by shooting her with a carbine.

Specification 3: In that * * *, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Mrs Anna Wippel, a human being, by shooting her with a carbine.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of the charge and specifications preferred against him except that Haynes was found not guilty of the

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Specification of Charge II and Charge II. No evidence of previous convictions was introduced against Haynes. Evidence was introduced against accused Young of three previous convictions by summary court, one for being disorderly in a public place while in uniform in violation of Article of War 96, one for absence without leave for one day in violation of Article of War 61, and one for being drunk on duty and carelessly discharging a carbine in a bivouac area in violation of Articles of War 85 and 96. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Continental Advance Section, Communications Zone, European Theater of Operations, approved each of the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed each of the sentences and withheld the orders directing execution thereof pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows: About 5 pm on 21 April 1945, the two accused, colored American soldiers, after shooting their carbines several times in the air on the street in Frankenthal, Germany, entered the home of Ludwig Emmert (R9) apparently in pursuit of his daughter (R18,19) but professedly for the purpose of searching for arms and ammunition (R9). Present in the house were Emmert and his wife, their daughters Frau Magdalene Messberger and Elfrede, and Hans Romer and Fritz Schreiber, two young boys (R9,10). Haynes tried to get Frau Messberger to go into the bedroom with him but she screamed and refused. Finally, her father told her to go into the room and show him that there were no arms or ammunition there. She complied but as soon as she did so both Young and Haynes tried to go in too and shut the door. Her father, however, prevented this and brought his daughter out of the room (R10,19). Young then discharged his carbine several times into the ceiling while he stood guard to see that on one left the house. About this time Frau Anna Wippel, a neighbor, came to the door to see if she could lend assistance. Young brought her inside and would not permit her to leave (R10,20). Haynes continued his efforts to get Frau Messberger in the bedroom with him without success. He gave his carbine to Young, seized Emmert by the coat, and with a pair of scissors in his hand made amotion as if to stab him in the chest. Emmert offered no resistance. Haynes then took back his carbine. Young fired and Emmert collapsed. Haynes fired also. Frau Messberger who had also been shot collapsed. After that there were some more shots (R11,20). When the soldiers had gone, Frau Emmert, who had left the house after the shooting began, returned and found her daughter and husband in a pool of blood on the floor. Frau Wippel was standing with blood running down her arms but finally collapsed (R20,21).

It was stipulated in effect by and between the prosecution, the defense and accused that Ludwig Emmert died as a result of a bullet wound in the brain: that Magdalene Messberger died from internal loss of blood as a result of being shot in tha back; and that Anna Wippel died from internal loss of blood as a result of a bullet wound in the chest. She was also shot in both arms. Emmert and his daughter died immediately. Frau Wippel died shortly after admission to the hospital (R31,32), where she had been taken just after the shooting (R22).

4. Both accused made extra-judicial statements after being advised of their rights. Young stated that he and a companion had been drinking schnapps and wine and that he remembered being in a house with a man and a woman. He also remembered that he shot in the house (R29; Pros.Ex.1). Haynes admitted drinking with a companion and firing his carbine in the air on the street. He remembered being in a German house with a man, two women and two boys. Because they were frightened he gave his carbine to his companion, who, according to Haynes, did all the firing (R31;Pros.Ex.2). Each of these extra-judicial statements was properly received in evidence against only the accused who made it (R29,31).

5. In addition to the evidence contained in their extra-judicial statements, there was other testimony bearing on the sobriety of accused. Hans Romer, one of the boy present in the Emmert house at the time, testified that Young was "drunk" (R11). Fritz Schreiber, the other young boy, stated that accused were staggering (R17). According to Frau Emmert they were drunk (R17). Accused were present at a formation between 6:30 and 7:00 pm the same night and, according to Second Lieutenant William B. Howard, they did not seem drunk at that time (R25). First Sergeant Arthur O. Glass testified that he saw Young between 5:30 and 6:00 pm in the afternoon in question and he gave evidence of drinking (R27). Sergeant John Buford, a witness for the defense, stated that he woke Young up for the formation and in his opinion Young had been drinking, although he could not say he was drunk (R33).

6. Both accused, after an explanation of their rights, elected to remain silent (R34).

7. Accused were charged with and convicted of the murder of three German citizens. Murder is the unlawful killing of a human being with malice aforethought (MCM 1928, par. 148a, p.162). Malice does not necessarily mean ill will nor an actual intent to take life. It may merely be knowledge that the act which causes death will probably cause death or grievous bodily harm (ibid.,p.163). Its existance

may be presumed when a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed.), sec.426, pp.654-655 and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec. 79b, pp.943-944).

In the instant case the court was authorized to find that accused by their conduct manifested a reckless disregard of human life in discharging their carbines. The uncontradicted evidence shows that they fired their carbines in the street and that Young shot his several times in the house. Haynes also fired. They fired them in such a way that three of the other six people in the room were mortally wounded. Their actions show at the very least an entire disregard of the fate of the other occupants of the room (CM ETO 7815, Gutierrez). We say at the very least because there is evidence from which the court could infer the existance of ill will and wicked ness. Emmert thwarted Haynes in his efforts to have sexual intercourse with Frau Messberger. Haynes deliberately gave his carbine to Young, grabbed Emmert by the coat, and made a motion with a pair of scissors as if to stab him. During all this time Young was standing guard to prevent anyone from going for assistance. As soon as Haynes had released Emmert and relieved Young of his (Haynes') carbine, Young shot Emmert. Haynes then fired his carbine and they continued to fire until the other occupants of the room had either escaped or were dead or dying. The inherent brutality and fury of the assault was in itself evidence of maliciousness (CM ETO 2007, Harris Jr.).

Whether they were so drunk as to be unable to entertain malice was a question of fact for the court and, present substantial evidence in the record to support their conclusion, we are unable to disturb it (CM ETO 895, Davis etal; CM ETO 1554, Pritchard; CM ETO 1631, Pepper). There is substantial evidence from which the court could conclude that they had not reached such an advanced stage of intoxication (Cf: CM ETO 16581, Atencio).

Both accused were separately charged with the murder of the same three persons. There was substantial evidence to establish that Young fired the fatal shot into Emmert. There was evidence as to who actually killed Frau Messberger or Frau Wippel. It was not necessary for the prosecution to trace the fatal bullet in each case to the gun of one or the other of these two accused. Both entered the house together. Young was a sentinel while Haynes tried to persuade Frau Messberger to go into the bedroom with him. When he momentarily succeeded Young showed the part he was

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willing to play in the affairs by immediately following them into the room. During the entire time Young repeatedly shot his weapon into the air and, on one occasion, he forced Frau Wippel to come into the house for the purpose, or so the court could infer, of preventing her from going for assistance. Haynes made the first threatening gesture, specifically directed toward Emmert, a gesture which indicated he was willing to wreck physical violence on Emmert if he did not succeed in satisfying his desires. Young obligingly held Haynes' weapon during this episode. Then, as soon as he returned Haynes' carbine, they both fired with the results to which we have already adverted. There was thus competent and substantial evidence to establish that both were engaged in a joint venture. Each was present during the entire affray. Each assisted the other and both fired their weapons. Both are principals and their guilt is sufficiently established by their joint participation (CM ETO 1453, Fowler; CM ETO 1621, Leatherberry; CM ETO 5764, Lilly et al). The record is legally sufficient to support the findings of guilty.

8. Both accused were sentenced to be shot to death with musketry. Article of War 92 provides that any person subject to military law who "commits murder or rape shall suffer death or imprisonment for life". Article of War 43 provides that "No person shall * * * be sentenced to suffer death, except * * * for an offense in these Articles expressly made punishable by death". Obviously murder is an offense "expressly made punishable by death" and one who commits it may be sentenced to death. There was substantial evidence that Young killed Emmert and as to him the sentence is clearly legal. The evidence as to Haynes, however, goes no further than to show that he was a common-law principal in the second degree, that is, he was present aiding and abetting the commission of the offense (1 Wharton's Criminal Law (12th Ed.1932) sec.245, p.327). The question as to Haynes, therefore, is whether he can properly be convicted of murder (and sentenced to be executed) in violation of Article of War 92.

The ancient and sometimes troublesome distinction between principals and aiders and abettors, has been abolished by sec.332, Federal Criminal Code (18 USCA 550). Under the statute one who arms a killer and commands and counsels a killing, even though not present at the scene may be indicted and convicted on a simple charge of murder (Young v. United States (CCA 5th,1938) 97F. (2nd) 200 (reversed on other grounds.); rehearing denied 97F. (2nd) 1023, 138F. (2nd) 838). Similarly we have held that one can be convicted of rape and sentenced to life imprisonment under Article of War 92 although the evidence shows that he was a principal in the second degree (CM ETO 5068, Rape and Holthus).

The fact that the death sentence has been imposed does not vary the application of these principles. In Suhay v. United States (CCA.10th 1938) 95F (2nd) 890, cert. denied, 304 US 580,82 L Ed.1543,) two defendants were found guilty of the murder of a special agent of the Federal Bureau of Investigation and sentenced to death. The evidence showed that the special agent was murdered when he attempted to arrest one of the defendants. The other defendant came to his cohort's rescue. Both shot, but there was no showing as to which defendant fired the fatal bullet. The court stated (p.894):

> "It was essential to the conviction of both of them that the government show that both participated in the homicide or that one committed it and the others acted in concert with him. Both were guilty as principals if one fired the shot or shots pursuant to a common purpose or design, and the other aided or abetted him".

The conviction was affirmed and the case remanded with directions to the trial court to fix a day for the execution of the sentence.

The established doctrine is thus summarized by Wharton:

> "The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and therefore it need not be made in indictments. Such is the only case, however, where the punishment is the same for both degrees. But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors. Where no such statute exists, in an indictment for murder, if several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present is, in contemplation of law, the injury of each and every one of them."

(Wharton's Criminal Law (12th Ed. 1932), sec.259, pp.345, 346) (Underscoring supplied).

The conclusion of the Board of Review is that both were properly convicted of murder in violation of Article of War 92 and that it was within the power of the court to impose the death sentence on both.

9. The charge sheets show that accused Haynes is 27 years three months of age and was inducted on 15 May 1943 at Camp Upton, New York, and that accused Young is 23 years seven months of age and was inducted on 26 June 1943 at Fort Jackson, South Carolina. Each was inducted to serve for the duration of the war plus six months. Neither accused had prior service.

10. The court was legally constituted and had jurisdiction of the persons and the 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.

11. The penalty for murder is death or life imprisonment as the court-martial may direct (Article of War 92).

Edward L. Stevens, Jr. Judge Advocate

Daniel K. Carroll Judge Advocate

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 2

13 OCT 1945

CM ETO 16620

UNITED STATES	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private RUFFIN T. TARVER (14015237), 656th Quartermaster Gas Supply Company, alias Private ROBERT THOMAS, 572nd Ordnance Ammunition Company, alias Staff Sergeant JOHN A. WILKS (33696379), 572nd Ordnance Ammunition Company	)	Trial by GCM, convened at Seine Section, Paris, France, 15 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ruffin T. TARVER, 656th Quartermaster Gas Supply Company, European Theater of Operations, United States Army, alias Private Robert THOMAS, 572nd Ordnance Ammunition Company, European Theater of Operations, United States Army, alias Staff Sergeant JOHN A. WILKS, 572nd Ordnance Ammunition Company, European Theater of Operations, United States Army, did, at his company on or about 27 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 5 February 1945.

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

Specification: In that Private Ruffin TARVER, 656th Gas Supply Company, European Theater of Operations, United States Army, did, at the Paris Detention Barracks, Seine Section, Com Z, European Theater of Operations, United States Army, on or about 2 April 1945, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 14 April 1945.

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

Specification: In that * * *, having been duly placed in confinement in the Paris Detention Barracks, Seine Section, Com Z, European Theater of Operations, on or about 5 February 1945, did, at Paris, France, on or about 2 April 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * *, did, at the Paris Detention Barracks, Seine Section, Com Z, European Theater of Operations, United States Army, on or about 2 April 1945, with intent to do him bodily harm, commit an assault upon Private First Class Alvin J. SICARD, 288th Military Police Company, Seine Section, Com Z, European Theater of Operations, United States Army, by willfully and feloniously striking the said Private First Class Alvin J. SICARD on the head with a chisel.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence was introduced of previous convictions. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence, recommended that it be commuted and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of the Specification of the Charge as involved a finding that the accused did on or about 14 December 1944, at the place alleged, desert the service of the United States and did remain absent in desertion until he was apprehended on the date and at the place alleged, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. a. The Charge and its Specification:

Over objection of the defense, the court admitted into evidence (R6) a duly authenticated extract copy of the morning report of the 656th Quartermaster Gas Supply Company for 27 September 1944, showing accused "Dy to AWOL" (Pros.Ex.A). In a pre-trial statement admitted into evidence over objection (R28), accused stated that he "took off from /his/ outfit sometime in October, 1944" (Pros.Ex.G). Prior to 17 January 1945, he was in the custody of the military police in Paris, France, under the alias of Staff Sergeant John G. Wilks (33696379), 572nd Ordnance Ammunition Company, and on that date was released (R8; Pros.Ex.B). He was apprehended by the military police in Paris on 4 February 1945 and at that time bore and presented papers purporting to be orders authorizing him, as "Wilks", to be in Paris (R10,11). He also had identification tags bearing Wilks' name which he claimed (R12,13). Later he conceded that his name was not "Wilks", and contended that he was "Robert Thomas", but finally admitted his true identity (R12-14; Pros.Exs.E,F).

b. Additional charges and their specifications:

On 5 February 1945, accused was confined in the Paris Detention Barracks, United States Army (R7-9; Pros.Ex.B). On the evening of 2 April 1945 accused and other prisoners inveigled a guard, Private First Class Alvin J. Sicard, into their cell, threw a blanket over his head, assaulted him with a chisel, and escaped (R15,21,23). The weapon was a chisel about eight to ten inches long, and accused struck Sicard on the head five times with it, inflicting serious wounds on his head and dazing him (R15,21,22). Accused admitted in a pre-trial statement that he escaped from the Detention Barracks (R8; Pros.Ex.G). In Paris, France, on 13 April 1945, when about to be apprehended, he and another soldier robbed three military policemen of their weapons and vehicle. He was apprehended by the police later that night (R24-26; Pros.Ex.G).

4. On being advised of his rights, accused elected to make an unsworn statement (R29). He stated that he had been in the army since August, 1940, serving previously in the Infantry and Engineers, and landing in France on D Day plus 2, with his present organization. In September 1944, he had some trouble with his first sergeant. On October 16 or 17, 1944, he was "admitted to a hospital near Liege, Belgium" and stayed there until 5 December when he was discharged. He then tried to find his unit but was unsuccessful, and on 14 December 1944 came to Paris. He used the name and dog-tag of "John A. Wilks" which he had found, doing so "to avoid detection". On January 4, 1945, he was "arrested and picked up as John A. Wilks" and, though he told the Prison officer his right name, he was not believed. He escaped in order to join a tank destroyer unit, "report to the front", and avoid the charge of desertion. He was going "up to the front" the night he

was arrested and at no time "did he attempt to desert". He did not plan the escape from confinement. He was one of the first men out of the cell and "did not know what happened" (R30).

5. a. The Charge and its Specification: "Desertion is absence without leave accompanied by the intention not to return * * *" (MCM, 1928, par.130a, p.142). The confirming authority has approved only so much of the findings of guilty of this charge as involves a finding that the accused absented himself without proper leave on 14 December 1944 and not on 27 September 1944 as charged and as found by the court, and that he remained absent in desertion until apprehended on 4 February 1945. The accused in his unsworn statement admitted in court that he absented himself without leave from the service on 14 December 1944, assumed a fictitious name and identification tags to avoid detection, and went to and remained in Paris, France. The evidence showed that he was apprehended there on 4 February 1945. The accused's efforts to avoid identification by posing as Sergeant Wilks and later as Robert Thomas was also shown. Under the circumstances the court was justified in inferring that the accused did not intend to return to the service and was therefore guilty of desertion as alleged and as modified by the confirming authority (MCM, 1928, par.130a, p.142; CM ETO 16869, Henry). In arriving at this conclusion it is not necessary to give any probative value to the morning report (Pros.Ex.A), which the Theater Judge Advocate has declared to be incompetent evidence because it was unsigned (Theater Judge Advocate's Review attached to record). However see CM ETO 5234, Stubinski. Upon the authority of the holding in said case the morning report was admissible in evidence. The obiter dicta in CM ETO 4756, Carmisciano was particularly distinguished in CM ETO 12151, Osborne and the principle of the Stubinski case was therein sustained.

b. The additional charges and their respective specifications: The evidence showed, and the accused in his unsworn statement before the court admitted, that he absented himself without proper leave by escaping from confinement at the Paris Detention Barracks on 2 April 1945. He escaped to avoid being tried by a court-martial for desertion. He was apprehended in Paris 12 days later armed with a pistol and shortly after again escaping from arrest by robbing his would be captors of their motor vehicle and weapons. The inference drawn from these circumstances that he did not intent to return to the service was the only reasonable and justifiable one. The evidence also clearly showed that in order to effect his escape he and his accomplices inveigled their guard into their cell and there beat the guard on the head with a chisel inflicting serious wounds upon him. All of the elements of the offenses charged under the additional charges — desertion, escape from confinement, and assault with intent to do bodily harm -- were proved by substantial competent evidence and the findings of guilty are sustained (CM ETO 16869, Henry as to desertion; CM ETO 11856, Debeau as to escape; CM ETO 2569, Davis as to assault).

6. The charge sheets show accused to be 25 years and four months of age. He enlisted 17 August 1940 at Fort Benning, Georgia. He had no prior service.

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

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

Earle D. Adelsheim Judge Advocate

Ronald D. Miller Judge Advocate

John J. Collins, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private RUFFIN T. TARVER (14015237), 656th Quartermaster Gas Supply Company, alias Private ROBERT THOMAS, 572nd Ordnance Ammunition Company, alias Staff Sergeant JOHN A. WILKS (33696379), 572nd 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 as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16620. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16620).

FRANKLIN RITTER
Colonel, JAGD
Acting Assistant Judge Advocate.

(Sentence as commuted ordered executed. GCMO 543, USFET, 3 Nov 1945).

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

BOARD OF REVIEW No. 1

30 OCT 1945

CM ETO 16621

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ANDREW A. MAKARA (35443182), 453rd Medical Collecting Company.	Trial by GCM, convened at Le Havre, France, 26-27 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Andrew A. Makara, 453rd Medical Collecting Company, did, at or near Fauville, S.I., France, on or about 11 March 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gerard Corbel, a human being by striking him with a piece of wood.

He pleaded not guilty, and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No

evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48, with the recommendation that, the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution was substantially as follows:

On 11 March 1945, accused (32 years of age (charge sheet)) was on duty at a prophylactic station at or near the town of Fauville (Seine Inferieure), France (R7). According to the testimony of his superior officer, accused had an exeellent record and was never known to be absent from his duties because of use of intoxicants (R58). At 1000 Hours on that day, he left the station and went to a cafe where he was seen at about 1130 hours playing with a little boy on his lap. He returned to his station and, after going to lunch and returning, again left at about 1500 hours and returned at about 1700 hours (R11). At lunch time he appeared to have been drinking (R43-44) as he did also at 1700 hours, at which time he was "comparatively high" but seemed very friendly rather than in a fighting mood (R11). He went to supper at about 1730 hours (R58) and returned between 1815 and 1830 hours (R7-8,12,44,59). He still was not drunk but had been drinking (R44-45). Shortly after 1845 hours he again left the prophylactic station and returned about 1930 hours (R8,9,59).

Two French women and a French girl aged 14 testified to seeing accused during the evening of 11 March. One of the women saw him drunk about 300 or 400 meters from a former slaughterhouse owned by the father of deceased (not more than a quarter of a mile from the center of Fauville (R33)) between 1830 and 1845 hours; he was playing with several children (R13-14,16). The other woman saw accused, who was drunk, talking to Gerard Corbel (the deceased, eight years of age (R35;Pros.Ex 6)) at the market square in the center

of town at about 1850 hours (R17-19). The girl testified she saw an American soldier, who she believed was accused but she was not sure, outside a cafe walking with and a little in advance of deceased in the direction of the slaughterhouse, about 20 meters distant therefrom at about 1900 hours (R22-24).

At about 1920 hours, two Frenchmen brought wood to the slaughterhouse, which the owner used for storing wood (R25-26, 28). One of them testified that at this time he saw accused, a man of large stature who was drunk or ill, slowly walking away from town at a point on the road about 100 meters from the slaughterhouse. Accused's face was white and his eyes tired; he appeared to be drunk (R27-29). Witness saw no one around the slaughterhouse and no one besides accused on the road (R30-31). Upon entering the slaughterhouse about two or three minutes after accused was seen, the two Frenchmen discovered deceased lying on the ground beside the wood pile (R25,28,30,33; Pros. Exs.2,3,4). He was alive but very badly injured with his head cut open (R26,28) and "full of blood" (R25). A pool of blood lay about six feet from the wood pile, near where deceased was found (R33,34,37,42,46;Pros. Exs.3,4). The boy's injuries consisted of "several lineal wounds [one about eight centimeters broad] of the scalp" and "a crushing in of the left parietal" (R49; Pros.Ex 9), and he died at 1500 hours, 12 March (R34-35; Pros. Exs.5,6).

A piece of firewood, approximately 12 inches long by four inches wide tapering to a point and covered with blood around the large end, to which hairs adhered, was discovered on the evening of 11 March on a pile of wood near the point where the child was found (R31-32,46,53; Pros.Ex 1). The blood on the stick was human type "A" (R67-69; Pros.Ex.18), the same type as the blood of deceased (R51-52,63;Pros. Exs. 13,14,15,16). The six hairs adhering to the stick were those of a child, contained blood clots and the cut ends were short and bobbin-shaped, denoting a blow with a blunt weapon (R69; Pros. Ex 18). Accused's blood was type "O" (R51-52, 63; Pros. Exs.11,12,17). Type "A" blood was also found on the back and pocket of the olive drab shirt worn by accused on 11 March (R49-50,67-69; Pros.Exs.10,18) and on one of the paratroop boots removed from him on the afternoon of 12 March (R40-41, 52-53,67-69; Pros.Exs.7,18).

When accused returned to his station about 1930 hours, he was still feeling "high" and staggered or stumbled, but talked intelligently. He lacked his tie and field jacket, the second button from the top of his fly was open, and his shirt was "bagging" on the side. He appeared to be rational and to know what he was doing and conversed with other soldiers about marrying. About 2000 hours, he retired fully clothed except for the paratroop boots he had been

wearing (R8-9,13,59).

On 12 March, the two women and the girl who testified they saw accused on the previous evening, identified accused on two occasions in two separate line-ups (R19,38-40, 71). The girl, who was not sure of the identity of the American soldier she saw on 11 March (R22-24), stated at each pretrial identification, that she was not quite sure of accused's identity as the soldier involved (R39-40,71). Following the second identification, accused was warned of his rights at the Fauville Gendarmerie and stated he was drinking heavily throughout the morning of 11 March and remembered nothing after about 1200 hours (R40). When a Frenchman, evidently a police officer, at the time accused's boots were removed, accused him of killing the "little Corbel" and inquired as to the source of the blood on accused's clothing, he answered, trembling, that he did not know (R47).

4. After his rights were explained, accused elected to take the stand as a witness in his own behalf (R71) and testified substantially that on the morning of 11 March 1945 he drank ten "doubleheaders" of calvados and in the afternoon six or seven more drinks thereof (R72-73). Thereafter he continued drinking and his "mind went out" (R74) at about 1400 or 1500 hours (R83,84), after which he remembered nothing until about 2200 hours when he was in the kitchen of an engineer company drinking coffee (R74,82,83). He went directly from there to the prophylactic station, conversed with the sergeant there and went to bed. He denied recalling that anything peculiar happened between supper and when he retired (R74); walking with anyone on the street; speaking to any children between 1800 hours and midnight (R77); and playing with any boys (R81). He did not look to see if there were blood on his boots because he was not guilty and still did not think he committed the crime. He admitted ownership of the boots (Pros.Ex 7) and the shirt (Pros.Ex.10) (R82) and that he liked children, but denied playing with children in Fauville. This was the first time he was ever in trouble due to drinking (R83).

No other evidence was introduced by the defense.

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

Whether or not a stick of wood or club is a deadly weapon depends upon all the attending circumstances including the manner of its use, and is generally a question of fact for the jury (or court-martial) (1 Wharton supra; CM ETO 3200, Price; Cf; MCM, 1928, par. 149m, p.180; CM ETO 15787, Parker and Bennerman).

The evidence clearly warranted the inference that at the time and place alleged, deceased was brutally assaulted on the head with a piece of firewood, 12 by four inches in dimensions, and that his death the following day was the direct result of this assault. The serious question as to the legal sufficiency of the evidence to support the findings that accused was guilty of murder arise from the fact that no witness actually saw the assailant strike the fatal blow. It is not essential to the legality of a conviction of murder, however, that there be such direct evidence; it is legal if supported by circumstantial evidence which excludes every reasonable hypothesis except the one of accused's guilt (Buntain v. State. 15 Texas Criminal Appeals 490) and which is not reasonably consistant with innocence (People v. Razezicz (1912),206 N.Y. 249, 99N.E.557). The questions are whether the circumstantial evidence in this case supports the conclusion (1) that accused struck the fatal blow and (2) if so, that it was murder.

As to the first question, the evidence showed that accused drank intoxicants on the day in question; that he played with a little boy on his lap in the morning; that he left his place of duty about 1845 hours and was seen 300 or 400 meters from the scene of the killing playing with children at about that time; that he was seen talking to deceased in the center of town, about a quarter of a mile from the scene shortly thereafter; that he or an American soldier similar in appearance, was seen walking toward the scene about 20 meters therefrom followed by deceased, at about 1900 hours; that he was again seen about 100 meters from the scene at about 1920 hours just before deceased was discovered fatally injured and that accused's face was white at the time; that no one else was seen in the vicinity of the killing; that blood of the same type as that of deceased and different from accused's type was found both upon the lethal club and upon accused's paratroop boot and shirt; and that when accused returned to his place of duty at about 1930 hours one of his fly buttons was open and his shirt was "bagging at the side". The only reasonable hypothesis on these facts is that it was accused who struck deceased with the club, and the court was justified in so concluding. The existence of the bare possibility that another administered the blow, which is not here a reasonable hypothesis,

does not militate against the sufficiency of the evidence (MCM, 1928, par. 78,p.63; CM ETO 3200, Price; CM ETO 13090, Brynjolfsson; CM ETO 14573, Morton). The weight to be accorded the testimony of the French girl that she believed it was accused she saw but was not sure and to her similar statements at the pretrial identification was for the court to determine in deciding the question of identity (CM ETO 14338, Reed).

As to the second question, whether the killing was murder, in addition to the foregoing evidence it was established that the victim was a child of eight years; that accused was a man of large stature 32 years of age; and that a child's hair adhering to the bloody lethal club indicated a vicious assault. The hypothesis that the killing was the result of accident, legitimate self-defense, or heat of passion engendered by adequate provocation are each untenable in view of this evidence and the court was not required to accept any of them (CM ETO 13090, Brynjolfsson; CM ETO 14573, Morton). Accused's act in striking deceased on the head with the club, under the circumstances shown by the evidence, warranted the inference of an intent to kill or at least of a manifest and reckless disregard for the safety of human life and "carried within itself proof of malice aforethought." The court was thus warranted in concluding that the homicide was murder (CM ETO 3200, Price, and authorities therein cited). The fact that the precise motive for the crime is not definitely shown in the record does not affect the validity of this conclusion (CM ETO 12331, Johnson).

6. Accused's defence was, in essence, extreme intoxication, resulting in complete loss of memory during the period when the crime was committed. In view of substantial evidence that, although he had been drinking, he was rational, intelligent, and in control of his faculties about the time of the crime, the implied finding that his condition then was consistant with the capacity to entertain malice may not here be disturbed upon appellate review (CM ETO 13090, Brynjolfsson; CM ETO 14433, Lamas; and cases therein cited).

7. The charge sheet shows that accused is 32 years of age and "entered service" 27 August 1942. No prior service is shown.

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

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

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

James D. O'Hara Judge Advocate

(84)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 30 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private ANDREW A. MAKARA, (35443182), 453rd Medical Collecting Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16621. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16621).

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

IN 1 NOV 1945 AGO, WD & R USFET

(Sentence as commuted ordered executed. GCMO 573, USFET, 19 Nov 1945).

16621

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

BOARD OF REVIEW NO. 1

2 OCT 1945

CM ETO 16622

U N I T E D S T A T E S	)	VII CORPS
	)	
v.	)	Trial by GCM, convened at Leipzig, Germany, 8 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private McKINLEY MOORE (32804867), 857th Quartermaster Fumigation and Bath Company	)	

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

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

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

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

Specification 1: In that Private McKinley Moore, 857th Quartermaster Fumigation and Bath Company, did, at Volkstedt, Germany, on or about 17 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Gerda Timm.

Specification 2: In that * * * did, at Volkstedt, Germany, on or about 17 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Frieda Kortung.

(86)

Specification 3: (Finding of not guilty).

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

Specification: In that * * * did, without proper leave, absent himself from his station at Volkstedt, Germany from about 1830, 17 April 1945, to about 0715, 18 April 1945.

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

Specification: In that * * * did, at Volkstedt, Germany, on or about 17 April, 1945, fraternize with German civilians in violation of existing directive, "Policy on Relations between Allied occupying Forces and Inhabitants of Germany," Supreme Headquarters, Allied Expeditionary Forces.

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 3, Charge I, and guilty of all charges and all other specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, VII Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Specification, Charge II:

Accused's absence without leave from his station at the place and for the period alleged was established by the testimony of the sergeant in charge of a six-man detail of which accused was a member (R23-24), of two other members of the detail (R24-27) and of German civilian witnesses who saw him away from his station commencing about 1900 hours (R9,10,17-18) (CM ETO 527, Astrella).

Specification, Charge III:

His guilt of fraternizing with German civilians as alleged is established by testimony of such civilians that, prior to the commission of the alleged rapes, discussed hereinafter, he visited a German home, conversed in broken German with the occupants and endeavored to induce a German girl there to have sexual intercourse with him (R5-8). (CM ETO 11978, Bromley; CM ETO 12592, Kolanko and Sanchez; CM ETO 12869, DeWar).

Specification 1, Charge I:

At about 2030 hours on the date and at the place alleged, accused, colored, armed with a carbine, entered the house where, among others, the alleged victim, Frau Gerda Timm and her two children lived, asked a man named Wohlert there for a woman, eluded his efforts to eject him, pushed him away and proceeded upstairs (R9-11). Frau Timm testified that he there ordered that the locked door to her room be opened, and fearing he would break it down or shoot, she complied (R11). She was unable to run downstairs because he blocked her path (R12). Upon entering, accused directed her to lay her child down, pulled her into another room and pushed the two women who were with her into the bedroom. He then pulled the victim into the hallway, where he stifled her cries for help by closing and placing his fist "in her mouth" (R11). While she struggled with him he pointed his carbine at her, tore off her clothing, threw her against the wall, causing her to bend down, and inserted his penis into her sexual organs. She continually tried to cry for help, struggled and pushed him, but could not kick him because his knees were tight against hers and she was terrified and became extremely weak (R12). When the other two women endeavored to break down the door and come to her assistance, he evidently became frightened and ran away (R11). The foregoing evidence shows beyond question that accused had carnal knowledge of his victim by force and fear and without her consent and thus supports the findings of guilty of rape (CM ETO 12180, Everett; CM ETO 12465, Standberry and cases therein cited).

Specification 2, Charge I:

Frau Frieda Kortung, the alleged victim, testified that at about 0100 hours on the night in question in the same town, accused knocked strongly on a shutter of the house where she lived (R16). When she repeatedly asked who was there, he replied "American". She then went across the street and summoned a neighbor named Lenz who accompanied her to her house where they were confronted by accused, armed with a rifle. He made them return to Lenz' house, forced Lenz out of the room at the point of his rifle, turned off the light and placed Frau Kortung upon the coal bin (R17). Although she resisted by fighting him off with her hands, which he then held, and told him she was an old woman and that he should get a young one, his reply was "Good", and he proceeded to penetrate her vagina with his penis for about two hours, but without satisfaction (R17-18). Her testimony was corroborated by that of Lenz that the soldier pushed him out into the hall, leaving only the victim in the room with him (accused), and that through a window he saw she "was used for intercourse on the table" by accused, although witness could not see any resistance (R19-20). The foregoing constituted substantial evidence that accused obtained sexual intercourse with the apparently elderly woman by terror engendered by his having threatened with his carbine the neighbor whose aid she had sought, as well as by physical force. The findings of guilty of rape were fully warranted (see cases cited with respect to Specification 1, supra).

(88)

4. During its closing argument, the defense made a motion that before the findings of the court were made public, accused be committed for observation so as to determine his sanity. The court overruled the motion on the ground that it felt that there was no necessity to inquire into any existing mental condition of accused (R28). The ruling of the court was not error in view of the lack of any evidence in the record rebutting the presumption of sanity (CM ETO 13376, Aasen). It is noted in this connection that the Staff Judge Advocate in his review states that he is advised that on the day before the trial the Corps psychiatrist examined accused and informed defense counsel that in his opinion accused was not mentally deranged. A certificate by the Commanding Officer of accused's company, dated 29 April 1945, and accompanying the record of trial, states that accused's mentality both prior to and at the time of the offenses was normal.

5. The charge sheet shows that accused is 22 years seven months of age and was inducted 13 February 1943 at New York, New York, to serve for the duration of the war plus six months. No prior service is shown.

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

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

Wm. T. Sumner Judge Advocate

Edward H. Stevens Jr. Judge Advocate

Donald R. Carroll Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 12 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private McKINLEY MOORE (32804867), 857th Quartermaster Fumigation and Bath Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. It is noted, as pointed out by the Staff Judge Advocate in his review, that there is no psychiatric report as to the sanity of the accused contained among the papers accompanying the record of trial herein. The Staff Judge Advocate recommended that prior to ordering the sentence executed, accused be examined by a psychiatrist and an absolute determination made as to his mental condition.

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 16622. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 16622).

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

(Sentence as commuted ordered executed. GCMO 622, USFET, 18 Dec 1945).

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RESTRICTED

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

BOARD OF REVIEW NO. 3

27 OCT 1945

CM ETO 16623

U N I T E D S T A T E S	)	XXI CORPS
	)	
v.	)	Trial by GCM, convened at Leipzig, Germany, 23 June 1945. Sentence: To be shot to death by musketry.
Private First Class ROBERT A. COLBY (35578510), Company C, 49th Engineer Combat Battalion	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Pfc Robert A. Colby, Company "C", 49th Engineer Combat Battalion, did at his Company area, 5 miles south Eisleben, Germany (RD6526) on or about 2230 hours 10 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Captain RICHARD J. BROWN, a human being, by shooting him with a rifle.

Specification 2: In that * * * did at his Company area, 5 miles south Eisleben, Germany (RD6526) on or about 2230 hours 10 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one First Lieutenant DONALD H. WADE, a human being, by shooting him with a rifle.

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He pleaded not guilty, and all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, XXI Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 10 June 1945, accused's company was in training near Eisleben, Germany (R7,18). At an orientation class, at which accused was present, the company had been put on a five-minute alert and instructed not to leave the area (R7). Between 1700 and 1800 hours, accused and another soldier were discovered by a company officer going toward town, and were returned by him to the company orderly room, where Captain Brown, the company commander, informed them that they were to work on a road after training hours for four days as punishment under Article of War 104, which article was read to accused at his request. Accused saluted and went off to work without further comment (R7-8).

At about 2235 hours, while accused and others were sitting around a fire, another soldier asked him where he was working and who was on the job with him. Accused did not answer, but left the fire and went to his tent. It was not customary for him to ignore questions. He was next seen walking down a path leading to the officers' quarters with an M-1 rifle (R16-18). Usually only guards carried weapons in the bivouac area (R18).

Captain Brown was seated on a footlocker near a fire outside another officer's tent, and Lieutenant Wade, a company officer, was seated four feet to his left on a box or water can (R11-12). Shortly thereafter, the reports of four shots were heard in the area (R9,11,21). The flashes from the shots, which were fired about 15 feet from Captain Brown, were seen by a sergeant who was sitting about 40 feet away (R18-19). Another soldier saw Captain Brown reach for his chest and saw Lieutenant Wade fall back (R11). Lieutenant Wade was heard to cry out, "I'm shot", and to call for a "medic" (R9,11,19). As men ran in the direction of the shots, accused was seen walking away from the scene with his rifle "at sling shoulder" (R19).

Captain Brown was found lying over his foot locker with a bullet hole just above his heart and a big hole "below his crotch". He died within a few minutes. Lieutenant Wade was lying face down with wounds in the abdomen and leg (R9).

Shortly after the shooting, at about 2245 hours, accused walked over to a sergeant, who was about 50 to 60 feet away, handed him the rifle and said, "I shot the Old Man but didn't want to shoot the Lieutenant" (R21-22). The rifle, an M-1, had one round of ammunition in the chamber

and three in the magazine, and the barrel was "still a little warm" (R21). Accused was in a "pretty sober condition" (R22). Accused was then taken to the first sergeant, who asked him, "What did you want to do that for?", to which accused replied, "it was the only way I had to fight back" (R25). Accused "was calm and collected and didn't seem a bit nervous" (R27).

In spite of medical treatment, Lieutenant Wade died at about 2400 or 0030 hours that night (R9, 13). Autopsies performed the following day revealed that Captain Brown had a wound which penetrated his heart, stomach, kidney and other organs in a manner sufficient to cause almost instantaneous death, as well as another bleeding wound in the left thigh, and other superficial wounds. Lieutenant Wade had wounds through the left thigh and through the abdomen, the latter having caused his death by internal hemorrhage (R14-15).

The first sergeant testified that accused had been an average soldier and had been in no difficulty prior to 10 June. He had been subjected to heavy artillery fire only one time, about a year before 10 June, and had never been reported for combat fatigue nor appeared emotionally upset (R26-27).

4. After his rights were explained to him, accused elected to testify (R28-29). He is from Indiana, his parents are living, he has a brother in the Marines, and he went as far as the second year in high school (R29,33-34). He landed in France on "D-Day" and has five battle stars. He went to radio school for 13 weeks about the time his outfit arrived in Germany (R29). At about 1800 hours on 10 June 1945, he and a soldier named Partin left the bivouac area to see if they could get something to drink and a lieutenant picked them up and took them before Captain Brown. They admitted to Captain Brown that they knew they were restricted, whereupon he told them to get into fatigues and get a shovel. After leaving him, they went back to him and accused asked for a "transfer to the 50th Signal because I wanted to get in radio work". Captain Brown "said he would see what he could do" (R30).

They got into fatigues, got their shovels and worked till about 2230 hours filling up "ruts and stuff". They talked about going somewhere and getting something to drink or going "AWOL or something" (R30-31). Accused testified:

> "I was pretty blue. * * * I hadn't had any haircut for some while, couldn't get a barber, and felt pretty dirty all over. I hadn't been paid in five months * * * [The food] never is good * * *. I had been depressed for some time * * * I thought if I could get drunk it would help * * *. Then we went over and sat by the bonfire and this Partin said it was too late to go any place to get anything to drink, and he didn't think we could get any anyway, so we sat by the fire and didn't know what to do * * * Then I got the idea of killing the Captain I guess" (R31).

He got the idea of killing someone "just on the spur of the moment" and did not think specifically of the captain, but "just any of those CP guys". He went and got his rifle and "went down and shot the Captain and Lieutenant Wade" (R32). He thought he knew what he was doing, but did not know whether he intended to shoot and kill both of them or not. He stated that he "didn't have anything against Captain Brown or Lieutenant Wade either one". He further stated that Captain Brown had always treated him fairly and that "I'd rather kill my 1st Sergeant than anybody in the company" (R32). The first time he thought about having done something wrong was when he was talking with the first sergeant, to whom he admitted saying, "That's the only way I can fight back." By that expression he meant "just fighting back at everything in general." He was not angry with the captain for giving him company punishment -- "It was just the fact that I couldnt get out to get drunk or something like that" (R32-33). He was sorry he killed his captain and would not do it again if he had it to do over again. To his recollection, the only other time he received company punishment was with the whole company in England (R34).

5. The evidence for the prosecution and the testimony of accused shows that he deliberately shot two of his company officers with a rifle, at the time and place alleged, while they were seated about a fire in the company area. While the record fails to show the first name or initials of either Captain Brown or Lieutenant Wade, the deceased, their identities are unequivocably established throughout the record as officers of accused's company, so that this lack of proof is of no significance (30 C.J., sec.532,pp.288-289).

The record is devoid of any evidence indicating legal justification or excuse for the commission of the homicides. There is no evidence that accused was drunk or legally insane, or that he committed the acts during the heat of sudden passion caused by provocation under circumstances which might reduce the offense to manslaughter. By his own testimony he admits that while sitting at a fire in the company area, he suddenly got the idea of killing "just any of those CP guys", apparently because he could not get out of the area and "get drunk or something like that" or because he wanted to fight back "at everything in general." He thus in effect admits that he acted with premeditated malice aforethought and "a heart regardless of social duty and fatally bent upon mischief" (Winthrop's Military Law and Precedents (Reprint, 1920), pp. 672-673). The evidence being undisputed that he intentionally fired his rifle at the deceased officers, it was not incumbent on the prosecution to show the particular motive which activated accused in taking the life of such officers (26 Am. Jur., sec. 465,pp.478-479).

> "Murder is the unlawful killing of a human being with malice aforethought. * * * Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time

> the act is committed. * * * 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 * * *; knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; * * *" (MCM, 1928, par. 148a, pp.162-164).

From the undisputed and uncontradicted evidence, the court was fully warranted in inferring that accused willfully fired the fatal shots with malice aforethought and commited each of the offenses of murder as charged (CM ETO 1901, Miranda; CM ETO 3932, Kluxdal; CM ETO 6159, Lewis; CM ETO 7815, Gutierrez; CM ETO 16397, Parent).

6. The order appointing the court, dated 21 June 1945, recites that "A GCM is aptd to meet at Leipzig, Germany, at OSCC on 25 June 1945 or as soon thereafter as practicable". The court actually met and tried accused on 23 June 1945. The record of trial recites that the court met pursuant to said order. No amendment thereto is shown or referred to, nor is there any reference to any change otherwise indicated by the appointing authority of the date set by him, in said order, for the original convening of the court. Prior to his arraignment accused, in open court, expressly agreed to trial on that date by waiving the usual minimum five-day period between service of charges and date of trial "because of the alerted status of units of the witnesses involved" (R3). No objection or challenge to any member of the court was made by accused for any reason during the trial. The reviewing authority expressly approved the sentence of the court on 1 July 1945. The question is presented whether the action of the court in meeting prematurely in apparent violation of the convening order, was merely an irregularity, which was waived by accused's failure to object and his consent to trial, and cured by the action of the reviewing authority, or whether such prematurity of the trial so affected the jurisdiction of the court that it could neither be waived by the accused nor cured by approval of the reviewing authority (see CM 198108, Casey, 3 BR 159 (1932)).

In a discussion of the time and place of meetings of courts-martial, Winthrop states:

> "The time or place, or both, may be changed by a subsequent Order from the same source. It would not be proper for the court, of its own authority

to depart from either; though if it did so the validity of the proceedings would not necessarily be affected: a general approval of the same by the commander would ratify the irregular action" (Winthrop's Military Law and Precedents (Reprint, 1920), p.159).

Under facts almost identical with the facts here presented, wherein the court tried and sentenced the accused on a date prior to the meeting date specified by the appointing order, Boards of Review both in this office and in Washington have heretofore held the records of trial legally sufficient (CM ETO 1606, Sayre; CM 200572, Shaw).

It is the general and well established rule that terms of civil courts which are held at a time other than that fixed by statute are illegal and the proceedings void (15 C.J., sec. 223, pp. 877-878; 21 C.J.S., sec. 150, pp.230-231). Such cases are in certain essential respects distinguishable from cases tried by courts-martial. The principle of having the time for a term of court fixed by the legislature rests on public convenience and the avoidance of confusion and possible injustice to litigants who cannot be required to sit constantly in attendance at court (see Stockslager v. United States (C.C.A. 9th 1902), 116 F 590). No basis exists for the application of such policy to courts-martial, which military necessity frequently requires to meet hurriedly under changing conditions and at varying times, as is demonstrated in the instant case. It is doubtless because of the peculiar and ambulatory nature of courts-martial that Congress has not attempted to establish by statute fixed times or terms or places for their meeting (AW 8,9,10).

It has been repeatedly held that the failure of an orderappointing a court-martial to specify a time for the meeting of the court does not affect the validity of proceedings held subsequent to the date of the order convening the court (Dig. Op. JAG, 1912-30, sec. 1270, pp.625-626). It is a common and accepted practice for convening authorities not to specify a date for the meeting of the court in the appointing order, but to delegate to the president the authority to call the members together for their initial and subsequent sessions at such times and places as he, in the exercise of his discretion, may deem proper and necessary.

The special order in this case, reciting that a general court-martial is appointed, did not specify any effective date nor provide, as it might have, that such appointment was "as of" a date subsequent to the order. It therefore became effective when actually or constructively delivered to the members designated therein (AR 310-50, 8 Aug 1942, par. 14), which obviously was prior to the trial, since the record recites that the court met pursuant to the order (R2). Accused was thus tried by a tribunal composed of members who had theretofore been legally constituted a court, although, for reasons of military expediency, it saw fit to meet at a time prior to that specified in the appointing order (cf Dean v. United States, 33 F (2d) 68, wherein a special term of court was held a de facto

term and its proceedings valid despite the irregularity of the judge's failure to call the term and impanel the grand jury in the manner prescribed by law).

The convening authority could, ofcourse, by amending order issued on or prior to 23 June, have authorized the court to meet on that date. But once a court is legally appointed, such an amending order is not the only method of calling it together to function, even for the first time. Where the power of convening the court is ab initio delegated to the president, he generally exercises it by merely notifying the members in such manner as he deems most practicable for the purpose. Since the president can thus exercise his delegated authority to convene a court once legally appointed, the convening authority himself is certainly not more circumscribed. His power of appointment is another matter. That may not be delegated and its prior exercise by him in the manner prescribed is an essential prerequisite to the lawful constitution and therefore to the jurisdiction of the court. Not so the time and place of its first meeting. Had he not approved of the court's action in meeting when it did, he was fully empowered to express his disapproval by disapproving the sentence and ordering a new trial; or he might have taken proper disciplinary action against the members of the court for violation of his directions as to the time of meeting. Had they acquitted accused, under the circumstances shown, jeopardy would certainly be held to have attached.

> "The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court as thus constituted was invested by act of Congress with power to try the person and the offense charged" (MCM 1928, par. 7, p.7).

Since the court which tried accused in this case was composed of a requisite number of competent members appointed by an official empowered to appoint it, in accordance with law, and accused was in the military service and charged with the violation of an article of war, all the requisites of jurisdiction set forth in the Manual for Courts-Martial were clearly present. In the opinion of the Board of Review, the action of the court, although irregular on its face in view of the convening date set by the appointing authority in his convening order, did not affect the jurisdiction of the court, and was effectively waived by the accused and cured by the action of the reviewing authority.

7. The charge sheet shows that accused is 23 years six months of age and was inducted 5 January 1943 at Indianapolis, Indiana. He had no prior service.

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

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

B R Keeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Levy Jr Judge Advocate

1st Ind.

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

1. In the case of Private First Class ROBERT A. COLBY (35578510), Company C, 49th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

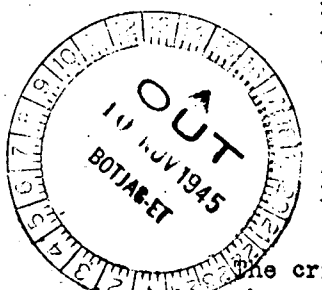
2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement, and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 16623. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16623).

3. This accused is 23 years six months of age. He was inducted 5 January 1943 and assigned on 11 January 1943 to the 49th Engineer Combat Battalion with which he has served continuously since. He landed in Normandy on D-Day and has continued through all the battles on the continent and has earned five battle stars. He has never previously been tried by courts-martial. He was a member of a radio squad and has never been absent from his unit except to attend a thirteen weeks course in radio at a Signal Corps school shortly before this offense. On return to his unit, he requested a transfer to the signal unit where he attended school.

4. The file contains a great many letters from members of Congress, from citizens of his home community, and from others, requesting clemency and stating that his conduct in his home community was unblemished and that he was highly regarded by all who knew him. One letter is signed by 65 citizens of his home community and states:

"In civilian life Robert was a good boy. He was reared in this God-fearing community where he was taught the Christian precept of love and goodvi ll toward his fellowmen.

Inasmuch as it was the army that reversed this Christian teaching of love for all men, and taught him, rather, the method of violence, we earnestly beg of you to exercise leniency toward him."



The crime itself is inexplicable. Although on the day of the crime he had been given four days extra fatigue by his company commander for breach of a company restriction to camp, he does not seem to have been concerned about this and had performed one day of the work without complaint.

No hard feeling or animosity against either Captain Brown or Lieutenant Wade were known to have existed. For some unexplainable reason he left a group of his companions at a bonfire, obtained his rifle, sought the deceased officers (who were but a short distance away) and fired on them. It appears to have been done on the spur of the moment.

Attention is invited to the question considered by the Board of Review in paragraph 6 of the holding, concerning the trial of the case on 23 June 1945, whereas the convening order directed it to meet on 25 June 1945, or as soon thereafter as practicable. The board has held that this did not effect the jurisdiction of the court, and I have no doubt about the correctness of that view. However, there is a paucity of precedent on the question, and the decisions as to similar questions in the civil courts are to the contrary. For the foregoing reasons, it is recommended that proper consideration be given to commutation of the sentence.

5. 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.

(Sentense confirmed but after reconsideration commuted to dishonorable discharge, total forfeitures, and confinement for life. Persuant to Paragraph 87b, MCM 1928 so much of previous action dated 29 Aug 1945 as inconsistent with this action recalled. GCMO 607, USFET, 7 Dec 1945).

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

BOARD OF REVIEW NO. 1

9 OCT 1945

CM ETO 16624

U N I T E D S T A T E S	)	2ND AIR DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	AAF Station 115, APO 558,
Captain ALDEN L. STORDEUR	)	U. S. Army, 2 June 1945.
(O-579380), Headquarters	)	Sentence: Dismissal, total
and Base Services Squadron,	)	forfeitures and confinement
379th Air Service Group	)	at hard labor for six months.
(formerly of 853rd Bombardment	)	Eastern Branch, United States
Squadron, 491st Bombardment	)	Disciplinary Barracks, Green-
Group)	)	haven, New York.

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

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

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

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

Specification 1: In that Captain Alden L. Stordeur, Headquarters & Base Services Squadron, 379th Air Service Group, AAF Station 143, APO 558, (then of the 853rd Bombardment Squadron, 491st Bombardment Group, AAF Station 143, APO 558) having taken oath in a trial by Special Courts-Martial of Private (then Master Sergeant) Robert E. Lauritzen, Headquarters, 491st Bombardment Group, AAF Station 143, APO 558, (then of the 853rd Bombardment Squadron, 491st Bombardment Group, AAF Station 143, APO 558) before Captain George E. Newburger, Trial Judge Advocate of said special court martial, a competent officer, that he would testify truly, did at AAF Station 143,

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APO 558, on or about 17 November 1944, willfully, corruptly, and contrary to such oath testify in substance that he did not know that there was a credit due to the 853rd Bombardment Squadron Officer's Fund from the Johnson, Burton, and Theobald Company Ltd. of Norwich, Norfolk County, England, and that he did not give the said Private Robert E. Lauritzen permission to use the moneys resulting from such credit to make up the shortage then existing in the 853rd Bombardment Squadron War Bond Fund, which testimony was a material matter and which he did not then believe to be true.

Specification 2: (Nolle prosequi).

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

Specification: In that * * * did at AAF Station 143, APO 558, on or about 31 October 1944, with intent to deceive First Lieutenant Leo Diernfield, 816th Air Engineering Squadron, 379th Air Service Group, AAF Station 143, APO 558, (then of the 326th Station Complement Squadron, AAF Station 143, APO 558), officially state to the said First Lieutenant Leo Diernfield that Private (then Master Sergeant) Robert E. Lauritzen never informed him that there was a cash credit due the 853rd Bombardment Squadron Officer's Fund from the firm of Johnson, Burton and Theobald Company Ltd., Norwich, Norfolk County, England, which statement was known by the same Captain Alden L. Stordeur, to be untrue in that the said Captain Alden L. Stordeur, had been informed by Private Robert E. Lauritzen of said credit.

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 specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding Officer, 2nd Air Division, approved only so much of the finding of guilty of Specification 1 and Charge I as involved a finding of guilty of false swearing in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence,

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but, owing to special circumstances in the case, reduced the period of confinement to six months, 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 of the prosecution disclosed that the present charges arose indirectly out of irregularities in the handling of certain funds. Three separate funds were involved and it appears probable that some unauthorized transfer of funds and application of credits occurred. A review of such manipulations as may have taken place would here avail nothing since they are not as such concerned in any finding under review. Accused stands convicted of false swearing and of making a false official statement under Articles of War 96 and 95 respectively.

A stipulation received without objection by the defense showed that, on 17 November 1944, accused gave testimony under oath at the trial by special court-martial of Master Sergeant Robert E. Lauritzen on a charge growing out of manipulations of the funds to which reference is made above (R7). After describing how certain moneys came into the possession of Lauritzen who was "handling the work", accused testified in that case:

> "There was a credit but I was under the assumption that it was taken care of and included in the final total of the bills. * * * I did not give Sergeant Lauritzen any permission to use any of this money for any other purpose * * * I never told him to take the money and place it in the War Bond Fund".

The investigating officer in the Lauritzen case, First Lieutenant Leo Diernfield, identified a sworn statement made by accused, which was received in evidence without objection by the defense (R14; Pros.Ex.2). This contained the following statement:

> "Sergeant Lauritzen never informed me that there was a cash credit due to the 853rd Bombardment Squadron Officer's Fund, from Johnson, Burton and Theobald, Ltd., and therefore I could not have given him permission to use that money".

Lauritzen testified that after discussing the War Bond Fund shortage, accused "directed" him to use the credit at issue against an existing shortage (R8,9,10). He testified that accused:

> "asked me how much credit we had due from Johnson, Burton and Theobald Company of Norwich, and I reported ten or twelve pounds" (R8).

After proper identification and without objection by the defense, a sworn statement signed by accused was received in evidence in this case (R12; Pros.Ex.1), which read in pertinent part:

> "That the information which I gave under oath during the trial by Courts-Martial of Pvt. Robert E. Lauritzen was false and the information which I gave under oath to 1st Lt. Leo Diernfield who was investigating officer for this case was false.
>
> I did know at the time of the cash credit due to the 853rd Bombardment Squadron Officers Fund from the Johnson, Burton and Theobald Company of Norwich, Norfolk.
>
> I did give permission of Pvt. Robert E. Lauritzen to use this money to make up the shortage then existing in the War Bond Fund of the 853rd Bombardment Squadron".

4. Having been advised of his rights, accused elected to testify in his own behalf (R14-15). He denied making the statement to Lauritzen that there was a cash credit due "because actually it wasn't a cash credit" (R16); he later stated that he knew that there was a credit due, but not that it was a cash credit (R20). The money he gave Lauritzen permission to use was to come from "Special Service" from the sale of excess material to them (R17). He stated that he signed the sworn statement admitting the falsifications (Pros.Ex.1), without reading all of it (R17), although he could have taken time to do so (R21). No other evidence was offered by the defense.

5. a. The finding as approved as to Specification 1 and Charge I involves accused's guilt of the offense of false swearing. The two statements of accused on which this charge was based he made as a sworn witness in the Lauritzen trial. The first statement was that he did not know that there was a credit due the squadron officers' fund from a named commercial company. The testimony of accused at the Lauritzen trial does not support this allegation. The statement included no mention of any specific fund or of the company alleged. More fundamentally, accused did not testify that he did not know of a credit. He specifically testified "there was a credit", although he indicated he understood it to be a paper credit for adjustment in the final bill.

The second statement alleged by this Specification is that he did not give Lauritzen permission to apply certain moneys to a shortage existing in the War Bond Fund. The record clearly shows that he made this statement (R7). There is sufficient evidence as to the statement's falsity in Lauritzen's testimony and in accused's sworn statement, to support the court's finding of guilt of false swearing.

The fact that the allegation as to only one of these two statements is sustained by the evidence does not affect the findings of

guilty of false swearing.

> "The view usually taken is that, where in an indictment there are several distinct assignments of perjury or false swearing, proof of any one of them is sufficient to support the indictment" (48 CJ, sec.149, p.889; see also 2 Wharton's Criminal Law (12th Ed., 1932), sec.1567, p.1826).

The testimony of accused at the Lauritzen trial was according to the record under oath, but there is no showing that the oath was administered by a qualified officer. The rule is that in such a state of record it is presumed that the provisions of Article of War 19 were met (CM ETO 9573, Konick).

The action of the reviewing authority in approving only so much of the finding of Charge I as involved finding accused guilty of false swearing was proper since it is a lesser included offense of perjury (CM 198262 (1932), Dig. Op. JAG, 1912-40, sec.451(52), p.331). The record of trial discloses a failure of proof as to the materiality of accused's false testimony at the Lauritzen trial, and thus one element of the crime of perjury was not established (MCM, 1928, par.149i, p.175). However, all of the elements of the offense of false swearing were proved (MCM, 1928, par.152c, p.191).

b. Under Charge II and Specification, accused was found guilty of making a false official statement in violation of Article of War 95. This determination was based on the fact that in his sworn statement he stated that Lauritzen had never informed him that a certain cash credit was outstanding (Pros.Ex.2). The officer to whom accused made this statement was acting in his official capacity as the investigating officer in the Lauritzen case (R13). Lauritzen testified that he had informed accused of this credit (R8). In a subsequent sworn statement (Pros.Ex.1), accused admitted that the information he had given this investigating officer was false. Accused, in his testimony, attempted an explanation of both the Lauritzen conversation and of how he signed the second statement without a full reading, as discussed above. This state of the record created a pure question of fact for the court and its finding thereon, being supported by substantial evidence, will not be disturbed. It is an offense in violation of Article of War 95 for an officer to make a false statement in the course of an official investigation (CM ETO 1786, Hambright; CM ETO 8457, Porter) and the present finding is warranted on the record.

c. While the statements forming the basis of the two charges are not identical, all arose out of one situation and concern the same subject matter. However, in a case where the identical misstatement was alleged under charges of violations of both Articles of War 95 and 96, no improper multiplication of charges existed and findings of guilty under both articles were upheld (CM ETO 5389, Pomerantz). The conviction of an officer under both articles is legal (CM ETO 1197,

Carr; McRae v. Henkes (CCA 8th, 1921), 273 Fed.108, cert. denied, 258 U.S. 624, 66 L.Ed.797(1922).

6. The charge sheet shows that accused is 27 years one month of age and enlisted 13 August 1940. He was commissioned 16 April 1943 at Miami Beach, Florida. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support so much of the finding of guilty of Specification 1 of Charge I as approved, as involves a finding of guilty of false swearing only as to the second statement therein alleged and legally sufficient to support the other findings of guilty as approved and the sentence as commuted.

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

Wm. F. Sprow Judge Advocate

Edward A. Steves Jr. Judge Advocate

(ON LEAVE) Judge Advocate

RESTRICTED

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 9 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Captain ALDEN L. STORDEUR (0579380), Headquarters and Base Services Squadron, 379th Air Service Group, (formerly of 853rd Bombardment Squadron, 491st Bombardment Group), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support so much of the finding of guilty of Specification 1 of Charge I, as approved, as involves a finding of guilty of false swearing only as to the second statement therein alleged and legally sufficient to support the other findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16624. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16624).

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

(Findings vacated in part in accordance with recommendation of The Assistant Judge Advocate General. Sentence ordered executed. GCMO 569, USFET, 16 Nov 1945).

RESTRICTED

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

BOARD OF REVIEW NO. 2

28 SEP 1945

CM ETO 16627

U N I T E D S T A T E S	94TH INFANTRY DIVISION
v.	Trial by GCM, convened at Viersen, Germany, 14-15 May 1945. Sentence as to each accused: Dishonorable discharge, total forfeiture and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates JOSEPH ATKINS (34627035), JOHN W. SYDNOR (33549411), and ALVIN KING (34527505), all of 3129th Quartermaster Service Company	

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

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

2. Accused were arraigned separately and, after expressly waiving their rights to object, were tried together upon the following charges and specifications:

ATKINS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Joseph Atkins, 3129th Quartermaster Service Company, did, at Viersen, Germany, on or about 13th April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Wilma Geisler.

SYDNOR

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John W. Sydnor, 3129th Quartermaster Service Company, did, at Viersen, Germany, on or about 13 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Wilma Geisler.

KING

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Alvin King, 3129th Quartermaster Service Company, did, at Viersen, Germany, on or about 13 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Wilma Geisler.

Each accused pleaded not guilty and, all of the members of the court present at the time the votes were taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 94th Infantry Division, approved each 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 each sentence but, owing to special circumstances in each case, commuted each sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

Accused are members of the 3129th Quartermaster Service Company, which, on the afternoon of 13 April 1945, was in the vicinity of Viersen, Germany. The complaining witness, Wilma Geisler, an unmarried girl of 15 years of age, and a girl companion, were walking near a dump frequented by colored soldiers, when they saw two negro soldiers lying in the bushes (R6,8,10,34). The soldiers waved for them to come over, but they kept on walking until they were stopped by a third colored soldier who offered them chocolate (R6). They took none, and he let them go; however, in the meantime, the two soldiers first seen had come up, and took hold of them (R6,

7,10,11,20). The accused Atkins accosted Miss Geisler, and another soldier stopped her friend, but the latter was released when she said her father was coming, and she ran away. Miss Geisler tried to get away from them, but Atkins held her fast (R6,7,10,11). Atkins and King pulled her into some bushes, and though she cried and shouted for help, they beat her and kicked her (R6,11,12). They both pushed her to the ground and accused Sydnor then appeared (R7,12). Atkins "came with a knife" and King was "going to shoot" (R7,12). Atkins "whipped /her/ on the mouth" and held a knife at her throat; Atkins and King pulled her dress up, and Atkins got on top of her and put his private parts in hers and moved (R12,13). She tried to prevent him from putting his private parts in hers by kicking and moving her arms and legs, and Sydnor and King helped to hold her (R14,15). King pointed a rifle at her when she was on the ground (R15,51). After some time Atkins got off her and Sydnor and King in turn had intercourse with her, each putting his private parts in hers (R15,16). They always held her (R16), and her legs were forced apart (R25). Her panties were torn, and her sweater was torn and pulled out because she tried to get away (R18, 20,26). On all occasions she was objecting and struggling against the acts of the accused. She did not assist them in any way, and she constantly feared for her safety and screamed (R18,19).

During the episode, shots were fired by other soldiers who were on the scene, and accused Atkins shot at a nearby house from which civilians were watching (R23,48,53,102). After accused King had got off her another soldier of accused's company came along, pulled her up, and waved for her to leave (R16). She left, but soon met a white officer who had been summoned by the complaints of civilian witnesses (R17,37). She returned with him (R17). At the scene, she identified the three accused as the men who had attacked her (R40).

Other soldiers of accused's company who observed the episode testified that they saw Atkins having sexual intercourse with the complaining witness (R78,92) and that she was "crying and mumbling and hollering" (R100). One witness also saw a knife in Atkins' hand, held on or near the girl's throat (R127). Another stated that he had seen Sydnor and King get on the girl, in succession, after Atkins had got up (R92). Other civilians in the nearby area saw three negroes throw a girl on the ground and hold her, she being on her back, screaming and calling for help and kicking (R55,57). Some saw the girl partly without clothing, with a negro kneeling before her and one lying at her right side (R47), and saw soldiers who were with her change places (R52). The prosecutrix was immediately examined by her doctor and he determined that her hymen was freshly torn (R41,42).

Testimony was introduced as to pre-trial statements made by each accused. In those statements each admitted attempting to have sexual intercourse with the complaining witness (R113,115,116,117). Atkins stated that she asked for chocolate and after he offered her some, she invited him to

follow her to some bushes, and lay down voluntarily. At about the time he got his penis out some other soldiers, spectators, came over, and the girl started squirming and moving about so much that he was not able to accomplish any sexual intercourse with her (R113). Sydnor stated that after the "first soldier" got off, he tried to get on, but was not able to enter her private parts because he had a venereal disease and could not get an erection (R115). King stated that after the other two soldiers had got up off her, he had his penis out, and then got on the girl, but he was unable to accomplish anything because she was "too small for him" (R116,117). Both Sydnor and King admitted in their pre-trial statements that they did not get the girl's consent before attempting intercourse with her (R115,117). Atkins and King stated that no one was holding the girl down when they were with her (R113,117).

4. On being advised of his rights as a witness, by his counsel, each accused elected to make an unsworn statement (R132). Atkins and Sydnor affirmed that the testimony by the prosedution witness that they had made pre-trial statements was true, and that these statements were true (R133). King stated that the testimony as to what he had said before the trial was correct, except that he had not said "that a sergeant came up, pulled this girl away"; and stated that what he had said in his pre-trial statement was true (R133-134). No other evidence was submitted by the defense.

5. Rape is defined as the "unlawful carnal knowledge of a woman by force and without her consent" (MCM,1928,par.148b,p.165). The record contains a wealth of evidence that the crime charged was committed by each of the accused, and the details of the prosecutrix' testimony were fully corroborated by disinterested eye witnesses (CM ETO 9083, Berger et al).

6. The charge sheets show that accused Atkins is 28 years and two months of age and was inducted 1 April 1943 at Camp Shelby, Mississippi; Sydnor is 24 years and eleven months of age and was inducted 18 January 1943 at Fort George G. Meade, Maryland; King is 21 years and eleven months of age and was inducted 31 January 1943 at Fort Benning, Georgia. None of the accused had prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 to support the findings of guilty and the sentences.

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

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

TEMPORARY DUTY Judge Advocate

Judge Advocate

Judge Advocate

(114)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Privates JOSEPH ATKINS (34627035), JOHN W. SYDNOR (33549411) and ALVIN KING (34527505), all of 3129th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16627. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16627).

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

(As to each accused sentence ordered executed.
GCMO 493, (Atkins) USFET, 19 Oct 1945).
GCMO 494, (Sydnor) USFET, 19 Oct 1945).
GCMO 495, (King) USFET, 19 Oct 1945).

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

BOARD OF REVIEW NO. 3

5 OCT 1945

CM ETO 16628

U N I T E D S T A T E S	DELTA BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	
Private ERIBERTO G. QUINTANILLA (38026245), Company L, 143rd Infantry, 36th Infantry Division	Trial by GCM, convened at Marseille, France, 28 May 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Eriberto G. Quintanilla, Company L, 143rd Infantry, 36th Infantry Division, did, at Marseille, France, on or about 9 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 20 March 1945.

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

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for absence without leave for one day in violation of Article of War 61. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence but recommended commutation to dishonorable discharge, total forfeitures and confinement at hard labor for 25 years, and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. Accused, wearing "OD" trousers and "one of the green type field jackets with his collar open" but no insignia whatever, was apprehended by an agent of the Criminal Investigation Division at Marseilles, France, 20 March 1945 (R8-9, 19). At that time he said he was a Spaniard, and, when asked for credentials, produced an official-looking card purporting to identify him as a lieutenant of the Spanish "FFI" (R9-10; Pros.Ex.2). Recognizing his accent as Mexican or Puerto Rican, the agent arrested him and took him to the "CID" office where he admitted his identity (R10,12). After due warning, he made two statements, one on 21 March and one on 26 March (R11,15-17; Pros.Ex.3,4). In the latter, he admitted escaping from the "D.B.S." Stockade some time in November, stealing and selling rations in Marseilles and purchasing his false identification card from a French lieutenant (Pros.Ex.3). The former fixed the date of his escape from the "D.B.S. Stockade, Marseilles, France" as "about the first of December" and also as "about four months ago" (Pros.Ex.4). In his unsworn statement upon the trial of the case, he said that he never intended to desert the Army and that he always wore his uniform (R22).

4. Defense evidence: No evidence was presented on behalf of the defense. After his rights were explained to him, accused elected to remain silent.

5. Eliminating an "Extract copy of Personnel Status Card of Delta Base Section Stockade" recording his escape therefrom 9 November 1944, for the introduction of which under either the "official statement" or "shopbook rule" no proper predicate was laid, the testimony of the apprehending officer furnished sufficient proof of the corpus delicti to render admissible the confessions of absence without leave (CM ETO 4915, Magee). The duration of this absence, his misrepresentation of identity when apprehended, and his admitted activities during the period involved support the inference of intent not to return which is essential, in this case, to sustain the conviction of desertion (MCM 1928, par. 130a, pp.143-144).

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 as commuted.

7. The charge sheet shows that accused is 23 years eight months of age and that without prior service he was inducted 22 January 1941 at Camp Bowie, Texas. He stated to the court, when this data was read, that he would be 21 on the 16th of July; and that he was born 16 July 1925 (R24-25).

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E R Keesling Jr Judge Advocate

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(118)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 5 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private ERIBERTO G. QUINTANILLA (38026245), Company L, 143rd Infantry, 36th Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16628. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16628).

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

(Sentence as commuted ordered executed. GCMO 508, USFET, 26 Oct 1945).

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

BOARD OF REVIEW NO. 5

19 OCT 1945

CM ETO 16640

U N I T E D S T A T E S	)	29TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 29, U. S. Army, 21,22 May 1945.
Private First Class ALFRED F. WILLET (31322060), and Private WILLIAM CARREON (36722728), both of Battery A, 227th Field Artillery Battalion	)	Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused were tried in a common trial to which each consented upon the following charges and specifications:

WILLET

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

Specification: In that Private First Class Alfred F. Willet, Battery A, 227th Field Artillery Battalion, did, at Rhade, Province of Westphalia, Germany, on or about 9 April 1945, in the nighttime, feoniously and burglariously break and enter the dwelling house of Wilhelm Leyeng with intent to commit a felony, viz: larceny therein.

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

Specification 1: In that * * *, did, at Rhade, Province of Westphalia, Germany, on or about 0200 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 2: In that * * * did, at Rhade, Province of Westphalia, Germany, on or about 0300 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 3: In that * * * did, at Rhade, Province of Westphalia, Germany, on or about 0300 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 4: In that * * * did, at Rhade, Province of Westphalia, Germany, on or about 0300 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

CARREON

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

Specification 1: In that Pvt. William Carreon, Battery A, 227th Field Artillery Battalion, did, at Rhade, Province of Westphalia, Germany, on or about 9 April 1945, in the nighttime, feloniously and burglariously break and enter the dwelling house of Wilhelm Leyeng with intent to commit a felony, viz: larceny therein.

Specification 2: In that * * *, did, at Rhade, Province of Westphalia, Germany, on or about 9 April 1945, commit the crime of sodony by feloniously and against the order of nature, having carnal connection per os with Vera Kolesnik.

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

Specification 1: In that * * *, did, at Rhade, Province of Westphalia, Germany, on or about 0200 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 2: In that * * * did, at Rhade, Province of Westphalia, Germany, on or about 0300 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 3: In that * * *, did, at Rhade, Province of Westphalia, Germany, on or about 0300 hours 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 4: In that * * * did, at Rhade, Province of Westphalia, Germany, on or about 0300 hours, 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Specification 5: In that * * * did, at Rhade, Province of Westphalia, Germany, on or about 0600 hours, 9 April 1945, forcibly and feloniously against her will, have carnal knowledge of Vera Kolesnik.

Each pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of the separate charges and specifications preferred against him. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring, accused Willet 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 Carreon was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be shot to death with musketry. The reviewing authority, the Commanding General, 29th Infantry Division, approved the sentence as to each accused but recommended in the case of Carreon that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Willet, and forwarded the record of trial for action as to Willet pursuant to Article of War 50½, and as to Carreon pursuant to Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed only so much of the sentence of accused Carreon as provided that he be shot to death with musketry but, owing to special circumstances in this case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that on the night of 8 and 9 April 1945, accused were both members of Battery A, 227 Field Artillery Battalion, Willet a private first class and Carreon a private, and were located with their organization in Rhade, Germany (R7,8,51). On that night, shortly after midnight, these accused forcibly entered a neighboring farm house which housed the elderly owner, a farmer, together with his son, a Pole, two Hollanders, and Vera Kolesnik, 20 years old, a slave laborer who had been brought to Germany in 1942 (R11,27,28,45). Eleven Italians slept in an adjoining barn. Accused Willet was armed at the time

with a carbine and Carreon with a pistol (R11,13,17,21,29,30). They exclaimed: "American control" (R11), gathered all the people into the barn, asked their names, and then informed them that they could go to bed and sleep. They accompanied Vera to her room, covered her with a blanket, ordered her to go to sleep, and departed. About five minutes later both accused returned to Vera's room. At this time, accused Carreon despite the girl's struggles to get away and the fact that she was "resisting and not giving in" removed her pants, nightie and brassiere. He tried to have normal intercourse with her by inserting his penis in her vagina. Because of her efforts to free herself from him, Carreon did not succeed in this endeavor, but did succeed in injecting his penis into her mouth. By this time, Vera was very weak. When Carreon first got on the bed he pulled out his pistol and waving it indicated "silence" by a motion to his lips, and then handed the pistol to Willet. After that, Vera did not see Willet until after Carreon was finished (R13-14, 31-35). Then Willet got in bed and had sexual intercourse with her while Carreon held her hands. During this intercourse in her room, according to the girl, she struggled in opposition trying to get away until she was worn out (R34-36). When Willet was having intercourse she was in great pain. It was her first intercourse. She screamed twice from pain (R36). The farmer's son and the Pole testified that they heard a few cries, "a light tone", "sobs" twice, but no screams (R15,17,26). After Willet completed the act of intercourse both accused helped her dress and the three went downstairs. Carreon asked where there was some schnapps or wine. She replied that she did not know but pointed to a door where she thought there was some. The two accused then blindfolded her and escorted her to a house ten or twenty minutes distant by walking. There she was assaulted by four different unknown men, three of whom succeeded and one failed in having intercourse with her. During these events Carreon sat at her feet but she did not remember whether Willet was in the room. Then Carreon picked up Vera - she still did not know where Willet was - and took her to another house where he lay on her the rest of the night, sleeping part of the time and foiling one effort by her to withdraw from beneath him and escape. In the morning at daybreak, Carreon had sexual intercourse with her, after which he gave her her clothes and told her to go away. She went back to the farm where she worked (R36-43). The son of the farmer and the Pole saw her when she entered. She appeared "a little bad and looked as if she had been crying". Asked where she had been, she made no answer but started to cry and went to her room(R16,25). A physical examination of Vera, showed "that it [her hymen] had been perforated and there were two small lacerations * * * in the hymenal ring". The labia were inflamed and red and no scars or old tears of the hymen were found (R48). The lacerations had occurred, in the opinion of the examining physician, an officer in the Army Medical Corps, within the preceeding 12 hours. The lacerations did not prove beyond all doubt to this witness that the girl had been a virgin before this episode and while he found that penetration of the hymen was recent he would not venture an opinion that the hymen had not been previously punctured (R46-49).

The room-mate of accused Willet, called by the prosecution, testified that he slept all through the night of 8 April until morning. He was awakened by some noises and saw accused Willet (not Carreon) lying on his stomach between the legs of a girl, six feet away. As he watched, Willet got up, and then the girl arose and went away. He heard no one else in the room and did not see Carreon there at any time (R50-58). A cloth belt belonging to Vera was found in this room where Willet lived, on the forenoon of 9 April (R43,49-51;Pros.Ex.2).

4. Advised of his rights as a witness, each accused elected to remain silent (R68,69).

On cross examination of the prosecutrix by the defense, the following appeared:

"Q. During the whole time that you were in the farmhouse with the tall one, did his penis enter your mouth?

A. When he did not succeed in inserting it into my vagina he then picked me up by my hair and began to insert it into my mouth.

Q. Did he succeed in putting it in your mouth?

A. I turned my head away. He did try to put it into my mouth but I turned away and tried to break loose from him.

Q. Then he did not actually penetrate your mouth with his penis?

A. He did insert it in my mouth" (R62,63).

Prosecutrix was asked by the court if Carreon ever succeeded in having intercourse with her. Her answer was: "No". They reminded her of her previous testimony, she then qualified this answer by saying that Carreon did have intercourse with her at daybreak (R64).

Captain George F. Weidl, the battery commander of both accused, was called as a defense witness. With respect to Carreon, he said that he had always been a good soldier "in every respect", good as to both efficiency and behavior. Willet, the Captain said, had been an excellent soldier, excellently behaved. The first sergeant of this battery testified to the same effect. Both accused were efficient soldiers and their behavior had been excellent.

5. There was substantial evidence to support each element of the offenses charged against each accused.

a. Specification of Charge I against Willet and Specification of Charge I against Carreon each alleges burglary in violation of Article of War 93, which is defined as "the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein(Bishop)" (MCM, 1928, 149d, p.168). The proof, shown by the record, leaves no element of this offense in inference, except that of the felonious intent. The accused after breaking into the house, in the night time, and after cowering and segregating the male occupants, directly and with clear purpose set about having intercourse with the female in the house, under circumstances constituting rape as will be seen. These facts lead to the reasonable inference that intercourse, by rape if necessary, was one of the purposes of such visit to the house, also that the intent was to commit larceny (a felony, irrespective of value at common law (MCM, ibid)), to steal schnapps or wine. This intent was a proper subject for inference by the court (CM ETO 78, Watts; CM ETO 3754, Gillenwaters; CM ETO 4071, Marks, et al; CM ETO 16005, Jones, et al).

b. Specification 2, Charge I, against Carreon, alleges sodomy per os with Vera Kolesnik. The girl testified that accused inserted his penis in her mouth. That act constituted sodomy, in violation of Article of War 93, as charged (MCM, 1928, 149K, p.177; CM ETO 1743, Penson; CM ETO 8511, Henry Smith).

c. The remaining charge and specifications against each accused allege rape in violation of Article of War 92. One specification against Willet and one against Carreon involve, on the evidence, a personal act of intercourse by each of them with Vera by force and against her will. Carreon is charged with the proven rape by Willet. But Willet is not charged with the personal rape by Carreon. The intercourse by Willet took place in the girl's room, and that by Carreon according to the girl was the one that took place just before her departure in the early morning of 9 April. The three additional charges of rape against each accused, are the intervening acts of intercourse by three unknown men who raped the girl, on the theory that they occurred, as a result of the procurement by both accused and with the active participation of Carreon who sat at her feet, as a continued threat, during each intercourse. The girl was unable to testify that she saw Willet after she had left her farmhouse and had arrived in the first house or that he was present during the succeeding raping. However, there is no evidence that he quit this wrongful enterprise after having helped initiate it and having participated in its first phases. If Willet helped bring the girl to the farm house for her to be raped by others his guilt of these subsequent rapes was proved. (cf: CM ETO 9643, Haymer) The fact that he was not charged as principal or accessory to the daybreak rape by Carreon intimates that the prosecution theorized that he abandoned the project before it reached that stage. If the court found that rape was in fact committed and was satisfied that Carreon assisted Willet in his rape and was

satisfied that each accused assisted in the rapes by the three unknown as aiders and abettors it was proper for them to be found guilty as principals as charged (sec. 332, Federal Criminal Code, (18 USCA 453); CM ETO 4172, Freeman Davis et al; CM ETO 4444, Hudson et al; CM ETO 8542, Myles and authorities therein cited).

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, 148b, p.165).

In this case, the prosecutrix testified to five acts of intercourse involving penetration of her genitals by the sex organs of five different males. She testified that she did not consent to any of these acts and that she resisted all advances until too exhausted to resist further. Resistance is not required when impossible. There is always a point in consummated rape where resistance fails and is overcome. The story of the prosecutrix, evidently accepted by the court, showed the presence of each of the essential elements of this offense and afforded a basis for the findings of guilty. Her recital of events is not without corroboration from independent sources. Accused's violent entrance into the farm house; the continuous display of firearms by accused; the purported examination of the inmates; and the actual signs of physical violence visited upon the genital organs of the girl sustain the testimony both as to penetration and non-consent. There is substantial evidence that accused committed the acts of rape of which they were found guilty and such findings are binding on the Board of Review upon appellate review (CM ETO 895, Davis et al; CM ETO 8156, Pead; CM ETO 8837, Wilson; CM ETO 12604, Mendez and Rego; CM ETO 14174, Hitchcock).

6. The charge sheets show that accused Willet is 20 years of age and was inducted 27 April 1943 at Portland, Maine, and that Carreon is 23 years of age and was inducted 9 January 1943 at Chicago, Illinois. No prior service is shown as to either accused.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 as to accused Willet as approved, as to accused Carreon as commuted.

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

_____ Judge Advocate

_____ Judge Advocate

(TEMPORARY DUTY) _____ Judge Advocate

16640

1st Ind.

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

1. In the case of Private WILLIAM CARREON (36722728), Battery A, 227th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, 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 16640. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16640).

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

(AS to accused CARREON, sentence as commuted ordered executed. GCMO 542, USFET, 3 Nov 1945).

16640

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

BOARD OF REVIEW NO. 1

CM ETO 16655

U N I T E D S T A T E S	)	NINTH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Kothen, Germany, 3 May
Private PETER P. PAGANO (32687613),	)	1945. Sentence (suspended):
Company A, 15th Engineer Battalion	)	Dishonorable discharge,
	)	total forfeitures and con-
	)	finement at hard labor for
	)	life.

HOLDING by BOARD OF REVIEW NO. 1
BURROW, CARROLL and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Peter P. Pagano, Company "A", 15th Engineer Battalion, did, at Kalterherberg, Germany, on or about 31 December 1944, desert the service of the United States by absenting himself without leave from his organization with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 18 January 1945.

Specification 2: In that * * *, did, at Kalterherberg, Germany, on or about 26 January 1945, desert the service of the United States by absenting himself without leave from his organization with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion until he was apprehended at Liege, Belgium, on or about 2 February 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for four days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the Record of Trial for action pursuant to Article of War 48, with the recommendation that, if the sentence be confirmed, it be commuted to dishonorable discharge, total forfeitures of all pay and allowances due or to become due, and confinement at hard labor for life. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the findings of guilty of Specification 1 of the Charge as involved a finding of guilty of absence without leave, in violation of Article of War 61. He confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, and suspended the sentence as thus confirmed and commuted. The proceedings were published in General Court-Martial Orders No. 383, Headquarters United States Forces, European Theater, 29 August 1945.

3. a. Specification 1:

The evidence supports the findings of guilty, as approved by the confirming authority, of accused's absence without leave from his organization at Kalterherberg, Germany, from 31 December 1944 to 18 January 1945, as alleged (R7,9-10,12,16,18; Pros.Ex.1).

b. Specification 2:

After accused's apprehension on 18 January (R12) and return to his combat engineer company on 20 January (R8-10; Pros.Ex.1), he was placed on duty (R8,13). On 26 January the company located near Kalterherberg, was engaged in the same operations as it had been previously - setting road blocks, laying defensive mines before the infantry, putting in barbed wire, setting trip flares and, most important, clearing snow from the roads to permit the passage of supplies from the rear to the infantry at the front. Preparations were in progress for an attack through Hofen, to commence about 1 February (R7-8,13). The work was hazardous and casualties were suffered in the company (R10). Accused again absented himself without leave on 26 January (R8,10,13; Pros.Ex.1). He testified that the reason for this absence was his desire to protect a girl in Liege, Belgium, whom he had received special permission to marry, from feared consequences, under Belgian

law, of having harbored him during his unauthorized absence which was the subject of Specification 1, supra (R19). He testified further that he realized he was in a combat zone, that he was within 20 miles of the front line, and that the company was clearing the road (R22). He heard occasional artillery fire (R26).

Accused was again apprehended in Liege on or about 2 February (R16), and was returned to duty with the company on or about 15 February (R13). The platoon leader and platoon sergeant testified for the defense that from that time until accused's confinement on 1 May, he worked under combat conditions, sometimes under fire, with the platoon, clearing mines before the tanks, and working on roads without showing cowardice. His performance of duties was satisfactory and he measured up to the high standards of discipline required (R27-30). (The Charge Sheet shows accused in confinement from 6-15 February and then from 1-3 May).

The foregoing evidence leaves no reasonable doubt that accused's unit on 26 January 1945, was engaged in the performance of hazardous duty and important service as an engineer company in support of combat units, that accused was aware of this and that there was therefore substantial evidence from which the court could infer that he left his organization on that day with the intent to avoid such duty and service, as alleged (CM ETO 6637, Pittala; CM ETO 7339, Conklin, and authorities therein cited).

4. The only question arising upon the record is whether the defense of constructive condonation was established by the defense. Upon direct examination, accused testified that following his second apprehension and confinement, he was released on 15 February 1945, and talked with the Staff Judge Advocate of the Ninth Infantry Division (R19-20). The outcome was as follows:

> "A. Colonel Gentry said that I had two choices: Either I returned to the Stockade and awaited trial or go back to my unit on the line on duty.
>
> Q. What did you decide to do? What was your choice?
> A. I returned to my organization for duty on the line" (R20).

He was continuously in combat in the line until his confinement in the division stockade on 1 May (R20).

> "An unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates" (MCM, 1928, par.69b, p.54).

The burden of supporting a special plea, including a plea in bar, by a preponderance of proof rests upon the accused (Ibid, par.64a, p.51). Accused's testimony that after his second absence, he was restored to duty, by someone, and performed combat duty in the line, is corroborated by that of two defense eye-witnesses, as well, inferentially, as by the Charge Sheet. The only evidence, however, leading to prove that such restoration was unconditional and that it was "by an authority competent to order trial" consists of the uncorroborated testimony of accused himself. For the purpose of this holding, the Board of Review will assume, without deciding, that an unconditional restoration to duty without trial by the Staff Judge Advocate of the authority competent to order trial, may successfully be pleaded in bar of trial for the desertion, as constructive condonation by that authority. Such restoration, however, was not established by the defense because the court was not bound to accept as probative thereof, the uncorroborated testimony of accused, but might reject it in whole or in part, as the testimony of a highly interested witness (Wheeler v. United States (C.C.A.5th 1935), 80 F(2nd) 678). While interest no longer excludes a party from the witness stand, it is still a major factor to be weighed by the jury, or court-martial, in determining the witness credibility (Reagan v. United States, 157 U.S. 301, 305-306, 39 L.Ed.709,711 (1895), cited in Wheeler case, supra). In the Wheeler case, a conviction for unlawfully possessing distilled spirits on which internal revenue taxes had not been paid, in violation of statute, was upheld despite uncontroverted testimony by the defendant that the spirits were not intended for sale, but for his own personal use. The court assumed without deciding that such facts if established would constitute a defense but held they were not established, saying:

> "The credibility of appellant's testimony in his own behalf was for the jury to pass on. That testimony may have had infirmities which were apparent to persons in whose presence it was given, but are not disclosed by a written report of it. It was for the jury to determine the effect, if any, upon the credibility of appellant's testimony of the circumstance that it was given in resisting a criminal charge made against himself. A jury is not bound to believe the testimony of an interested witness. Reagan v. United States, 157, U.S. 301, 15 S. Ct.610,39 L.Ed.709; Robertson v. Territory of Arizona (C.C.A.) 188 F.783; State v. Pock 35 S.D. 393,152 N.W.507. The court did not err in refusing an instruction the giving of which would have amounted to a command to the jury to accept as true appellant's testimony in his own behalf.
>
> The judgment is affirmed."
> (80 F (2nd) 679-680)

(See also United States v. Sebo (C.C.A. 7th, 1939), 101 F (2nd) 889,891-892; United States v. Lo Briondo, et al (C.C.A. 2d, 1943) 135 F (2nd) 130,131).

The rule is recognized in military justice in desertion cases:

> "Although accused may testify that he intended to return, such testimony is not compelling as the court may believe or reject the testimony of any witness in whole or in part" (MCM, 1928, par.130a, p.144).

The full purport of the conversation between the Staff Judge Advocate and accused, assuming there was one, and any evidence bearing upon the authority of that officer to act for the division commander in the premises, should have been presented by the defense if it intended to establish constructive condonation. Upon the state of the record, one cannot say that the defense was established or that the court was bound to believe accused's uncorroborated testimony with respect thereto or that it constituted a discharge of the defense's burden of supporting the plea, which the Board will assume to have been entered. Nevertheless, though this record is technically sufficient, accused's testimony, if true, marks this case as one deserving immediate and careful clemency and administrative attention in order that substantial justice may yet be achieved. In other words, the Board of Review does not have legal power to reach a situation of the nature here disclosed, and urges that those possessing such power investigate the facts surrounding accused's subsequent conduct and take such corrective action as may be deemed advisable.

5. The record shows (R2) that the charges were served on accused only two days before the trial. In view of the specific waiver of objection to trial at this time (R6), and in the absence of indication that any of accused's substantial rights were prejudiced, the irregularity may be regarded as harmless (CM ETO 8083, Cubley; CM ETO 14564, Anthony and Arnold).

6. The Charge Sheet shows that accused is 24 years 11 months of age and was inducted 18 December 1942, to serve for the duration of the war plus 6 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 accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted by the confirming authority.

Wm. F. Amos Judge Advocate

(ON LEAVE) Judge Advocate

Gerard Dalton Judge Advocate

(Sentence as commuted ordered executed and suspended. GCMO 383, USFET, 29 Aug 1945).

Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2

28 SEP 1945

CM ETO 16662

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Merseburg, Germany, 21 April 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class JAMES T. AUSTIN (34755579), Company C, 9th Infantry	)	

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

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

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

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

Specification: In that Private First Class James T. Austin, Company C, 9th Infantry, did, at or near Hachelbich, Germany, on or about 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Elsa Schneider.

He pleaded not guilty to the specification but guilty to a specification reading that he "did at or near Hachelbich, Germany, on or about 12 April 1945, wrongfully fraternize with Elsa Schneider, an inhabitant of Germany, in violation of the policies and orders of the Supreme Headquarters, Allied Expeditionary Forces, European Theater of Operations" and not guilty of the Charge but guilty of a violation of the 96th Article of War. Four-fifths of the members of the court present at the time the vote was taken concurring he

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

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

Elsa Schneider, age 35, her 14 year old daughter and 10 year old son, on 12 April 1945, resided in Hachelbich, Germany, with a Mr. and Mrs. Wensel (R8,9). She testified that between 1200 and 1300 hours on that date, accused and another soldier entered the kitchen of their home carrying pistols (R9,10). Accused threatened Mrs. Schneider's daughter with a pistol and asked her how old she was. The girl answered "fourteen" (R9). Accused then came towards Mrs. Schneider, threatened her with a pistol by pointing it at her chest and pointing the weapon towards the ceiling, said something like "go". When she did not follow him, he pushed her to the door and she ran outside into the court yard. Accused followed and placed himself in front of her (R10). Accused's companion soon came out into the courtyard with his pistol in his hand (R10) and accused with his pistol in one hand, grasped her shoulder with the other hand and made her follow him into the house (R11). He pushed her up the stairs and she ascended three steps. At this point, she managed to free herself and went back down the three steps. Accused followed her, pushed her again and, pointing his pistol at her, forced her up to the first landing. She called Mr. Wensel but when he tried to follow them, accused's companion prevented him from doing so (R11,12,23,28). Mr. Wensel, Mrs. Wensel, Mrs. Schneider's daughter and son were then locked in the kitchen by accused's companion (R23,24,29).

Accused again took hold of Mrs. Schneider, and pointing his pistol at her chest, forced her to follow him to the first floor (R14). He opened the door of a bedroom and after they entered, while accused was locking the door, she tried to reach the window, but he pushed her back on to a bed (R14). He prevented her from yelling by pressing his teeth against her lips and placing his pistol "on the children's bed", he took off her "panties", unbuttoned his trousers "and then he came upon me" (R14). He broke the elastic in her panties, tore her garter and stockings and despite her efforts to resist by kicking her feet and attempting to keep her legs crossed, he effected a penetration of her genitals with his

penis (R15,16). The sexual act continued for about ten minutes, and, because he had his chest on her mouth, it was impossible for her to cry out (R17). After accused effected a discharge in her, he got up, buttoned his trousers, took back his pistol and opened the door. He then whistled and receiving no answer called out a name and accused's companion entered the room (R17). After remaining upstairs for sometime with the other soldier, she came downstairs to the kitchen where she observed accused, holding a photograph in his hands, arguing with her daughter (R18). In about 15 minutes, accused and his companion left, without further molesting any of the occupants of the house (R18,24). Before he left, accused locked the door of the house and closed the shutter of one of the windows and, in about five minutes he unlocked the door (R18,19). Accused did not use a rubber prophylactic during the act of intercourse (R50).

Mr. Wensel, aged 68, and Mrs. Schneider's daughter, corroborated her testimony as to what transpired before and after she was taken upstairs by accused (R22-26;26-30).

4. Private Herschel Parker, Company C, 9th Infantry Regiment, testified for the defense substantially as follows:

On 12 April 1945, he accompanied accused to a house where Else Schneider resided (R31). They entered the house with their pistols drawn because "We don't know what is going to jump up" (R31). When they determined nothing was going to happen they put their pistols away and accused went upstairs with Mrs. Schneider (R32). Accused did not force her to go upstairs but indicated "with motions" for her to do so (R32). He did not hear any struggle or outcry from upstairs, and while accused was up there, he (Parker) was "looting" (R32). On cross examination, Parker stated that while accused did not touch Mrs. Schneider, he did have his gun drawn at the time he took her upstairs (R33), and that he heard her call for Mr. Wensel but that he (Parker) prevented Mr. Wensel from leaving the ground floor (R34).

Accused after his rights as a witness were fully explained to him (R37), was sworn and testified substantially as follows:

He is a Private First Class in Company C, 9th Infantry. On 12 April 1945, after coming off guard duty, he went to the house where Else Schneider resided looking for something to drink (R38). The door was open and he entered her house with his P-38 pistol drawn. With his pistol in his hand, he searched the downstairs and the cellar but did not find anything to drink (R39,40). He only went to the ninth grade in school and does not speak German (R40). After coming out of the cellar he told his companion (Parker) to remain downstairs and that he was going to search the upstairs (R40). He motioned for the lady (Mrs. Schneider) to come with him and she went

upstairs in front of him (R40,41). He did not take hold of her or pull her and his pistol was in his holster (R40). They went immediately upstairs and she opened the door of a room on the left. They entered the room and she turned around, faced him and pushed the door shut (R41). In order to close the door she had to reach around him and, not knowing what she was going to do, he drew his pistol (R42). Thinking someone might be there he looked under the bed and then turned around to her (R42). She was not crying nor did she seem to be nervous or upset (R42). She said something in German which he did not understand and then he asked her "Fig, Fig", which he heard other soldiers say was the German word for intercourse (R42). She did not reply but started pulling off her clothes and got in bed. He got in the bed too, and after he "got the rubber on", he started having intercourse with her (R43). The intercourse lasted about ten minutes and when he finished he "pulled the rubber off and threw it in a little pot beside the bed". He then gave her his pocket handkerchief to clean herself, buttoned his pants and left the room (R43,44). As he left his companion entered the room and closed the door (R44). She did not attempt to hinder him during the act of intercourse, she did not make any outcry and she was still lying on the bed when he left the room (R44). He went downstairs into the kitchen, where he picked up a photograph of a German soldier and a little girl was trying to tell him something about it (R44). His companion came downstairs in about ten minutes accompanied by the woman (Mrs. Schneider), who started talking to the other German people present and in a few minutes he left the house (R44,48). He did not pay her anything for the intercourse nor did he use any physical force at any time during the sexual act (R44). On cross examination he stated that when he finished having the intercourse and started to get up, she kissed him on the cheek and he categorically denied pointing a pistol at anyone or hearing Mrs. Schneider call for Mr. Wensel (R46,47).

5. The first element of the crime of rape, namely, carnal knowledge of Mrs. Schneider by the accused at the time and place alleged, is clearly established by the uncontradicted evidence of the prosecution and the admission of the accused. The only issue presented to the court was whether she willingly consented to the act, as contended by accused in his sworn testimony, or whether she was overpowered by accused and her life threatened with a pistol as related by her. She testified with clarity and conviction and her version of what transpired is corroborated by her daughter and Mr. Wensel. This issue, being one of fact, was for the exclusive determination of the court and inasmuch as there is competent, substantial evidence to support its findings, they will not be distrubed on appellate review (CM ETO 10715,Goynes).

6. The charge sheet shows that accused is 25 years, four months of age and was inducted 2 July 1943 at Fort Benning, Georgia. He has no prior service.

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

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

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

28 SEP 1945

CM ETO 16666

U N I T E D S T A T E S	75TH INFANTRY DIVISION
v.	Trial by GCM, convened at Mailly Le Camp, France, 24 August 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private ALBERT SHERMAN (36889831), Company K, 290th Infantry	

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

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

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

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

Specification: In that Private Albert Sherman, Company K, 290th Infantry, did, at or near Devantave, Belgium, on or about 3 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Liege, Belgium, on or about 2 June 1945.

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

Specification: In that * * * did, at or near Liege, Belgium, on or about 2 June 1945, willfully, unlawfully, and without authority possess and use as true and genuine a certain military pass in words and figures, as follows:

(140)

"No. SW ..... PASS
GOOD FOR NOT OVER 48 HOURS.

/s/ Sifiert Robert	Pfc	36688987
Name in full	Rank	A.S.N.
168 QMC		230
Organization		A.P.O. No.
Liege		

is authorized to visit the place recorded above.

1200 2 June 45 to 1200 4 June 45
From-Hour and Date Hour and Date

Location of Lodging Heerlen

TPM FORM NO. 3 "

which said pass was, as he, the said Private Albert Sherman, then well knew, was falsely made and untrue in its entirety.

With respect to Charge I and its Specification, he pleaded not guilty of desertion but guilty of absence without leave in violation of Article of War 61; and he pleaded guilty to Charge II and its Specification. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that on 3 January 1945, accused was a private in Company K, 290th Infantry (R6). On that day, this company was "holding a defensive line just outside the high ground of Soy in Belgium" (R6). It continued fighting in Belgium until the middle of January (R7). An extract copy of the morning report of that organization for 7 January 1945, received in evidence without objection, shows that accused was absent that date and that his absence was accounted for as "missing in action" (R6,7; Pros.Ex.A). From then on he was not seen or heard of by his company until the following June (R7,9,24). However, on 7 January accused did appear at the 16th General Hospital with a "slight wound on his left leg". This was bandaged at the dispensary. He remained in that neighborhood for three days, staying in the tent of one of the men, "and a day or so later he came back and stayed a couple of hours". Accused said nothing to his tent mate at the hospital about looking for his organization, but said that "he was handling supplies for the front line" (R10, 11). He was arrested by the military police in Liege on or about 2 June 1945, in uniform and was carrying a pass. He gave his name as Robert Sifiert. The pass was made out in that name and issued by an organization

to which accused did not belong (R12,14; Pros.Ex.B).

On 16 June 1945, accused voluntarily made a signed, written statement (R15; Pros.Ex.C). He said therein, that about 2 January 1945, he was sent back to an aid station in Belgium to be treated for a shrapnel wound in his left leg. "At this time the wounded were coming back and a big push was starting". From there he went to a field hospital where he remained a week, having his leg bandaged. No one then "checked" him or took his name. Accordingly, he left and went to the 16th General Hospital, and as no one checked him there he "took off" and went to Liege. He made inquiries from time to time as to the position of his company but was unable to get any information. He spent most of his time making trips out of Liege to Verviers, Belgium, selling watches, bought in Liege, at a profit of about 1000 francs per watch. When "picked up" around 3 June, he had in his possession 69,000 Belgian and 2000 French francs most of which came from his profits in selling watches (Pros.Ex.C).

4. Advised of his rights as a witness, accused elected to testify under oath. His testimony need not be repeated here since it was in substance a recapitulation of his pre-trial statement which is summarized above.

5. No lengthy comment on this evidence is required. Accused absented himself from military control for over five months. His initial absence occurred while his company was in combat, opposing the enemy, at a critical point and time in the conflict in Belgium in early January. Even were accused's evacuation to the field hospital authorized, his injury was slight and duty required his prompt return to his organization. It is clear he made no real attempt to find his company. He went to Liege where he enriched himself traveling under an assumed name on a fictitious pass. On this evidence, the court with perfect propriety inferred an intent to desert the service (MCM, 1928, par.130a, p.142; CM 245568, Clancy; CM ETO 8083, Cubley). The possession and use by accused of the false military pass, constituted a violation of Article of War 96, as charged (AW 96; 18 USCA 132; CM ETO 2831, Kaplan; CM ETO 2210, Lavelle).

6. The charge sheet shows that accused is 28 years of age and that he was inducted 12 November 1943, without prior service.

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

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

penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

Branch Office of The Judge Advocate General
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BOARD OF REVIEW No. 2

11 OCT 1945

CM ETO 16668

U N I T E D S T A T E S	CHANOR BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Sergeant WILLIE SUMPTER (34654434), 240th Port Company, 494th Port Battalion	Trial by GCM convened at Le Havre, Seine-Inferieure, France, 11 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Willie Sumpter, 240th Port Company, 494th Port Battalion, did, at Rouen, France, on or about 10 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Ely Doucet, a human being by shooting him with a carbine.

He pleaded not guilty, and two-thirds of the members present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous conviction 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, as such places as

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

3. Evidence for the Prosecution: About 11:45 PM on the night of 10 July 1945, Sergeant Ely Doucet (deceased) and three other enlisted men were in Room 9, or the so-called "Sergeants' Room", located on the ground floor of a billet of the 240th Port Company in Rouen, France. Doucet was upset about something and slammed the door, as he came in. The accused, a member of that organization, then walked into the room. The blade of a knife was visible protruding from the pocket of Doucet and also one from the pocket of the accused. Doucet said, "Sumpter, I have given my knife to the Mess Sergeant and I am here to fight you with my fists", and then advanced upon accused and struck him on the left side of his face with his right fist (R7-8). Sumpter stood motionless for about 35 seconds (R14), then left the room. The two men were platoon sergeants and there had been considerable rivalry between them. Several other enlisted men entered the room. Between 5 and 8 minutes later accused appeared at the door with a .30 calibre carbine in his hands and pointed it at Doucet (R9). He said he was going to kill "that God damn Doucet" (R17). He was ordered to drop the gun. He ignored the order and said, "I'm going to kill all of you mother-fuckers in this room" and pointed the gun at one of the other enlisted men (R9-10). The six enlisted men in the room fled, two going out through the window (R10,17,21). Within 15 seconds a shot was heard. Accused was seen running to the officers' quarters almost immediately thereafter. He was heard to say, "I did it, I finished him" (R10). To a lieutenant in the officers' quarters, he said, "Lieutenant, I just killed Doucet, or at least I tried to" (R25). Doucet was found dead from a bullet wound, lying face down in the hall outside of Room 9 (R20). Under his body was found his open knife with a 3 inch blade (R27). The bullet had entered his back and gone out through his chest (R29).

On 13 July 1945 the accused voluntarily signed a statement containing his version of the occurence. It was admitted in evidence by stipulation (R30-31, Pros. Ex.1). In it he contended that he, Doucet, and soldier Robinson, went to town on the evening of 10 July 1945 and drank cognac. On their way back Doucet and Robinson got into an argument. Doucet removed two knives from his pocket, threw them on the ground, put his right hand in his shirt and forced accused, who thought Doucet was armed, to pick up the knives. Accused went to the mess hall for a sandwich. Doucet advanced on him in a threatening manner and accused ran away from him. Doucet threw two knives on the table and backed out of the mess hall with his hand stuck in the bosom of his shirt. Accused went

to Room 9, where he was billetted, to go to bed. He had no weapon with him. Doucet was there and grabbed him by the shirt with his left hand. He had a knife in his right hand. He said "Give me my knives". Accused told him that the mess sergeant had picked them up. Doucet then struck him on the side of the head with his fist. Accused went out of Room 9 and looked for a carbine to "shoot Doucet if he kept on chasing me". He found a carbine and returned to Room 9. He stood at the door and looked in. Everything was quiet and Doucet "was not chasing me any more". He started to leave the vicinity and got as far as the stairway when Doucet "sneaked out" and passed him as he stood in the darkness of a shadow. When about 15 yards from the stairway Doucet saw accused and said "There he is" and advanced toward accused. Accused loaded the carbine and pointed it at Doucet. Doucet stopped 10 yards away. Accused pointed the carbine at Doucet's legs and pulled the trigger. It did not go off. Doucet "ducked down to get away from being shot by me". Realizing that the "safety" of the gun was "on", accused released it and again pulled the trigger. The gun went off and the bullet hit Doucet as he crouched near the floor. Accused ran to the officers' quarters and told an officer that he shot Doucet and "intended to shoot him in the leg". He contended that he was sober and not drunk at the time.

4. EVIDENCE FOR THE DEFENSE: After Doucet entered Room 9, and before accused arrived, he had a knife and he said that he was going to "get" "that damn Sumpter (accused)". Doucet refused to surrender the knife but closed the knife when accused came in the room and struck accused with his fist. Accused left the room and returned in 3 to 6 minutes with the carbine. Doucet's knife was admitted in evidence (R33-34. Def.Ex.1). Earlier in the evening, Doucet threw two knives across the table in the mess hall and asked accused if he wanted to fight. The accused told him no. Then Doucet left (R36).

The accused, having been fully informed concerning his rights as a witness, elected to re-introduce his voluntary pre-trial statement as an unsworn statement (R39-40; Pros.Ex.1).

5. The accused has been convicted of the murder of Sergeant Ely Doucet. Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death /Underhill, Criminal Evidence (4th Ed., 1935) sec.557, p.1090/

The evidence for the prosecution, which included for

all practical purposes the accused's version of the shooting, clearly established that the accused and the deceased had had an argument of some nature; that the accused followed the deceased to Room 9 and there deceased punched him in the face; and that the accused then procured a carbine and after announcing his intention of killing the deceased fired the carbine so that the bullet struck deceased in the back and caused his death. There was therefore substantial evidence to support the finding of the court that the accused killed the deceased with malice aforethought. The accused contended that he did not intend to kill the deceased but merely tried to wound him in self defense.

> "To excuse a killing on the ground of self-fense upon a sudden affray, the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life * * * or to prevent great bodily harm to himself * * * The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself on the right of self defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; But if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM,1928,par.148a, p.163).

By these standards it is clear that the accused's defense as set forth in his pre-trial and un-sworn statement, even if believed, would not as a matter of law constitute self-defense so as to legally excuse the killing.

The accused's version of the occurence was ref uted by the prosecution's evidence that he expressed his intention of killing the deceased after he returned with the carbine and before he shot him and also by the undisputed fact that the accused shot the deceased in the back. There was therefore substantial evidence that the accused did not kill the deceased in self defense but did so with actual malice aforethought and without lawful excuse. The determination of the issues of fact was in the exclusive province of the court and as its findings are based on substantial evidence of record they will not be disturbed by the Board upon review (CM ETO 4194 Scott; CM ETO 13139 Ridenour).

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It was not contended by the defense but the record suggests the possibility that the crime committed was only voluntary manslaughter. Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation (MCM,1928, par.149, p.165). The accused admitted that he did not act in the heat of sudden passion. Even if he had so claimed, the question of sufficient cooling time elapsing between the provocation (the blow struck by the deceased) and the shooting was one of fact for the court to determine under the circumstances. The killing was therefore without excuse and the conviction is sustained.

6. The charge sheet shows that accused is 37 years and 8 months of age. Without prior service, he was inducted 29 April 1943 at Fort Jackson, South Carolina.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

20 SEP 1945

CM ETO 16688

U N I T E D S T A T E S	)	70TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Weilburg, Germany, 25 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class PAUL L. KRAMER (37570588), Company B, 276th Infantry	)	

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

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

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

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

Specification: In that Private First Class Paul L. Kramer, then assigned to Company "B", 276th Infantry, did, at or near Ruckenhausen, Germany, on or about 15 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Paula Wagner.

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

Specification: In that * * * did, at or near Ruckenhausen, Germany, on or about 16 May 1945, with intent to do him bodily harm, commit an assault upon Adolf Meyer, by shooting him in the shoulder with a dangerous weapon, to wit a rifle.

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

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charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for absences without leave for 18 days and for an undisclosed period not exceeding nine days, and one by summary court for absence without leave for one day, all in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Competent evidence establishes that accused and two other American soldiers, at about 2330 hours 15 May 1945, forced their way at gunpoint into a German home in the community of Ruckerhausen. There was some shooting in the cellar and accused then came upstairs to the second floor. At the point of his rifle, accused forced the prosecutrix, 49 years of age, into a room, locked the door, threw her on the bed, and had sexual intercourse with her. When she tried to keep her legs together accused kicked her and when she screamed he smothered her cries with a pillow and threatened to kill her. All elements of the offense were thus established by substantial evidence. The record is legally sufficient to support the findings of guilty of the Specification and Charge I (CM ETO 12180, Everett and cases therein cited; CM ETO 14564, Anthony and Arnold; CM ETO 14596, Bradford et al).

4. Shortly after midnight, accused and his two companions found their way into the home of Herr Adolf Meyer, a short distance from the house of Fraulein Wagner. They searched the house, took three bicycles, and forced Meyer to go with them (R24,25,35). Accused, who could speak German, threatened to shoot him if he did not accompany them (R25,27). Meyer was led into a field and pushed into a lake or stream (R27). According to his testimony, all three were armed at the time (R27). Private First Class Hubert E. Loppe, an accomplice, was not sure that accused was armed then (R36). At any rate shots were fired by Loppe and the third soldier present, Kenney, and Meyer received a grazing wound in the right shoulder (R29,30,37).

5. Accused, after being warned of his rights, elected to be sworn and testify, but only as to the Specification of Charge II. He admitted being in Meyer's home on the night in question. One of his two companions suggested that "we should shoot this son-of-a-bitch" (R46) and that "we should take the son-of-a-bitch along" (R47). He admitted Meyer was taken into the field. He admitted he went into the field, too, but maintained that he had left his rifle with his bicycle at the side of the road (R45,46). He heard a splash but could not say whether Meyer was pushed into the water or not. Kenney and Loppe fired their weapons (R48,49).

6. Accused was charged with assault with intent to do bodily harm with a dangerous weapon. It is clear that the intentional shooting of a human being with a carbine or rifle is such an assault (CM ETO 1585 Houseworth; CM ETO 3366, Kennedy; CM ETO 3812, Harshner). That this shooting was intentional is clear from accused's admission that Meyer was removed from his house for that purpose. It matters little that accused may or may not have been armed at the time of the assault. He was present at the inception of the plot and remained present until Meyer was shot. He threatened to shoot Meyer if he did not accompany them. As an aider and abettor in the joint criminal enterprise, he was clearly a principal and equally guilty with the man whose bullet actually struck Meyer (CM ETO 5764, Lilly et al and cases therein cited). The record is legally sufficient to support the findings of guilty of the Specification and Charge II.

7. The charge sheet shows that accused is 22 years nine months of age and was inducted 28 June 1943 at Fort Snelling, Minnesota, to serve for the duration of the war plus six months. He had no prior service.

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

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

Wm. T. Burrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

David K. Carroll Judge Advocate

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BOARD OF REVIEW NO. 5

18 OCT 1945

CM ETO 16705

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Augsburg, Germany, 26 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class SIDNEY C. ROBERTS (37090684), Company E, 343rd Engineer General Service Regiment	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Sidney C. Roberts, Company "E", 343rd Engineer General Service Regiment, did, at Gernsheim, Germany, on or about 2300 hours, 10 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Elizabeth Sander.

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

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3. Evidence for the prosecution shows that on 10 April 1945 Elizabeth Sander, 34 years of age, lived in Gernsheim, Germany. About 11 pm that night while she and her seven children, ranging in age from 11 to one-half years, were sleeping in their room, accused forced his way in through the door (R4). He approached her with his rifle pointed at her chest saying "Wo fraulein" (R4,5). She told him there was no fraulein there and asked him to go. Whereupon, he went with his rifle toward the children, who were crying. She stepped in front of the children to protect them. Accused pushed her so she fell on the bed. Then he "tore" her out of bed and pushed her to the floor (R5). Two of the children tried to aid their mother, but accused pushed one aside and pointed his rifle at the other (R5). When one of the boys tried to leave the room accused struck him on the forehead with the barrel of the rifle (R20). While she lay on the floor he tore her drawers apart, opened his trousers and inserted his penis (R6). She slapped him, pushed him aside with her hands, cried for help, begged him to stop; but while on the floor her menstruation started and she became so weak she could not resist further (R5,8,10). During the intercourse the rifle remained at the bed, and she pushed it aside so he could not use it as she feared he would shoot the children and herself (R6,7). Although it was dark, the only light being from matches that were constantly lighted, she did not grab the rifle and run because she felt he might follow her and might kill the children (R7,20). Hans Staab, who occupied a room across the hall with his parents, was awakened around 11:30 pm on the night in question by her screams which lasted about 20 minutes. He heard a man's voice but didnot get up and go to her aid as he was frightened (R11,12,13). Five or six minutes after the intercourse started First Lieutenant William D. Price and four soldiers, having received a report, entered the room and found accused on top of the prosecutrix in the act of intercourse. One of the soldiers pulled him off the woman (R9,15). His pants were down and her dress was well above her stomach. Although no noise could be heard from the outside, on entering the room they found the children crying and the woman "sobbing" (R16,17). The accused, who showed definite signs of being drunk, was taken into custody (R15,17).

4. The accused, after being fully advised of his rights as a witness, elected to remain silent (R19).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). The evidence introduced was clearly sufficient to support the court's finding of guilty. The accused at night forcibly entered the room occupied by the prosecutrix and her seven small children. Here he threatened her and the children with his rifle, threw her on the floor, tore her clothes and had sexual intercourse. She called for help and resisted by slapping and pushing him. She testified to fright and fear that accused would shoot her and the children. Such fear excuses a more vigorous resistance (CM ETO 12873, Spohn and Whelchel; CM ETO 11376, Longie; CM ETO 11608, Hutchinson).

In considering the evidence as to the force and violence visited upon the victim by accused and her submission to the act of intercourse

through fear of death or great bodily harm, the following quotation is particularly applicable in the instant case:

> "The case is of familiar pattern to the Board of Review which has consistently asserted in its consideration of like cases that the court with the witnesses before it was in a better position to judge of their credibility and value of their evidence than the Board of Review on appellate review with only the cold typewritten record before it. Inasmuch as there was substantial evidence to support the findings, the Board of Review will accept them on appellate review * * *" (CM ETO 8837, Wilson).

6. The charge sheet shows that accused is 25 years and 11 months of age and was inducted 16 April 1941 at Fort Snelling, Minnesota. He had no prior service.

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

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

(DISSENTING) Judge Advocate

Judge Advocate

Judge Advocate

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BOARD OF REVIEW NO. 5

18 OCT 1945

CM ETO 16705

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Augsburg, Germany, 26 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private First Class SIDNEY C. ROBERTS (37090684), Company E, 343rd Engineer General Service Regiment	

DISSENTING OPINION
OF
JOHN WARREN HILL, Judge Advocate

I cannot agree with the majority holding in this case that the accused committed rape.

It is the function of the Board of Review to carefully analyze the evidence in those cases where the required elements of the offense are necessarily inferred from all the circumstances rather than proved by direct evidence. This is particularly true in rape cases where because of the very nature of the offense a charge of rape and conviction thereof could otherwise rest upon the caprice, the change of mind and the mere spoken word of the woman. In measuring fear, resistance, force, you deal with intangibles which the prosecutrix herself cannot accurately translate into words. It is well known that many women are the subjects of neuroses and the victims of their own imagination. In the cold light of the next day she will refuse to believe that she consented the night before and soon she will honestly believe that her coy remonstrances were vehement protests and violent resistance.

Fear, panic, remorse, disappointment, have fostered many a false accusation of rape. Common sense calls for a very high degree of proof to sustain this charge. And The Manual for Courts-Martial, 1928, (par.148b,p.165) makes a similar plea which it is the duty of

the court and certainly the Board of Review to heed.

In analysing the prosecutrix's testimony in this case we are unable to find any use of force or threats to overcome resistance or any legal excuse for her failure to resist. If the court properly believed and found that she screamed, that in itself will not ~~turn intercourse into~~ constitute resistance. The law is well settled that the woman must resist to the utmost unless she, from that resistance, will invite death or bodily harm. Screams are not resistance. They may be simulated or may indicate an emotion not genuine to the issue of rape. In cases of rape coming out of enemy territory, the courts have properly assumed, generally, that an armed American soldier inculcates fear in a German woman. Such is not the situation in the present case as I read it.

The prosecutrix in this case made no resistance. The evidence shows that she was not afraid for herself and that she could have escaped.

Asked if she did "anything to resist the advances made by the accused", she replied: "Yes of course I resisted; and when he grabbed me, I slapped him * * * I pushed him aside with my hands"(R5).

Accused was drunk (R7,8). This woman was not afraid of him (she slapped him without retaliation), and she was able to handle him (she pushed him aside). This is not either the resistance or the fear that the law requires in these cases (44 Am. Jur.,secs.6,7, pp.904,905).

Accused did not threaten her with the rifle but put it aside, after which she pushed it away further so he could not use it (R6). She said she could have run away, and gave as her reason for not doing so: "I didn't want to leave my children to him, I felt he would kill them". She could have taken the rifle and run, she said. But he would have followed her. However, she admitted that it was dark and she could have run away - but she didn't want to leave the children. Again asked why she didn't take the rifle and run, which would have made it impossible for accused to shoot the children, she said she was too frightened to touch a rifle. However she had already pushed the rifle away from accused, and when the lieutenant entered the room, she admitted, she picked the rifle up quickly from the floor and gave it to him (R7). The story of prosecutrix is incredible. She screamed "all the time", so that aneighboring house heard her, she claimed (R10). Yet a man in the same house heard her scream only once (R11), and the lieutenant didn't hear her scream at all (R16,17). The room was in utter darkness. Yet she saw the soldier point a rifle at her son through the fortuitous circumstance of a match being lit. They were all lighting matches (R20). He hit the 9 year old boy (R5) on the forehead with the handle of his rifle, but

the blow left no mark (R20).

On her story, this prosecutrix could have run away. She admitted that she could have gotten away. This admitted belief plumbs the shallowness of her claimed fright for herself. This is a case where there was no legal excuse for the prosecutrix's failure to resist. She was dealing with a drunk whom she could have eluded and whom she could have "pushed around" and she knew it. Her failure to resist under these circumstances was fatal to the prosecution's case.

What happened here was that this woman was complaisant because of an ill founded idea -- insufficient to excuse incomplaisancy -- that otherwise some harm might come to the children. Her every word of testimony calls for this conclusion. Not confusing "submission" with "consent", the submission of this prosecutrix was not justified by fear of injury or great bodily harm to herself. Her fear was not for herself but for her children. Such fear is not mentioned in available authorities as the kind which excuses the lack of resistance (52 CJ, secs.26-29,pp.1016-1020,44 Am. Jur.,secs.6,8,pp.904-906).

The fact that the prosecutrix's acquiescence was passive, in the absence of force or of threats against herself which she feared, will not constitute rape (52 CJ, sec.27,p.1018). To excuse the failure of a prosecutrix to resist on any other ground than fear of death or grievous bodily harm for herself would open the door to all sorts of excuses and justifications, making the successful prosecution for rape as simple and easy a matter as the accusation of rape.

Wm Hammett Judge Advocate

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BOARD OF REVIEW NO. 5

7 NOV 1945

CM ETO 16711

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
v.	)	Trial by GCM, convened at Heidelberg, Germany, 27 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private GEORGE L. MOBLEY (34411695), 4067th Quartermaster Service Company.	)	

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

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

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

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

Specification: In that Private George L. Mobley, 4067th Quartermaster Service Company, did, at Heilbronn, Germany, on or about 28 April 1945, forcibly and feloniously, against her will have carnal knowledge of Hedwig Heid.

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

Specification I: In that * * *, did, at Heilbronn, Germany, on or about 28 April 1945, in the nightime, feloniously and burglariously break and enter the dwelling house of Hedwig Heid, with intent to commit a felony, viz: rape.

Specification 2: In that * * *, did, at Heilbronn, Germany, on or about 28 April 1945, with intent to commit murder, commit an assault upon Gottfried Setzer, by shooting him in the head, with a dangerous weapon, to wit: a rifle

Specification 3: In that * * *, did, at Heilbronn, Germany, on or about 28 April 1945, commit the crime of sodomy, by feloniously and against the order of nature having carnal connections per os with Hedwig Heid.

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

3. Evidence for the prosecution shows that on 28 April 1945, accused, a colored soldier, was a member of the 4067th Quartermaster Service Company (R53). About 2130 hours that day the occupants of the ground floor apartment at Uhland Strasse 71, Heilbronn, Germany, were disturbed by a loud knocking on the outer door. The occupants were Gottfried Setzer, 77 years of age, his housekeeper Fraulein Louise Immig, Frau Hedwig Heid, her six and one-half year old child, and her mother Frau Anna Oeffinger, all evacuees. (R6,38,44). Louise started to go to open the door, but there was a crash and when she got to the outer door accused was already inside (R7,45). He pointed his rifle at her and entered the living room where he noticed a door leading to the room occupied by the evacuees. He pounded on the door, and when it was opened, forced Louise and Setzer to enter the room with him (R8,46). He then slung his rifle over his shoulder, pulled out his pistol, pointed it at Louise and moved toward her with caressing gestures, saying "you and I" (R9, 46). At this time he noticed Hedwig Heid, who was holding her sick child, and approaching her, pointed his rifle against her chest, took her arm and tried to get her to go with him (R10). Her mother opened the window and called for help but he pushed her away and closed the window (R11). He then walked about the room pointing his revolver at each individual "as if he wanted to shoot" (R12,13). Suddenly he left the room, and the door was locked by those inside (R13,47). In less than a minute after he left a short "crack" was heard outside the door and a shot was fired. There was a "fire flash" from the door followed by the smell of smoke (R14,15,47). Setzer called "help, I was hit" and fell bleeding and moaning (R15,17,51). The bullet wounded him in the region of the right temple and eye and tore his left eye completely (R52,53). Immediately after the shot was fired accused forced the door open and entered carrying his rifle by his hip parallel to the floor (R16,17,48). When he entered the door opened up wide, and Hedwig saw no one else in the hall (R17). He put the rifle over his shoulder, took his revolver out and grabbed Hedwig by the arm (R18). Louise screamed out of the window for help, and accused went over, slapped her on the face and pushed Setzer on the chest. He pointed his revolver at Frau Oeffinger and forced her to take the child from hedwig (R18,19).

He then grabbed Hedwig by the arm, and, with the pistol in his hand, pulled her out of the door into the street (R19). He forced her to walk with him down several streets until they came to an open space where the buildings had been destroyed by bombs (R20). Here he laid his rifle against a wall, pulled her nightshirt off, and although she tried to pull away, he pushed her against the wall, pulled her knees apart, and had sexual intercourse with her. During the act he held his revolver in his hand (R22, 23). Next he turned her around, pulled up her clothes and pushed his sexual organ into hers from the back (R24). After he had completed this act he pushed her to her knees, opened her mouth with his fingers and pushed his penis into her mouth (R25). Just prior to committing this act he had put away his revolver, reached into his pocket, and upon removing his hand jabbed at her with his closed fist, which she thought held a knife (R26). Accused picked up his rifle, grabbed her by the arm and pulled her behind the house. Here he pushed her to the ground, forced her legs apart and inserted his penis into her vagina (R27,28). After three or four minutes he got up and made her accompany him down several streets to an empty garage where he stood behind her with his revolver and compelled her to enter (R28-31). Inside he lay down on the floor, pulled her on top of him forcing his penis into her sexual organ (R31). She did not voluntarily go with him, always held back and resisted until she could fight no more (R21,22,27). She was "very afraid" and wanted to withdraw and go home (R25,31). He then fell asleep, and she ran out into the street (R32). She met some American soldiers, who were looking for her, and they took her home (R33). She arrived there about 2400 hours in a very excited condition (R49,50). After getting dressed she went to the garage with the soldiers where accused was found still sleeping (R33). She was then taken to an American doctor who examined her and found "some sperm by her genital organs, but no trace of violence" (R33, Prox Ex A).

Accused had been drinking but was not drunk although he was "on the way to be drunk" (R50,55). He was able to walk straight and move about without any assistance (R50).

4. Accused, after having been fully advised of his rights, elected to make an unsworn statement (R56). He stated he was 23 years old and went through the fourth grade. Before coming in the army he worked on the WPA and supported his mother and father, who are too old to work. He has been in the army about three years, half of it overseas sending food to the front. He hates to be in this trouble as he is the only one to help his motherand father (R56,57).

5.a "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM 1928, par. 148b, p.165). The evidence shows that accused armed with rifle and revolver, forced his way at night into the apartment where the victim and four others were present. He threatened all of the occupants with his revolver, seriously injured one, grabbed the prosecutrix by the arm and pulled her from the apartment. He forced her to go with him some distance, and although she resisted, he pulled her nightshirt off, forced her knees apart and had intercourse. He held his pistol in his hands during the act. She was afraid and resisted until she could fight no more. Subsequently he compelled her to submit to intercourse three times that night. This is sufficient

evidence to support the court's finding that accused was guilty of rape as alleged in Charge I and its Specification (CM ETO 3691, Houston); CM ETO 14066, Heishman).

b. Specification I of Charge II alleges facts constituting the crime of Burglary. "Burglary is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein" (MCM 1928, par. 149d, p.168). There is substantial evidence that accused at about 2130 hours forced his way into the apartment occupied by Heid and four other people, and therein threatened them and made advances towards the women. He then left, and when the door was locked, he fired a shot through it, seriously injuring Setzer. Immediately afterwards he forced the door open and re-entered. He compelled one of the women to accompany him outside where he raped her. The intent to commit the felony may be inferred from proof of actual commission of the felony and even where not actually committed it may be inferred from the time and manner of entry and conduct after entry (CM ETO 78, Watts). Although accused did not commit rape in the apartment house, his manner of entry and conduct while in the apartment followed by the actual commission of the crime outside, furnished sufficient evidence for the court to infer that accused at the time of his unlawful entry into the apartment had the intent to commit rape therein. (CM ETO 3754, Gillenwaters).

c. Specification 2 Charge II alleges the crime of assault with intent to commit murder. The sole question for determination is whether accused entertained the specific intent, with malice aforethought, and without justification or excuse to take the life of Setzer (CM ETO 1535, Cooper; CM ETO 2672, Brooks). Accused pointed his pistol at each person in the room as if he wanted to shoot and then left the room. He was immediately locked out. In less than a minute, without legal provocation or excuse, he fired his rifle through the door and then forced his way in. The inference of a specific intent to take the life of one or more of the occupants at the time he fired was justified in view of the nature of the weapon, the manner in which he used it and the direct result of the act (CM ETO 2899, Reeves). There was no evidence introduced to rebut this natural inference from these facts. "Where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group" (MCM, 1928, par. 149l, p.179). The intent to kill Setzer was therefore established. The deliberate act of firing under the circumstances carried its own proof of malice aforethought and had death resulted, it would have been murder (CM ETO 4292, Hendricks; CM ETO 7815, Gutierrez; CM ETO 14047, Lancaster et al). The degree of intoxication of accused shown by the evidence is not sufficient to raise at issue in the case (CM ETO 14047, Lancaster et al).

d. "Sodomy consists * * * in sexual connections, by rectum or by mouth, by a man with a human being" (MCM, 1928, rec. 149k, p.177). The prosecutrix testified that accused opened her mouth with his fingers and pushed his penis into her mouth. This was sufficient evidence to support the court's findings of guilty of Specification 3 of Charge II (CM ETO 2695, White).

6. The charge sheet shows that accused is 26 years three months of age and was inducted 31 August 1942 at Fort Benning, Georgia. 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 is legally sufficient to support the findings of guilty and the sentence.

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

John W. Winnbrill Judge Advocate

Anthony Julian Judge Advocate

John C. Burn Judge Advocate

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

BOARD OF REVIEW NO. 5

CM ETO 16727

U N I T E D S T A T E S	3rd INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 27 May 1945, Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates JOSEPH J. SANTANGELO (35340706), and NICHOLAS W. PARISO (32466140), both of Medical Detachment, 7th Infantry	

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

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

2. Accused were tried in a common trial, to which each consented, upon the following charges and specifications:

SANTANGELO

CHARGE I: Violation of the 58th Article of War

Specification: In that Private Joseph J Santangelo, Medical Detachment, 7th Infantry, did, near Singling, France, on or about 14 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Lyon, France on or about 13 April 1945.

CHARGE II: Violation of the 93rd Article of War
(Nolle Prosequi)

Specification I: (Nolle Prosequi)

Specification II: (Nolle Prosequi)

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PARISO

CHARGE I: Violation of the 58th Article of War

Specification: In that Private Nicholas W. Pariso, Medical Detachment, 7th Infantry, did, at near Singling, France, on or about 14 March 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Lyon, France, on or about 14 April 1945.

CHARGE II: Violation of the 93rd Article of War (Nolle Prosequi)

Specification I: (Nolle Prosequi)

Specification II: (Nolle Prosequi)

At the commencement of the trial, the prosecution nolle prossed Charge II and the specifications thereunder against each accused. Each pleaded not guilty and, all of the members of the court present when the vote was taken concurring, each was found guilty of the Specification of Charge I against him, except the word "apprehended", substituting therefor the words "returned to military control", of the excepted words, not guilty; of the substituted words, guilty, and guilty of Charge I. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the period 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 of each accused, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3 a. Evidence introduced by the prosecution showed that at all times mentioned in the Specification of Charge I relating to him, each accused was a member of the medical detachment, 7th Infantry, and was attached to Company C as an aid man (R12,16,19,20). This company, prior to 14 March 1945, had been out of combat but in training for three or four weeks, and on that date was in an assembly area preparing to start that night on an "approach march for an attack across the German border" (R13-18). Both accused had been present with the company during this training period and were on hand on the day in question (R14, 21).

b. The company marched at about 7:00 pm, 14 March (R13,16,20), subsequently attacked (probably the following night (R20)), met enemy resistance, and crossed the border (R13). The Company was subjected to

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small arms fire, flak, mortars and artillery and suffered casualties (R13,17,20). On this "approach" march, accused Pariso was missing from the platoon to which he was detailed and although search was made for him in the company column, he could not be found (R13,14). Similarly, accused Santangelo "took off" when the company "shoved off" (R17). On the approach march (R20). He, too, was not with the company. Neither accused was authorized to be absent and both were recorded on the company morning report as absent without leave as of that date (R10-12,14,17 Pros. Exs. A,B). Accused returned to military control, Santangelo on 13 and Pariso on 14 April (R23, Pros. Exs. C,D). As aid men, it was the duty of accused to go with their company into combat (R22).

4. Advised of his rights as a witness, each accused elected to make an unsworn statement in writing which was read by defense counsel (R23-27). Pariso, told of 400 days of combat, after first landing in Africa, of combat in Italy from Naples to Cassino, to Florence, and in France from Marseille to Belleville. During this time, he claimed, he only had two rest periods (R24, 25). Santangelo's statement related his combat experiences: from Anzio to Rome, and thence to France with the crossing of the Meurthe and Fecht rivers, during which time he was twice injured, once receiving multiple wounds, and often subject to "close calls". He dressed the wounds of many during this period while under actual fire.

5. On these facts the court was justified in finding accused guilty as charged. The unauthorized absence was proved by direct evidence. And this absence coming as it did just before or just after the company had started a march toward enemy territory, from a point so close to the enemy that within 24 hours thereafter contact was made with it, and just following a period of training for three of four weeks, supported the inference that the absence of each accused was for the purpose of avoiding hazardous duty. These accused were experienced in all the phases of combat and the preliminaries thereto. They knew where they were and what the training signified. Their absence motivated by the alleged and properly inferred intent was desertion (MCM 1928, par.130a, p.142; CM ETO 8083, Cubley; CM ETO 12007, Pierce and authorities therein cited).

6. The charge sheets show that accused Santangelo is 26 years and 11 months of age and was inducted 18 September 1942, at Akron, Ohio, and that Pariso is 24 years and eight months of age and was inducted 2 September 1942 at Newark, New Jersey. Neither accused had prior service.

7. The court was legally constituted and had jurisdiction of 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 sentences.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42: Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

Judge Advocate

Judge Advocate

(TEMPORARY DUTY) Judge Advocate

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 2

17 OCT 1945

CM ETO 16739

U N I T E D S T A T E S	)	84TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Weinheim, Germany, 22 and 31 August 1945.
	)	
Private First Class FRANK E. LEONARD (31468851), Company F, 333rd Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class FRANK E. LEONARD, Company "F" 333d Infantry, did at Krefeld, Germany, on or about 5 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one, Hans-Gunther Wieynk, a human being by shooting him with a pistol.

These proceedings are on rehearing and the record of the former trial on 9 March 1945 is attached to the record of the instant proceedings. Accused pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence 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

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

This case is a companion to CM ETO 10053, Miller, decided 8 August 1945.

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

Accused, a member of the military service, was a jeep driver in Company F, 333rd Infantry (R27, 43,50). On the evening of 5 March 1945, accused and a group of soldiers, including First Sergeant Eldon W. Miller, were seen entering the weapons platoon command post, in Krefeld, Germany, by Sergeant (then Private First Class) John E. Yokum, who was the guard on duty outside that building (R29,30,50). In about five or ten minutes this group, including accused and Sergeant Miller, left the command post, turned to the right and entered the house next door, which was inhabited by civilians (R30,31). It was about 2315 hours at this time and Sergeant (then Private) Wilfred A. Gibson appeared to take up his guard duties on this post (R31, 49,50). Sergeants Yokum and Gibson then entered the civilian's house (R31) and accused and Hans-Gunther-Wieynk a German civilian were seen on a landing on the stairs therein. Sergeant Miller was on one of the last steps coming down to the landing (R32, 50, 51). Sergeant Miller said to accused "Do you want him?" and accused replied in substance, "Sure, give him to me" (R54).

Accused then carried a P.38 pistol (R54, 62). The group of men, including the civilian, came down the stairs and went out of the door (R32, 40) where Sergeant Miller was heard to say to accused "You should do a good job on him" (R33,34). Sergeant Yokum returned to the command post next door, entered the building and in about one minute he heard two shots (R34). Sergeant Gibson also returned at once to his guard position at the command post next door and he was summoned inside by Sergeant Miller who had followed him back from the civilian house. While he was on his way into the command post in response to this summons he heard two shots (R55,61,63,64,67,68).

About 2330 hours in the evening in question Private First Class Raymond B. Franklin was on guard duty outside the command post of the first platoon of Company L, 333rd Infantry, at a point in front of the next building away from the civilian residence heretofore mentioned, and the weapons platoon command post (R12,13; Pros. Ex. A). Private Franklin heard someone coming along the road from his left and he recognized the accused who was accompanied by a German civilian. He halted them and after accused "said something to me" he permitted them to proceed. The accused and the civilian continued down the road and Private Franklin heard a shot. He turned and saw the German civilian lying on the ground at the corner of the street and accused was standing over the fallen civilian. At this moment two more shots were fired and Private Franklin saw the flash from the gun reflected in the back of a command car standing nearby, about four or five feet from the body of the German civilian (R13, 14,20,21). Immediately after these flashes accused "turned profile" and Private Franklin saw he had a foreign make gun in his hand (R15,16).

Private Franklin then walked over to accused and heard him say something about "these damn nazis" (R17). Shortly afterwards the two guards from the weapons platoon arrived at the scene of the shooting (R24, 27), and Sergeant Miller and some others also arrived (R18,22,24).

After Sergeant Yokum heard the shots he walked up the street to the corner where he saw the German civilian, who had left the house with accused, lying on the ground and in his opinion the man was dead (R35, 36, 37). At dawn the next day Sergeant Gibson went down to the corner of the street, where he observed blood on the street and also saw the body of Hans-Gunther-Wieynk lying there. On the following day he again saw this same body at the Battalion Aid Station in the presence of Captain Haylett, the surgeon of the 2nd Battalion (R57,67).

On 7 March 1945, Captain William Henry Haylett the surgeon of the 2nd Battalion, 333rd Infantry performed an autopsy on a corpse and determined death had resulted from three bullet wounds (R8-12). On 8 March 1945 Sergeant Gibson and others examined this corpse in his presence (R11).

Various witnesses stated that at the time of the shooting and also shortly before accused appeared to have been drinking, "he wasn't walking very steady" and his speech was blurred (R25); he was talking loudly and somewhat incoherently and "he seemed quite drunk to me" (R39); his speech was not unintelligible or incoherent, although this witness "believed him to be drunk" (R65)

4. Accused after his rights as a witness were explained to him (R69), elected to remain silent and no evidence was introduced in his behalf.

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

Although no witness actually saw accused fire the fatal shots, competent substantial evidence established beyond any doubt that accused shot and killed Hans-Gunther Wieynk at the time and place alleged. Whether this homicide was perpetrated with malice aforethought and without legal justification was a question for the court to decide and its affirmative answer thereto is amply supported by the proof of the circumstances under which the slaying took place. The remarks made by accused both immediately before and after the shooting are conclusive on this point (CM ETO 15788, Polson). Inasmuch as the question of the effect of intoxication upon accused's deliberative faculties was one of fact for the court and there is substantial evidence to support its conclusion that accused was not so bereft of his faculties as to prohibit the existence of malice aforethought, the same will not be disturbed on review (CM ETO 6229, Creech).

Accused without any apparent cause or reason deliberately killed a German civilian. No possible excuse or justification can be offered for the cold-blooded, brutal killing. Such actions by American soldiers in a conquered land are a betrayal of their country's ideals, besmirch the honor of America and deserve punishment as the law decrees. The crime was murder and the accused was a murderer (CM ETO 9810, Johnson; CM ETO 14380, Hall; CM ETO 16581, Atencio).

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6. The charge sheet shows that accused is 34 years and eight months of age and was inducted 2 June 1944 at Fort Devons, Massachusetts. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, par. 1b (4), 3b).

[signature] Judge Advocate

[signature] Judge Advocate

ON LEAVE Judge Advocate

Branch Office of The Judge Advocate General
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European Theater
APO 887

BOARD OF REVIEW No. 2

2 NOV 1945

CM ETO 16772

U N I T E D S T A T E S	29TH INFANTRY DIVISION
v.	
Private RALPH J. CHUTNICUTT (39698137) Company B, 115th Infantry.	Trial by GCM, convened at APO 29, U.S. Army, 13 and 14 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING BY BOARD OF REVIEW No. 2
HEPBURN, MILLER and COLLINS, Judge Advocates

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

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

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

Specification: In that Private Ralph J. Chutnicutt, Company "B", 115th Infantry, did, at Bremen-Grohn, Germany, on or about 26 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Fraulein Imgard Tietjen, Muhlenstr 12, Bremen-Grohn, Germany, a human being, by shooting her with a rifle.

RESTRICTED

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that * * *, did, at or near Bremen-Grohn, Germany, on or about 28 June 1945, with intent to do him bodily harm, commit an assault upon Herr Max Kuhn, by willfully and feloniously choking the said Herr Max Kuhn around the neck with his hands.

He pleaded not guilty and, two thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specifications 1 and 2 of Charge II and guilty of the Charges and all other specifications. Evidence was introduced of one previous conviction by special court-martial for disorderly conduct in uniform in a public place and absence without leave for two days in violation of Articles of War 96 and 61 respectively. Three fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Federal /United States/ Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

2. The undisputed evidence of the prosecution is summarized as follows:

a. Charge I and its Specification: On 26 June 1945, accused, a member of Company B, 115th Infantry (R55), at about 1630 hours approached Wilma Tinnemeier, an 18 year old German girl, near her home at Muhlenstrasse 14, Bremen-Grohn, Germany and asked for liquor. At that time he was sober (R19). She told him she had no liquor whereupon he told her to obtain some from the neighbors and that he would be back at 1900 (R21). She saw him at 1900, and did not notice anything about him to indicate he was not sober (R20). On both occasions he was carrying a "large" gun. At about 2215 accused came out of the camp (R28), located nearby (R29, Pros. Ex.4) and went to 14 Muhlenstrasse where four women were sitting in the garden. Two of them fled into the house but Frau Tinnemeier and Frau Bothurs remained (R29). He approached "quite reasonably" and tried to converse with them in English and became impatient because they could not understand the English language (R29). He "cocked" his rifle, showed them the safety was off and pointed it at them "as if he wanted to shoot".

They called upon an auxillary policeman, Herr Otto Grasnick, to take him away. Grasnick said he did not have the time because he was required to report to headquarters. The accused pointed his rifle at Herr Grasnick and told him to "come on". The policeman entered the garden and accused demanded his identification papers. After examining them, accused returned the papers, told him "all right, take off", and "opened" the rifle and pointed out to him that there were cartridges in it (R29). At that time accused was, according to Frau Tinnemeier, not drunk "beyond his senses" and was "merely intoxicated" and "could still walk" (R33). According to Herr Grasnick, he was not sober, had been drinking and was "wiggling around" (R51). Two soldiers approached after the policeman left and the women called to them and asked them to take accused away. While the soldiers talked to him, Frau Tinnemeier and the other woman went into 14 Muhlenstrasse, locked the door and went upstairs to watch from a window (R31). Accused forcibly resisted going with the soldiers and after they left, tried to get into the house from the front and side (R31-32). After walking back and forth in front of the house holding his rifle under his arm, he went down Muhlenstrasse to the vicinity of the camp which he tried to enter. About this time Frau Tinnemeier saw her daughter Wilma returning from her grandparents. She opened the front door a few inches, called to her daughter and told her to go in a neighbor's house and not to come home. As the daughter went into a neighbor's house, accused stopped the woman accompanying her. The woman motioned accused away, "made a big detour", went away and entered the camp (R32).

The accused first looked toward Wilma Tinnemeier and later, raised his rifle to his shoulder and pointed its muzzle toward 14 Muhlenstrasse (R46). The occupants at 14 Muhlenstrasse took cover and a shot was heard (R46), which hit the wall of that house next to the door (R32). He then came up the street and, holding his rifle under his arm, faced Sager's house, 14 Muhlenstrasse (R43), and Tietjen's house, 12 Muhlenstrasse (R7) which are adjacent and form a duplex (R46-47). He turned around and with "large" steps went toward the rye field across the street from these houses (R47, Pros. Ex 4). Then, facing the houses, he walked "sidewards" along the edge of the field and knelt down about a meter within the field (R41). He aimed his rifle first at Sager's house. Suddenly he turned the rifle (R47,48) and pointed it toward Tietjen's house (R37,39). Frau Tietjen, having heard a shot, had gone to the front window of their house to see what was happening (R7). She saw accused pointing the rifle at Sager's house and called to her daughter, Imgard Tietjen, the deceased, to come in immediately (R7-8). Imgard joined her mother standing in front of the window. A shot was heard and Imgard Tietjen received a bullet in her right temple (R8). The posterior of her skull and her brains were blown away which caused

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her death immediately (R17). After the shot was fired, accused lay down "flat" and when Imgard Tietjen's father emerged from the house, he ran away through the rye field (R40). This occurred about 2300 but the light was still sufficient to see plainly (R37-38). About 2315 or 2330, he met two American soldiers about 350 yards from 12 Muhlenstrasse, demanded something to drink and attempted to provoke a quarrel with them. He said he was a good wrestler. good boxer, and good shot with a rifle. He told them his name and stated that he was a California Indian. He asked his way to his outfit and when told it was 2300 and that he should return to camp, he said it would be all right as he was one of the MP's (R52-54). He was drunk, talked loud and used vulgar language (R54).

Accused went on guard armed with an M-1 rifle (R57), at about 2400 although he was supposed to go on at 2300. He told the other guard that he had had something to drink and had an argument with six "GI's", and was going to have a fight with them, that they surrounded him; that he wasn't scared of them and he was not afraid of the Germans; that two "GI's" brought him back (R56); that he was not carrying any ammunition with him because he was not scared of the Germans (R56-57). He slapped his ammunition belt to show the guard that he did not have any ammunition (R57). The guard testified that accused seemed to know what he was doing; that he did'nt know whether to call him drunk or not; and that he kept up "that" conversation which he had not done before (R57). In the course of the investigation, two empty .30 caliber cartridges were found, one at each of the places where accused was seen when the shots were fired. (R60,63). A portion of a .30 caliber bullet was found in the room where the victim was shot (R65), and a bullet hole through the front window was discovered (R13, Pros. Ex.3).

b. Charge II, Specification 3. At about 0130 hours, 28 June 1945, accused broke into the home of Max Kuhn at 9 Nordstrasse, Bremen-Grohn, Germany, through the rear door (R68-70). Kuhn's wife and daughter escaped from the house through a window (R70). Accused, who was drunk (R73), asked Kuhn where the white woman was and, when he shrugged his shoulders in reply, accused struck Kuhn on the chin 4 or 5 times and knocked him on his bed. Accused then grasped Kuhn by the neck with his hands and choked him. As a result of the blows Kuhn's jaw was blue and swollen. Marks of the choking were left on his neck (R70). The choking lasted "only a moment, but I could notice that I went out of air." Kuhn did not resist but cried for help. Accused then demanded schnapps and assaulted Kuhn further when he received none. Kuhn finally escaped from the house (R71,73). Military Police arrived at the house at 0430 and found accused lying asleep on one of the beds with his rifle dissembled on the floor (R78). Kuhn was examined by a physician and found to have pressure marks on his neck and other bruises

on his body (R76).

4. a. The accused, after being advised of his rights, elected to remain silent (R102). The defense called five soldiers who testified concerning accused's past behavior when intoxicated. One witness testified that it was impossible to keep liquor away from him; that he had to be put to bed forcibly when intoxicated and that they had to keep the weapons under lock when accused was drunk (R88). Another stated that accused "kept to himself" and did not mingle with others when he was sober (R89-90); that he was always looking for trouble and wanting to fight when he was drunk; that he was constantly seeking whisky and always got drunk when he found it (R90). Others testified that he always carried a gun with him; that one night he was found doing the manual of arms and close order drill by himself (R92). On another occasion, he was "hollering" and "imagining" he was on the front line saying "there are Jerries around here, give me my pistol" and that somebody was attacking him (R93).

b. The report of a Board of Officers who examined accused from 4 August through 6 August to determine his mental status was admitted in evidence (R95, Def. Ex.A). The report showed that accused, at the time of the examination, had no hallucinations, no ideas of persecution or other abnormal ideas and was of normal intelligence. The summary and opinion is as follows verbatim:

"5. Summary - This is the case of a 32-year-old American Indian with a faulty background revealed by the absence of a normal home life and the early addiction to alcohol. He was arrested on two occasions for drunkenness. In the Army his record was marred by two court-martials for being AWOL. He apparently made out well in combat, but following it he became nervous, restless, and began drinking heavily enough so that he developed visual hallucinations.

6. Opinion - It is the opinion of the Board that Pvt Chutnicutt is at the present time sane and responsible. It is further the opinion and belief of the Board that the possibility exists that Pvt Chutnicutt was mentally incompetent at the time of the alleged offense to a degree that would impair both his ability to differentiate between right and wrong and to adhere to the right. The basis for this opinion is the history of long-standing alcoholism, heavy indulgence in the habit recently and the

occurrence of visual hallucinations, both recently and in the past" (Def. Ex.A).

Captain Thomas A. Naclerio, Medical Corps, Neuropsychiatrist, senior member of the Board, was present in the court room while the aforementioned soldiers testified (R87). He was called and testified in response to questions of defense, prosecution and the court that was still of the same opinion as that expressed in the report--that the possibility existed that accused was mentally incompetent at the time the offenses were committed (R95). His opinion was based on history of the patient as obtained largely from him and some from other records. He could not state whether accused was definitely insane or sane (R95). His opinion was also based on the fact that hallucinations occur in alcoholic individuals. The fact that a man had visional hallucinations is necessarily a sign that he is temporarily insane but not necessarily previously insane (R95-96). Based on accused's own story, he is an alcoholic. There is no present sign of frank psychosis or insanity and there was none at the time of the examination (R96). The fact that accused returned to his guard post that night voluntarily and finished his tour of duty did not change his opinion that a possibility existed that he was mentally deranged previously (R96-97,99). The mental incompetency might have been provoked by some immediate experience during the period of which his judgment was impaired. When this experience passed "he himself, cleared up".(R97). Accused appeared to be an individual in which there is much aggressiveness which has been repressed; when intoxicated these strong and normally dominant feelings become manifest. The charge against him indicates an abnormality of mind that night (97). The fact that he met two soldiers with two girls on his way to the guard post and made no statement of previous events was abnormal; the fact that he may not have cared to mention the incident did not make any difference in view of the whole history (R97-98). No one thing indicates that he was mentally deranged on this particular evening but he is of a class of individuals that may have been upset by alcoholic indulgence (R98). Accused's actions in wanting to look at identification papers, examining them, and returning them, indicated that he had some judgment. His action in firing the shot, dropping down, taking cover and then running away indicate that he had some judgment yet it is "instinctional" to run away from danger which he could still do under the influence of alcohol (R99). It was not likely that the man's mental condition would be changed in ten or fifteen minutes (R100).

5. a. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * * * * * Malice Aforethought. Malice does not necessarily mean hatred or personal ill-will toward the person

killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exists at the time the act is committed (Clark)" (MCM,1928, Par.148a, p. 162-163).
Malice may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill, Criminal Evidence, (4th Ed.,1935), sec.557, p. 1090). A reckless disregard for human life may be the legal equivalent of the specific intent to kill and constitute malice (CM ETO 2899, Reeves; CM ETO 4149, Lewis; CM ETO 5764, Lilly et al; CM ETO 15425, Lemons).

The evidence clearly established that accused killed Frau Irmgard Tietjen by shooting her with a rifle at the time and place alleged. In the absence of a condition affecting his mental responsibility for the offense charged, the evidence clearly supported the finding that the killing was with malice aforethought. Such a finding would be consistent with the accused's actions prior to and at the time of the shooting or justified from the act itself (CM ETO 6265, Thurman 1945; CM ETO 15416, Radcliffe 1945).

The only serious issue presented to the trial court for resolution was whether a temporary insanity, produced by intoxication, existed at the time of the commission of the act. On this issue, defense concentrated its effort and the issue of mental responsibility was squarely before the trial court for its determination. It should be noted that the report of the Board of Officers and medical testimony admitted in evidence went no further than to establish the possibility of accused's insanity at the time of the alleged offense to a degree that would impair both his ability to differentiate between right and wrong and to adhere to the right. The abnormal conduct of accused on previous occasions when he was intoxicated was taken into consideration by the medical witness in reaching his conclusion. Such evidence alone, namely, the possibility of mental incompetency, did not necessarily establish a reasonable doubt as to accused's sanity. The record of trial discloses a detailed account of accused's actions from 2215 to 2300, at 2315 and again at 2400. Some of accused's actions during the period preceding the shooting were conceded by the medical witness

to indicate he had some judgment. His actions in first concealing himself after he fired the fatal shot and later in effecting his escape, indicate that he was not devoid of judgment, although in the medical witnesses' opinion, he could have done these things from instinct. The determination of the question of accused's mental responsibility was within the peculiar province of the court and it was its duty to weigh and resolve any and all conflicts in the evidence. From the court's intelligent and impartial examination of the medical witness, it is obvious that it fully appreciated the issue and thoroughly considered it. The trial courts findings are sufficiently supported and will not be disturbed upon appellate review (CM ETO 314, Mason; CM ETO 5747, Harrison, Jr; CM ETO 9877, Balfour; cf: "Mental Accountability under Military Law" by Colonel E.A. Lipscomb, The Judge Advocate Journal, Vol II, No.2, p.14).

b. Specification 3, Charge II alleged an assault with intent to do bodily harm. The evidence is undisputed that accused assaulted Herr Max Kuhn at the time, the place and in the manner alleged. The fact that the victim was unable to breathe and marks of violence were left by accused's attack justify the conclusion that he intended bodily harm as alleged (CM ETO 4606, Geckler).

6. The charge sheet shows that accused is 32 years of age and that he was inducted on 18 April 1943 at Presidio, California. He had no prior service.

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

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

(ON LEAVE) Judge Advocate

Ronald D. Miller Judge Advocate

John J. Collins Jr. Judge Advocate

16772

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

BOARD OF REVIEW NO. 2

19 OCT 1945

CM ETO 16835

UNITED STATES	AIR 9TH/DIVISION (M), FORMERLY 9TH BOMBARDMENT DIVISION
v.	
Major WALTER D. SNYDER, JR. (O-402904), Headquarters, 322nd Bombardment Group (M)	Trial by GCM, convened at Caserne Mortier, Paris, France, 28,29 April 1945. Sentence: Dismissal and total forfeitures.

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

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

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

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

Specification: In that Major Walter D. Snyder, Jr., Hq., 322nd Bombardment Group (M), APO 140, U.S. Army, did, at Beauvais, Oise, France, on or about 0230 hours, 26 March 1945, with intent to do him bodily harm, commit an assault upon 1st Lt. Frank E. Davis, by willfully and feloniously striking the said 1st Lt. Frank E. Davis in the face with his fist.

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

Specification: In that * * *, was, on or about 0230 hours, 26 March 1945, in the inclosure of the home of M. Raymond Tanguy, 87 Rue de Jacobins, Beauvais, Oise, France, drunk and disorderly while in uniform.

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

(182)

Specification: In that * * *, did, at Beauvais, Oise, France, on or about 0130 hours, 26 March 1945, wrongfully and unlawfully enter the premises of M. Raymond Tanguy, 87 Rue de Jacobins, Beauvais, Oise, France, a French civilian, without the consent of the lawful occupants.

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

Specification I: In that * * *, did, at Beauvais, Oise, France, on or about 0130 hours, 26 March 1945, with intent to do him bodily harm, commit an assault upon M. Raymond Tanguy, 87 Rue de Jacobins, Beauvais, Oise, France, a French civilian, by willfully and feloniously striking him with his fist, throwing him to the ground and seizing him by the throat with his hands.

Specification 2: In that * * *, did, at Beauvais, Oise, France, on or about 0130 hours, 26 March 1945, unlawfully enter the dwelling of Mme. Vve Guilbert with intent to commit a criminal offense, to wit: Assault and battery.

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

Specification 1: In that * * *, did, at Beauvais, Oise, France, on or about 0130 hours, 26 March 1945, wrongfully strike Mme. Yvonne Tanguy, 87 Rue de Jacobins, Beauvais, Oise, France, on the left cheek with his hand.

Specification 2: In that * * *, did, at Beauvais, Oise, France, on or about 0130 hours, 26 March 1945, wrongfully strike M. Henri Nauche, on the body with his fist.

He pleaded not guilty, and was found not guilty of Charge II, but guilty of a violation of the 96th Article of War and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to pay to the United States a fine of five thousand dollars ($5,000.00). The reviewing authority, the Commanding General, 9th Air Division, approved only so much of the sentence as provides for dismissal from the service and forfeiture of all pay and allowances due or to become due, stating that the sentence as adjudged by the court is considered highly impracticable and totally inadequate from the standpoint of imposing appropriate punishment on an officer convicted of such serious and reprehensible conduct, and that in imposing such meager punishment the court reflected no credit upon its conception of its responsibility, and forwarded the

record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence as modified and approved, stating that the portion of the sentence adjudged by the court involving the imposition of the fine was wholly inappropriate punishment in this case and results in the regrettably inadequate punishment for this officer guilty of such serious offenses, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

a. Charge II and its Specification; Charge III and its Specification; Specification 1 of Additional Charge I; and Specification 1 of Additional Charge II:

M. Raymond Tanguy resides at 87 Rue de Jacobins, Beauvais, France, and about 0130 to 0200 hours on 26 March 1945 (R7,8,26) his doorbell rang. Inasmuch as his son was attending a dance he opened the street door to his premises. A "very strongly built" moustached American stood at the door and "asked for a girl". M. Tanguy answered, "There is no girl here" (R7,11), and attempted to close the door. The American followed him into the passage beyond the door, jumped on him and began to strike him with his fists (R8,15,18). M. Tanguy was struck on the left upper part of his body and the left eye and was bit on the right hand. A struggle followed, during which time they fell in a gutter that runs through the passage. While he was on the ground, the American had his knees on M. Tanguy's body and caught him by the throat (R8,9,15; Pros.Ex.1). M. Tanguy called for help and his wife, Madame Yvonne Tanguy, responded to his call and attempted to assist him. She pulled the American's hair and attempted to take his hands from her husband's throat. Holding M. Tanguy with one hand he struck Madame Tanguy with the other hand, knocking her to the ground. At this point an unnamed French soldier appeared. He stunned the American by kicking him in the head. M. Tanguy was able to free himself after which he and his wife immediately retired to their house and locked the door (R8,20,21).

As he proceeded to his house M. Tanguy found a watch near the gutter, mid-way in the passage that connects the street with the courtyard where his house is located and at the point where the American first struck him (R8,9,15; Pros.Ex.1). He took the watch in the house and placed it on the kitchen table (R8,22). It was M. Tanguy's opinion the American was "drunk" although he based this opinion solely on the American's conduct, inasmuch as he did not have an opportunity to smell his breath, hear his voice or observe his gait or eyes (R9). A physician who examined M. Tanguy on 26 March 1945 found the following injuries: multiple scratches of the face, ecchymosis of the high right eyebrow, edema of the right side of the face, and "the part near the neck", scratches on the hands, bites on the left hand, ecchymosis at the left armpit and part of the face, edema and superficial wounds on

the knees (R34,35; Pros.Exs.2a,2b). Madame Tanguy was examined by the same doctor on 26 March 1945 and found to have the following injuries: light ecchymosis of the left cheek and severe palpitation of the whole side of the face (R35; Pros.Exs.3a,3b).

b. Specification 2 of Additional Charge I; Specification 2 of Additional Charge II:

On 26 March 1945 Madame Reine-Marie Guilbert and her husband, M. Henri Nauche, were staying with her mother who was seriously ill, at 91 Rue de Jacobins, Beauvais, France (R13,27,30,31; Pros.Ex.1). About 0130 hours on that date they were awakened by shouts of "help, help". They looked out of the window and observed an American soldier whom they both identified as accused, in the street. Accused knocked on their door and Madame Guilbert told him to go to bed. He then asked her "how much money for you?" and when M. Nauche also told him to go to bed, accused replied, "Monsieur, come down. Me kill you". M. Nauche dressed himself and his wife remained at the window. Accused rushed the door of their house three times, breaking it down on the third attempt. M. Nauche hurried downstairs and found accused in the house near his mother-in-law's bed. Accused attempted to strike M. Nauche and grabbed him "by the breast" and they both fell on the mother-in-law's bed. They rolled off the bed and M. Nauche was then under an arm chair. M. Nauche grasped accused by the neck and, at this point, his wife arrived on the scene and struck accused on the head with a broomstick. This stunned accused and he released his grasp on M. Nauche. They both arose and accused was pushed outside, but he managed to drag M. Nauche with him. Accused then kicked M. Nauche on the upper part of his leg and his wife hit accused with a chair. M. Nauche succeeded in reentering the house and accused threw one of the shutters from the broken door at them. Accused departed, and M. Nauche followed him as far as the Professional School, from which building he later saw accused emerge accompanied by other American soldiers. Meanwhile his wife left on her bicycle to seek assistance from the military police (R26,27,31). M. Nauche was examined by a physician later that day who found he had sustained slight wounds on the head, numerous bruises on his forearms, and a large swelling on the interior part of the right leg (R33). The door of the house was completely broken, the glass smashed and the curtain torn out (R31).

c. Charge I and its Specification:

At approximately 0130 hours on 26 March 1945 accused walked into a public dance given by "the French USO or its equivalent" in the Professional School in Beauvais (35,45,55). He approached Lieutenant Frank E. Davis, Assistant Provost Marshal, and told him some Frenchman had stolen his watch (R35). Accused said he could identify the Frenchman involved and with Lieutenant Davis, Captain Albert J. Jackson, Lieutenant Charles J. Carmody, Lieutenant Elliott S. Moorehead, Jr., and Major Clifford C. Wray, left the dance hall. Accused pointed to a civilian, M. Tanguy, as the person who stole his watch, and the group, including some French gendarmes and a French policeman in plain clothes, who spoke English, were directed to the home of M. Nauche

(R36,43,44,45,46,51,55). A key was produced and a door leading into a courtyard was opened. The group proceeded into the courtyard and went over to a kitchen in the far left-hand corner, where Lieutenant Carmody picked up a watch from a table and delivered it to Lieutenant Davis (R36,37,46). This watch was the property of accused (R38), who remained outside the kitchen and said "that he wanted to kill these Frenchmen" (R37). Lieutenant Davis testified accused "had been drinking, but he wasn't drunk". Captain Jackson stated he was under the influence of alcohol but "had full control of his faculties" (R36,44). He was highly excited and "used strong language because his watch had been stolen" (R60). Accused asked Lieutenant Davis to give him his watch but the latter kept it for use as evidence in a court-martial (R48,51,70). Accused did not want to return to the dance (R48) and was determined to take some action against the Frenchman at whom he was quite angry (R51,53). Lieutenant Davis tried to remove accused from the premises to prevent further fighting and Lieutenants Carmody and Moorehead assisted him (R37,53). Lieutenant Davis put a "hammer lock" on accused and got him out to the street. The group returned to the dance (R39,51,52,55). Accused and Lieutenant Davis soon left the dance hall (R37,46,55) and when they were outside, accused struck Lieutenant Davis four or five times about the face and head with his fist, knocking him down (R37). While he was on the ground accused hit him again (R41). As a result of these blows Lieutenant Davis sustained a broken tooth, a broken nose and several minor cuts (R37,43; Pros.Ex.4). Major Wray, a medical officer, testified accused was "moderately intoxicated" and he had lost "His sense of judgement and reasoning" (R56,59). Other officers in the group testified accused was not "drunk" (R36,44,49).

4. Accused after his rights as a witness were explained to him (R60), was sworn and testified substantially as follows:

He is a major assigned to Headquarters, 322nd Bombardment Group, Station A-89. On the evening of 25 March 1945 he attended a dance given by the officers of the 322nd Bombardment Group. When it was over he went with Major Wray to a dance that was held at the Professional School in Beauvais. They arrived there at approximately 0130 hours, 26 March 1945. It was extremely hot and crowded at this affair and he "had had quite a bit to drink" so he left the building to get some air. He turned to the left and walked about forty or fifty yards when someone dumped a large container of water on him. He was highly incensed by the incident and turned and had words with someone in a window on the left hand side of the street. While he was thus arguing, a door four or five feet away, and directly in front of him opened and two men appeared. They entered the argument, which soon progressed into a scuffle, and he was thrown to the ground. He arose and was thrown down again several times. His assailants left. He pursued them for about ten feet and another scuffle ensued in which he was hit over the head with a chair and "pretty well beaten up".

He returned to the Professional School in a highly incensed state as he "had quite a bit to drink" and he knew "my actions were not what they should have been". Several officers attempted to persuade him to remain at the dance but at that time he realized he had lost his watch in the scuffle (R61-62). Accompanied by a number of officers, some French police and M. Nauche, who was outside the Professional School as they left, he returned to the house where the scuffle took place. M. Nauche produced a key and admitted the group into the residence of M. Tanguy, while he remained outside. Lieutenant Camody returned to accused and informed him that he had found his watch and given it to Lieutenant Davis. When Lieutenant Davis appeared, he (accused) asked him for his watch but Davis refused to give it to him. There was some argument but no violence or threats of violence. As they went out the door from the courtyard to the street, Lieutenant Davis took hold of him, "piloted" him through the doorway and, when they reached the street put a "hammer lock" on him. When they reached the Professional School he was released and they went inside. In about twenty minutes Lieutenant Davis asked him to go outside. As they started down the steps Lieutenant Davis attempted to grasp his arm. When they reached the main entrance a scuffle ensued and he struck Lieutenant Davis. Some of the officers appeared and there was no further fighting for a moment, when suddenly he saw Lieutenant Davis lunge toward him and he (accused) struck the Lieutenant again. He made no effort to follow Lieutenant Davis, who staggered backwards and fell. Major Wray then appeared and escorted him to the field (R62,63, 65). He had never seen Madame Tanguy and, if she was struck, it was because she was too close to the scuffle. Neither had he ever seen Madame Guilbert before (R63). He denied attempting to enter any house, attempting to break down a door, asking for a woman or threatening to kill anyone (R65). He drank scotch and cognac at the Officers Club and one glass of wine at the Professional School. After his watch was recovered he was still "highly angry" with the Frenchmen and wanted to "get even" with them.

It was stipulated by the defense counsel, prosecution and accused, that if accused's Deputy Group Commander and his Operations Officer, both Lieutenant Colonels, were present at the trial, they would testify that they observed accused's work for nine months and he is at the present time, and has been, an officer of unquestioned value to the service of the United States and that he has ability and knowledge which will be of continued value to the service (R69; Def. Ex.A).

5. a. The record contains clear and substantial evidence that accused struck Lieutenant Davis four or five times with such violence that he was twice knocked to the ground and sustained a broken tooth and fractured nose as a result thereof. This vicious attack constitutes substantial proof of all the required elements of the offense charged in the Specification of Charge I (MCM, 1928, par.149n, p.180; CM ETO 5584, Yancy; CM ETO 10098, Mooney).

b. In the Specification of Charge II accused is charged with being drunk and disorderly in uniform in the inclosure of the home of M. Tanguy in violation of Article of War 95 and was found guilty of

these acts in violation of Article of War 96. While the evidence as to his state of sobriety was conflicting, the testimony of Major Wray, a medical officer, constitutes substantial evidence to support the court's findings on this issue, and that he was disorderly is clearly established by the testimony of both Monsieur and Madame Tanguy. The court's action in finding accused guilty of violation of Article of War 96 was entirely proper (CM ETO 439, Nicholson, 1 BR (ETO, 397).

c. Concerning the offense alleged in the Specification of Charge III, there is clear and substantial evidence that accused forced his way into the premises of M. Tanguy without the latter's consent. For an officer to force his way into the premises of a civilian citizen of a friendly nation at 0200 hours under the circumstances disclosed by the evidence is clearly conduct of a nature to bring discredit upon the military service in violation of Article of War 96 (MCM, 1928, par.152b, p.188; CM ETO 5362, Cooper, et al).

d. Concerning Specification 1 of Additional Charge I and Specifications 1 and 2 of Additional Charge II, wherein accused is charged with assault upon M. Tanguy with intent to do him bodily harm, and assault and battery upon the persons of Madame Tanguy and M. Nauche, there is substantial evidence to sustain the court's findings of guilty of all these offenses. M. Tanguy was struck with sufficient force to knock him down; accused was choking him so violently it was necessary for the French soldier to kick him in the head before M. Tanguy was released; and a medical examiner found he had sustained substantial injuries as a result of this completely unprovoked attack. Similarly the record contains clear proof that accused struck both Madame Tanguy and M. Nauche entirely without provocation or justification (MCM, 1928, par.149n, p.180; CM ETO 10098, Mooney, supra; CM ETO 5584, Yancy, supra; MCM, 1928, par.152c, p.189; CM ETO 4607, Gardner).

e. "Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein" (MCM, 1928, par.149e, p.169). All the elements of this crime as charged by Specification 2 of Additional Charge I were clearly proved (CM ETO 3707, Manning).

6. The charge sheet shows that accused is 31 years and eleven months of age and that his commissioned service began 11 January 1941. No prior service is shown.

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

(188)

8. Dismissal and total forfeitures are authorized punishments for violation by an officer of the 93rd and the 96th Articles of War (AW 93,96).

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

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

1. In the case of Major WALTER D. SNYDER, JR. (O-402904), Headquarters, 322nd Bombardment Group (M), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16835. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16835).

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

(Sentence ordered executed. GCMO 537, USFET, 3 Nov 1945).

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16435

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

RD OF REVIEW NO. 5

27 OCT 1945

ETO 16851

ITED STATES	)	76TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Crimmitschau,
	)	Germany, 5 June 1945. Sentence:
ivate ROBERT L. MOORE,	)	Dishonorable discharge, total forfeitures
3385559), 444th Quarter-	)	and confinement at hard labor for life.
ster Truck Company	)	United States Penitentiary, Lewisburg,
	)	Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert L. Moore, 444th Quartermaster Truck Company, did, at Bad Kostritz, Kreis Gera, Thuringen, Germany, on or about 19 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one ERIKA NEUMANN, a human being by shooting her with a pistol.

He pleaded not guilty, and, all of the members of the court present

at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court-martial for disrespectful behavior toward a superior officer in violation of Article of War 63. All of the members of the court present when the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 76th Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence proved the following facts:

Accused, a colored soldier, assigned to the 444th Quartermaster Truck Company, arrived with members of his organization in the town of Bad Kostritz, Germany on 19 April 1945 (R20). About 2130 hours on that date Willi Neumannand his wife Erika, age 20, deceased, who resided at Bad Kostritz, were awakened by Stanislaus Budasik, Erika's father, who informed them that there was a soldier kicking at the door. They got up and Neumann, together with Budasik and his wife Ida, looked out the window and saw a colored soldier standing at the door below with a pistol in his hand. He said "Auf Machen" (open up) (R7,13,15,16). Neumannand Budasik accompanied by two evacuees, who lived at the house, went downstairs and opened the door (R7). The soldier entered and immediately went upstairs (R7). He carried a pistol in his right hand with his finger on the trigger and a flash light in his left hand (R7,9). There was a lamp in the hallway, and it was still fairly light outside (R10). The men followed him upstairs and on the landing they stood in front of Erika and Ida who had remained upstairs (R17). Accused pointed at and beat his chest as though he was thirsty or sick, but he was not understood. He looked in two rooms at the top of the stairs and then noticed Erika, who was standing in a corner where it was rather dark (R7). He put his flashlight in his pocket and with his left hand reached in front of Neumann, grabbed her by the coat and tried to drag her into one of the bedrooms. He said "Komme Mit" (come with me) but Erika refused (R7,9,13). Ida grabbed her daughter's arm to "draw her away", whereupon accused grabbed the mother but she freed herself from his grasp. As she did this, accused raised his pistol, aimed at Erika, who was standing about a meter away, and fired two shots in succession (R7,13,15,17). Neumann, who was two or three paces away, tried to jump in between them but the shots were fired before he was able to do so (R10). The first shot went through

Ida's hand and Erika's lower arm and into her chest. The second shot hit Erika in the head (R7,13). She threw her arm toward her lungs, uttered her husband's name and dropped (R7,13). Neumanndetermined she was dead by feeling her pulse (R8). It was stipulated that she died on the night of 19 April 1945 as a result of a gunshot wound of the head (R19). She was buried on 22 April 1945 (R8). Immediately after the shots Budasik jumped from the second story window and returned to the house with an American guard. When they arrived accused had left (R17).

Accused was described as drunk because his breath smelled of alcohol and his eyes were glazed (R9,14,17). However, he stood steady on his feet and did not indicate by any actions that he was drunk (R11,15).

On 23 April accused, after having been advised of his rights, made a sworn statement to 1st Lieutenant David Pate, the investigating officer. This statement was introduced in evidence (R20,21). In it accused stated that he got drunk and went to a house and asked for some wine. When told to get out he reached for a girl and told her to get him some wine. A woman stepped between them and pushed him. Although he did not know it, the safety was off his gun, and it went off shooting the girl. He then went downstairs and had started down the street when a soldier overtook him and brought him back to the house (Pros.Ex.A).

4. Accused, after being advised of his rights, elected to make a sworn statement (R23). About 1630 hours on 19 April he started to drink wine. After he got drunk, he left the area and as he walked down the street he saw a man in a German uniform looking at him out of a window. He knocked at the door of the house and three men came to the door. He asked for some wine. The men went upstairs and he was still standing in the doorway. A woman said "no wine" and then another woman "jumped into" him and the gun went off. As he left the house he fell on the steps. Two soldiers followed him down the street and said "you shot a woman" and he went back (R23,24). He did not think that the shot hit anybody and did not see any one drop after it went off. He did not recall all the things that happened that night clearly (R25). A doctor had warned him not to drink as he could not stand it (R24). The reason he had been drinking on the day in question was that he had received word the day before that his father had died (R27).

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

The evidence shows that the accused when about a meter distant from the deceased, without any justification or provocation, aimed his pistol and fired two shots which caused her death. He was chargeable

with knowledge that such act might cause death or grievous bodily harm and when, as here, death results a finding of murder is justified (CM ETO 8630, Williams; CM ETO 10714, Turner; CM ETO 12331, Johnson). There was evidence that accused had been drinking and that he smelled of alcohol and his eyes were glazed. However, he stood steady on his feet and did not indicate by any actions he was drunk. The question whether accused was too intoxicated to entertain the requisite malice to constitute the homicide murder instead of manslaughter was one of fact for determination by the court (CM ETO 3932 Kluxdal; CM ETO 6265 Thurman et al; CM ETO 16187 Rollins). This homicide was manifestly murder (CM ETO 16005, Jones and Hough; CM ETO 16340, Damaso; CM ETO 16581, Atencio; CM ETO 17074, Maye).

6. The charge sheet shows that accused is 23 years and nine months of age and that he was inducted 24 November 1942 at Baltimore, Maryland, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and 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 as commuted.

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

John Saunders, Judge Advocate

Anthony Julian, Judge Advocate

(TEMPORARY DUTY) Judge Advocate

1st Ind.

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

1. In the case of Private ROBERT L. MOORE, (33385559), 444th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as commuted.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16581. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16851).

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

(Sentence as commuted ordered executed. GCMO 570, USFET, 17 Nov 1945).

345

16851

RESTRICTED

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

BOARD OF REVIEW NO. 2

6 OCT 1945

CM ETO 16869

U N I T E D S T A T E S	)	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private CLINTON J. HENRY (20651119), Company D, 341st Engineer Regiment	)	Trial by GCM, convened at Paris, France, 14 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Clinton J. HENRY, Company D, 341st Engineer Regiment, European Theater of Operations, United States Army, did, at his organization, on or about 29 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 15 January 1945.

Specification 2: In that * * * did, at Paris, Detention Barracks, Seine Section, Com Z, European Theater of Operations, United States Army, on or about 7 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 10 April 1945.

16869

He pleaded not guilty and, all of the members present at the time the vote was taken concurring, was found guilty of the Charge and its specifications. No evidence of any previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that pursuant to Article of War 50 the sentence be commuted. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the reviewing authority commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution:

a. Specification 1 of the Charge: There was admitted in evidence without objection an authenticated extract copy of the morning report of Company D, 341st Engineer Regiment, dated 29 August 1944 which showed the accused on that date as "Dy to AWOL 0600" (R4, Pros. Ex.A). Numerous witnesses testified that they had seen the accused in Paris, France, dressed in civilian clothes in November 1944 (R24) and in January 1945 (R9,16). He represented himself to be a Canadian newspaper man (R10,24). He carried an automatic pistol with him (R10) and engaged in an attempted robbery of a store (R10,17). On 15 January 1945, he was apprehended by the Military Police in his hotel room (R18) dressed in civilian clothes and wearing spectables (R8). On that date accused voluntarily signed a written statement in which he admitted that he absented himself without leave from his organization on 23 August 1944 and came to Paris. In it he also related his activities during his absence including his association with French civilians who engaged in black market and other criminal activities and how he made 97,000 francs. He was picked up by the military police three times, but managed to escape or effect his release. He admitted participating in the attempted robbery. He claimed his uniform was stolen (R27,29; Pros.Ex.B and C).

b. Specification 2 of the Charge: On 7 March 1945 the accused was in confinement. That evening he and two other prisoners were supposed to deliver some clothing to a sergeant. They went downstairs with the clothing and never returned. He was "brought in" around 10 April 1945 (R5) after he was apprehended that same day by the French police in Paris, France, dressed in civilian clothes, wearing long hair and glasses (R6,8).

4. Evidence for the Defense: The accused having been advised concerning his rights as a witness elected to testify in his own behalf. He is 22 years of age and entered the service through the National Guard of Wisconsin in 1939 (R31). He volunteered for overseas combat

service and reached Ireland in March 1942. He married in England in July 1943 and landed in France on D plus 10 or 11 days with the 341st Engineers (R32) and remained with them until after Cherbourg was taken (R33). He did not get along in the outfit and wanted combat action so he left and went to Paris where he attached himself to a reconnaissance unit (R34). He was not allowed to stay with that unit without a formal transfer so he returned to Paris and turned in to the military police but they were too busy to bother with him. He denied that he was arrested by them three times (R35). He bought some civilian clothes only because three soldiers had stolen his uniform (R36). He admitted he told the witnesses who testified against him that he was a Canadian newspaper man (R37) and participated in an attempted robbery when drunk (R36-38). He claimed he intended to return to his organization but could not do so because he could not locate it. He was afraid to turn in again to the military police because of the severe sentences he heard were being given for a few days "AWOL". After he was apprehended by the military police the first time he went to Cherbourg and tried to get to England to see his wife. When he ran out of money he returned to Paris and was apprehended by the French police on 12 April (R38) and turned over to the military authorities. He desires combat (R39). On cross-examination, he admitted that he left the Paris Detention Barracks on 7 March after his arrest on 15 January without permission and that he wore civilian clothes each of the two times he was apprehended (R40). He wore glasses to avoid detection (R41).

5. The evidence shows and the accused admits that he absented himself without leave or authority from the service of the United States on the dates alleged in the specifications and remained absent without leave during the time alleged, namely 29 August 1944 to 15 January 1945; and 7 March to 10 April 1945. It was well within the province of the court to infer as to both occasions from the circumstances so fully related in the summation of facts above that he did not intend to return and that therefore he was guilty of desertion under both specifications (MCM, 1928, par.130a, p.142).

6. The charge sheet shows that the accused is 22 years and eight months of age and that he was "mustered into service with the National Guard on November 1941 (Ser. Records not available, information from accused)".

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

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

in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

RESTRICTED

1st Ind. (201)

War Department, Branch Office of The Judge Advocate General with the European Theater. 6 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CLINTON J. HENRY (20651119), Company D, 341st Engineer Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16869. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16869).

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

(Sentence as commuted ordered executed. GCMO 527, USFET, 1 Nov 1945).

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

BOARD OF REVIEW NO. 2

18 OCT 1945

CM ETO 16873

U N I T E D S T A T E S	)	XVI CORPS
	)	
v.	)	Trial by GCM convened at Beckum,
	)	Germany, 2 June 1945. Sentence
Privates GEORGE F. BROOKS	)	as to each accused: Dishonorable
(33857063), WEBSTER WATKINS	)	discharge, total forfeitures and
(36972866), and Private First	)	confinement at hard labor for
Class FOSTER BONNER (36949648),	)	life. United States Penitentiary,
all of 4450th Quartermaster	)	Lewisburg, Pennsylvania.
Service Company		

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

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

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

BROOKS

CHARGE: Violation of the 92nd Article of War.

Specification: In that George Frederick Brooks, 4450th Quartermaster Service Company, did, at or near Kinderhaus-Münster, Germany, on or about 11 April, 1945, forcibly and feloniously against her will, have carnal knowledge of Maria Espeter.

WATKINS

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Webster Watkins, 4450th Quartermaster Service Company, did, at or near Kinderhaus-Münster, Germany, on or about 11 April, 1945, forcibly and feloniously against her will, have carnal knowledge of Maria Espeter.

Specification 2: In that * * *, did, at or near Kinderhaus-Munster, Germany on or about 11 April, 1945, forcibly and against her will, have carnal knowledge of Hedwig Keldermann.

BONNER

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Foster Bonner, 4450th Quartermaster Service Company, did, at or near Kinderhaus-Munster, Germany on or about 11 April, 1945, forcibly and feloniously against her will, have carnal knowledge of Maria Espeter.

Specification 2: In that * * *, did, at or near Kinderhaus-Munster, Germany, on or about 11 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Hanni Hillmann.

Each accused 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 the specification, or specifications, preferred against him. Evidence was introduced of a previous conviction by special court-martial for absence without leave as to Brooks for five days and as to Watkins for fourteen days, both in violation of Article of War 61. No evidence of any previous conviction as to Bonner was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, Brooks was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. All the members of the court present at the time the vote was taken concurring, Watkins and Bonner were each sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, XVI Corps, approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to Brooks, and forwarded the record of trial for action under Articles of War 48 and 50½. The confirming authority, the Commanding General, European Theater, confirmed the sentences as to Watkins and Bonner, but, owing to special circumstances in the case, commuted the sentences 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 the natural life of each, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the orders directing the execution of the sentences pursuant to Article of War 50½.

3. Evidence for the prosecution: Between 9:45 and 10 pm, 11 April 1945, three colored American soldiers armed with carbines came to the home of a Mrs. Schleickman at Grevenerstrasse 401, Kinderhaus, near Munster, Germany, where there was then living, besides Mrs. Schleickman, three Hollanders, Mrs. Maria Espeter (age 24), her brother, Bernard Keldermann, her sister, Miss Hedwig Keldermann, Miss Hanni Hillman, a

Mrs. Clerfeld and some children (R9-10). Uninvited, the three soldiers, who were later identified (R28) by three of the witnesses as the accused and as members of the 4450th Quartermaster Service Company (R26), entered the house and asked Bernard Keldermann for a pass and then asked him for a "Miss". They then went upstairs, asked the three Hollanders for a pass, searched various rooms and entered the upstairs kitchen where all of the women in the house had assembled in fear. The three Hollanders and Bernard Keldermann had also entered the kitchen. Again accused asked for a pass and also asked for whiskey, which was produced (R12-53). The accused offered the women chocolate and cigarettes and drank the whiskey. About 10:15, through one of the Hollanders who understood English, Watkins, who acted as spokesman for the three accused, told them that they had to have "a woman for the evening". The women all cried "terribly" and got down on their knees and begged for mercy. They said that they were all married. One of the accused extinguished the only light in the room. Mrs. Schleickmann escaped in the darkness. The light was soon restored (R13,33-35). One of the accused then said that if they did not stop crying they (the accused) would shoot them. They held their rifles in their hands. The women stopped crying. Then Watkins grabbed Hanni Hillmann by the arm and pulled her into the adjoining bedroom followed by Bonner (R14,15,36). The latter pointed his rifle at her, placed his dagger at her breast (R36), and threw her on the bed. He then removed her panties and had intercourse with her against her will. She "could not resist any more, for he would have killed me" (R37; Specification 2 of the Charge against Bonner). While this act of savagery occurred and thereafter when one of the soldiers was in the bedroom, the other two soldiers remained in the kitchen and stood before the occupants with their readied weapons (R15). Watkins went into the bedroom and pulled Bonner off of Miss Hillmann and allowed her to return to the kitchen (R37). After Bonner and Miss Hillmann had entered the kitchen, Watkins then grasped Hedwig Keldermann by the arm and pulled her into the bedroom (R16,38), threw her on the bed, held her hands with one of his hands, and with the other pulled her panties off. She resisted but the negro was too strong. He had sexual intercourse with her (R47; Specification 2 of Charge against Watkins). Watkins then again returned to the kitchen and pulled Maria Espeter from behind the table where she was sitting (R48), took her to the door and Bonner followed her into the bedroom. She pleaded with him. Bonner raised his carbine asif to strike her and placed her on the bed (R17). She called in vain for help. Bonner put a knife in his mouth, loosened his pants, laid the knife on her neck, pulled her panties down and inserted his penis in her vagina against her will (R19). She did not resist further because of her fear. (Specification 1 of the Charge against Bonner). Watkins then came into the bedroom. Mrs. Espeter stood up but Watkins pushed her back onto the bed, loosened his pants and, holding her fast, penetrated her sexual organ with his penis against her will (R18,19; Specification 1 of the Charge against Watkins). Watkins allowed her to arise, but before she could get out of the room Brooks came in and pushed her back on the bed. She cried loudly (R20) and struggled with Brooks, but he penetrated her sexual organ with his penis against her will. She could not resist. "I was all broken down with my nerves" (R21; Charge and Specification against Brooks). The three negroes then left about 11:30 to 11:40 pm (R21). Shortly before

12 o'clock the three accused, smelling of liquor, were seen by their Commanding Officer entering their billets at or about the same time. He had completed a bed check, finding them and two other enlisted men missing (R27). The following day the three female victims, at an identification parade, identified Watkins and Brooks (R28). Only two of them identified Bonner (R28). Bonner was described by Mrs. Espeter as the "drunken one" who always wore his helmet down over his face so that only the lower part of his face was visible (R23). Mrs. Espeter contracted a venereal disease as a result of her experiences (R23-24).

4. Evidence for the defense: The First Sergeant of the accused's unit, who helped to make the bed check on the night of April 11th, found that the three accused were absent but he met them as he went downstairs. None were drunk. It was then "around 11:30, something like that" (R58). A private in the same unit sometime about dusk (R62), on the evening of 11 April, swapped cigarettes with Bonner who was dressed in fatigues and said he was going to wash some clothes (R61). Corporal T. H. Shephard was in the mess hall that night when Bonner and Watkins came in about 10 o'clock and talked for about twenty minutes (R69). Sergeant George C. Robb, "clocked" the distance between the company area and the place of the alleged offenses and found that it was 1.7 miles (R76).

Each accused was fully advised as to their rights as a witness. Watkins and Brooks elected to remain silent (R78). Bonner elected to testify in his own behalf (R78). He claimed that after "chow" on the evening of 11 April he was on a detail from 6:30 to 8:30 pm. He then rode his bicycle around the area for a while. He talked to another soldier and swapped cigarettes. He put his O.D. clothes into soak, and then went out and met Brooks and Watkins. The three walked over to a warehouse and there talked to an infantryman doing guard duty. He then went into the mess hall and talked to the cook and several others there and then rejoined Brooks and Watkins and the guard. The three then came into the billet and saw their Commanding Officer who told them to go to bed (R79).

5. Evidence of the extra-judicial identification of the accused by the victims at an identification parade was clearly admissible (CM ETO 3837, Bernard W. Smith; CM ETO 16931, Brinley).

6. The evidence of the defense, having for its purpose the establishment of an alibi for accused created an issue of fact for resolution by the court. It's findings are conclusive because supported by substantial evidence (CM ETO 3200, Price; CM ETO 3837, Smith, supra).

7. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). Substantial evidence showed that the accused did at the time and place alleged in the specifications engage in sexual intercourse with Miss Hedwig Kelderman, Miss Hanni Hillmann and Mrs. Marie Espeter. Therefore, the first element of the crime of rape was established beyond reasonable doubt.

With respect to the rape of Miss Hillmann by Bonner, prosecution's evidence is in conflict. The victim, in the courtroom, identified Brooks as her rapist. Maria Espeter, Hedwig Kelderman and Bernard Kelderman identified Bonner as the negro who followed Watkins and Miss Hillman from the kitchen into the bedroom. The court by its findings accepted the testimony of the witnesses rather than that of the victim, herself. This was the exercise by the court of its proper function as a fact finding agency and, inasmuch as the finding is supported by substantial evidence, it will not be disturbed on appellate review (CM ETO 895, Davis, et al; CM ETO 1554, Pritchard; CM ETO 1631, Pepper). However, even if it be admitted that it was Brooks who raped Miss Hillman, Bonner was manifestly an aider and abettor of the crime and is guilty as a principal (CM ETO 2686, Brinson and Smith; CM ETO 3740, Sanders, et al; CM ETO 4234, Lasker and Harrell; CM ETO 5068, Rape and Holthus; CM ETO 14615, Lewis and Jerro; CM ETO 16617, Haynes and Young).

Regardless of how reluctant consent is given, consent negatives rape. Each victim of the carnal acts under discussion testified that the sexual connection was effected against her will and that she was not able to, or did not resist to a greater degree than that shown by the evidence because of her fear of death or great bodily harm at the hands of the accused. It is well established that if a woman's failure to resist is induced by fear of death or great bodily harm imposed by her assailant, it is not necessary to prove resistance in order to show lack of consent (CM ETO 3740, Sanders, et al; CM ETO 13369, McMillon, et al; CM ETO 10742, Byrd; CM ETO 13897, Cuffee).

With respect to the question whether intercourse was induced by the accused through the creation in the minds of the victims of fear of death or great bodily harm or was obtained through the freely given consent of the victims, the following comment is conclusive:

> "The case is of familiar pattern to the Board of Review which has consistently assented in its consideration of like cases that the court with the witnesses before it was in a better position to judge of their credibility and value of their evidence than the Board of Review on appellate review with only the cold typewritten record before it. Inasmuch as there was substantial evidence to support the findings, the Board of Review will accept them on appellate review * * *" (CM ETO 8837, Wilson).

The evidence outlined above clearly shows all of the essential elements of the crime of rape with reference to each offense charged against the respective accused at the time and place alleged in the specifications. It was shown that each accused by force effected a sexual penetration of each of the females named against her will, and that her ability to resist to a greater extent was destroyed by the

accused's threat of death or great bodily harm with deadly weapons. The convictions are sustained (CM ETO 3740, Sanders, et al; CM ETO 4172, Freeman Davis, et al; CM ETO 4444, Hudson, et al; CM ETO 11621, Trujillo, et al).

8. The charge sheets show that Brooks is 23 years and 11 months of age and was inducted on 19 July 1944 at Fort George G. Meade, Maryland; that Watkins is 24 years of age and was inducted on 26 April 1944 at Fort Sheridan, Illinois; and that Bonner is 24 years and 6 months of age and was inducted 13 July 1944 at Chicago, Illinois. None of the accused had prior service.

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

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

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

(209)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private WEBSTER WATKINS (36972886) and Private First Class FOSTER BONNER (36949648), both of 4450th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16873. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16873).

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

(As to accused Watkins , sentence as commuted ordered executed. GCMO 535, USFET, 3 Nov. 1945).
(As to accused Bonner, sentence as commuted ordered executed. GCMO 544, USFET, 3 Nov 1945).

RESTRICTED

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

BOARD OF REVIEW No. 1

10 OCT 1945

CM ETO 16874	
U N I T E D S T A T E S	8TH INFANTRY DIVISION
v	Trial by GCM, convened at APO 8, U.S. Army, 31 May and 12 June 1945.
Private First Class Heywood W. Miller (34152083), Service Company, 121st 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
BURROW, CARROLL and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War

Specification: In that Private First Class Heywood W. Miller, Service Company, One Hundred and Twenty First Infantry, APO #8, United States Army, did at Schwerin, Germany, on or about 26 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one First Lieutenant Kenneth E. Finsness, a human being by shooting him with a rifle.

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

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The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence and forwarded the record for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in this case commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

At about 2200 hours on 26 May 1945 First Lieutenant Kenneth E. Finsness walked slowly on a sidewalk in Schwerin, Germany. It was twilight and the sky was overcast. While he was opposite a large building occupied by members of Service Company, 121st Infantry, a shot was fired. The officer became rigid for a moment, then fell to the sidewalk (R17,19,46, Pros. Ex. C). Lieutenant Finsness was taken to a hospital, where he was pronounced dead upon arrival. A medical officer at the hospital testified that the cause of death was a bullet wound; that the wound of entrance and the wound of exit were identical in appearance; that the course through the neck was practically straight and indicated that Lieutenant Finsness, if he had been in a standing position, "was shot well down on the left or high up on the right" at an estimated angle of 30 to 35 degrees; that, in the witness's opinion, the bullet causing the wound was a steel jacketed .30 caliber high-velocity bullet (R8,9).

Accused, a member of the Service Company, lived on said date in a five-room apartment on the fourth floor of the building to which reference had been made. The balcony of the apartment was on the front side of the building and faced the street on which Lieutenant Finsness was killed (R30). On the night in question accused had an M-1 rifle in the kitchen, where he usually kept it. The bathroom in the apartment had a broken window after this night, but it was not broken previously (R31). There were no other broken windows in the house (R28). This bathroom was in the rear of the building (R27).

At about 2100 hours on the night in question, Lieutenant Finsness visited the apartment, saw accused on the balcony, and told him he had enough to drink and to go to bed. Accused replied that he knew what he was doing. The officer then went downstairs. After he had left, about 5 or 10 minutes later accused said he did not like his job as mechanic and wanted to "get his truck back"(R30). Accused at this time had been drinking but seemed to be able to "get around" (R31,32).

Sometime between 2130 and 2200 accused talked to Lieutenant Finsness in the company command post on the first floor of the building and asked him whether he wanted to see him, to which the officer replied that he did not. Accused then asked whether it was all right for him to go back to the party and the officer replied with words to this effect; "sure go ahead and do what you want to do". He then turned away, but accused asked him about getting his truck back. Lieutenant Finsness replied, "You can see me in the morning and we will straighten it out then". Accused, replied, "I'll make it Monday morning, tomorrow is Sunday". This ended the conversation, which was conducted in an agreeable tone (R38). Between five and ten minutes later the shot was fired (R42). About one minute after the shot was fired, a crash of glass was heard (R26). Upon hearing the crash, a first sergeant noticed a rifle coming down to the ground at the rear of the building (R39). It was an M-1 (R40). The sergeant then went upstairs to the fifth floor, met accused at the top of the stairs, and asked him where he was at the time the shot was fired (R41). Accused answered that he was in his room. About two or three minutes elapsed between the shot and the time the sergeant saw accused at the top of the stairs (R42).

A soldier reading in his room on the fifth floor testified he heard the shot and the crash of glass. Accused came into the room about two minutes later (R59,60).

The rifle found in the rear of the building had the same number (1253388) as that shown at a showdown inspection the day before to have been charged to accused (R52,55). The rifle was found below the broken window of accused's bathroom (R40, Pros. Ex. E).

Major Anthony L. Terranova, a medical officer, testified that at about 2205 hours he saw accused standing in the hallway of the company command post. Accused asked if he could talk with him for a few minutes. Expecting it to be a sidewalk diagnosis, the officer disregarded him for a second or two. Accused a second time said, "I want to tell you something." The Major then answered, "All right", and took him to a room

where there was a little more quiet. At this time the officer did not know that "anybody was shot by anybody else". Accused said,"Major, I had a couple drinks tonight, I did it, I am sorry I did it". Surprised, the Major said, "Why did you do it?" and accused answered, "I had my ass eaten out pretty bad". The officer then gave him a test for sobriety and concluded that accused had alcohol on his breath that he was well oriented and was quite rational, that he was "slighly inebriated", and that he certainly "knew what he was doing (R56-58).

4. Accused, after his rights as a witness were explained to him, elected to make an unsworn statement which was substantially as follows:

At about 1900 hours he went to a party where he drank champagne. He remembered talking to the first sergeant, and the next thing he remembered was meeting him and an officer on the fifth floor on the stairs, but he did not remember hearing a shot. He remembered telling Major Terranova, "I had a couple of drinks, I didit, I'm sorry I did it". He did not know what he meant by saying he was sorry, and he did not remember taking his rifle from the kitchen (R70).

Witnesses for the defense testified that accused had taken drinks at the party that evening (R63); that on about three previous occasions accused the next morning after a drinking bout could not remember anything that happened the night before (R64); that before accused left the United States he fired twice before qualifyingas a sharpshooter in November of 1943 (R61-62).

5. The principal issue in this case involves the identification of the person who fired the fatal shot. The evidence, however, permits only the hypothesis that accused was the killer. An opposite hypothesis would be opposed to all reasonable inferences and deductions (CM ETO 2686, Brinson and Smith; CM ETO 3200, Price. The shot consistent with the evidence, could readily have been fired from accused's apartment. He admitted to the first se rgeant that he was in his room when the shot was fired. His rifle was missing after the firing and was found behind the building, below his bathroom window, the rifle apparently having been thrown through his window, about a minute after the shot was fired. An hour before the shooting the deceased informed him he had enough to drink and directed him to go to bed. Accused replied that he knew what he was doing. He had indicated dissatifaction with his assignment. Whatever doubt there might otherwise be as to whether accused killed the

deceased, the court could properly consider that doubt resolved by his statements to Major Terranova "that I had a couple drinks tonight, I didit, I am sorry I did it" and that he did it because "I had my ass eaten out pretty bad", if these statements were admissible in evidence.

The question arises as to whether these statements were admissible under the circumstances proven. The statements made to Major Terranova constitute a confession and hence it must appear that these statements were voluntarily made. The Manual states:

> "A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggest further inquiry as to the circumstances, a confession, may be regarded as having been voluntarily made" (MCM, 1928, par. 114b, p. 116).

It has been often held by the Board of Review that if it is shown that the confession was the voluntary act of an accused, the test of its admissibility is met, notwithstanding the factthat Article of War 24 was not read or explained to accused(CM ETO 397, Shaffer; CM ETO 1057, Redmond; CM ETO 1663, Ison CM ETO2342, Welbes).

In the present case the evidence is convincing and uncontradicted that the statements of accused were voluntarily made to the medical officer. Not only is there no suggestion of involuntariness of any kind, but the statements appear to have been made virtually at the insistence of accused to this officer, who testified that, at that time, he was not even aware that "anybody was shot by anybody else". Accused's statements being shown to have been voluntarily made, they were properly admitted in evidence.

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

death (1 Wharton's Criminal Law (12th Ed., 1932) sec 426, pp. 654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec 44, p. 905; sec 79b pp. 943, 944).

In the opinion of the Board of Review, every element of the crime, of murder was proven by competent, substantial evidence (CF: CM ETO 11231, Mitchell; CM ETO 12320, Norris CM ETO 11231 Graham).

7. At the trial a German balistics expert testified that a certain cartridge case had been fired from accused rifle(R14), but there was no competent proof that this particular cartridge was the one which was found near the scene of the shooting. This testimony should, therefore, have been stricken, though no objection was made by the defense. In the opinion of the Board of Review, however, in view of the other compelling evidence the admission of this testimony was not prejudicial to the substantial rights of accused (AW 37).

8. The charge sheet shows that accused is 26 years of age and was inducted 6 October 1941 at Camp Livingston, Louisiana, his term of service being governed by the Service Extension Act of 1941. He had no prior service.

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

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

Judge Advocate

(ON LEAVE) Judge Advocate

Judge Advocate

RESTRICTED

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 1945. TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Private First Class HEYWOOD W. MILLER (34152083), Service Company, 121st 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 16874. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16874).

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

22 OCT 1945

(Sentence as commuted ordered executed. GCMO 541, USFET, 3 Nov 1945).

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

BOARD OF REVIEW NO. 2

18 OCT 1945

CM ETO 16880

U N I T E D S T A T E S	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Munich, Germany, 11 June 1945.
Private FRANK FERRARA	)	Sentence: Dishonorable discharge,
(32863204), Company C,	)	total forfeitures, confinement at
179th Infantry	)	hard labor for life. United
	)	States Penitentiary, Lewisburg,
	)	Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Frank Ferrara, Company C, 179th Infantry, did, at or near Anzio, Italy, on or about 2 June 1944, desert the service of the United States, and did remain absent in desertion until on or about 2 September 1944.

Specification 2: In that * * *, did, at or near Marseilles, France, on or about 10 September 1944, desert the service of the United States and did remain absent in desertion until on or about 2 May 1945.

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

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concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 45th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

There was introduced in evidence without objection: (1) An extract copy of the morning report of Company C, 179th Infantry (R4), which showed the accused on 10 June 1944 as "dy to AWOL Jun 2/44" and on 2 September 1944 from "AWOL to apprehended and conf. PBS stockade" (Pros.Ex.A); and (2) an extract copy of the morning report of Disciplinary Training Stockade, PBS South, APO 782, U. S. Army showing receipt of accused as a prisoner on 2 September 1944 and his release on 10 September 1944 (R4; Pros.Ex.B)

By testimony it was shown that accused was a member of Company C, 179th Infantry during May 1944 (R7), and at a time during that month, not definitely fixed in the record, he went back to the Provisional Training Company (R8). On 30 May 1944 accused and another soldier, also with the Provisional Training Company, were to return to "C" Company. They both got on the trucks to return and were carried to a point near "the howitzers" where they got off the trucks to wait until dark. Accused told his companion that he was not going back and disappeared (R5-6). On 1 June 1944 accused's name was on a list of reinforcements expected to join Company "C", 179th Infantry then located at the Anzio beachhead. He did not appear with the others (R6-7). Around the early part of September 1944 (R9) an investigating officer of the 179th Infantry interviewed the accused who voluntarily admitted that he absented himself without leave about 2 June 1944 from the Provisional Training Company, and, after making several unsuccessful attempts to join his unit, he went to Bagnoli, Italy, and remained there until apprehended on 2 September 1944 by Military Police (R10). On 22 May 1945, accused was interviewed by another investigating officer and voluntarily stated that he absented himself without leave enroute to join his unit from the "PT" Company about 30 May 1944 because he had been "up in the line for about three months and had gotten pretty shaky and reached the point where he couldn't take it any more". He subsequently made some unsuccessful attempts to join his outfit (R12). He went to Naples where he stayed until apprehended in September (R12-13). Again while enroute from Marseilles, France, to join his company he arrived at Belfort where, because of combat firing in that vicinity, he got nervous and took off and remained away for many months in

Marseilles until he was again apprehended (R13). Private First Class FRANCIS J. PAYTON, a member of the same unit as accused, testified that he saw the accused in Marseilles, France, in November or December at the Red Cross. At that time the company was in Alsace (R8). Private First Class Payton joined the company in the latter part of December and did not again see the accused until about 4 May 1945 (R9).

4. The accused having been advised concerning his rights as a witness elected to remain silent and offered no evidence (R13-14).

5. The evidence for the prosecution including the voluntary admission of the accused clearly shows that the accused absented himself without leave while enroute to join his organization near Anzio, Italy, on or about 2 June 1944 and remained absent without leave until apprehended on or about 2 September 1944. The same evidence shows that he again absented himself without leave about 10 September 1944 near Marseilles, France, and remained away until apprehended about 2 May 1945. The intent not to return on both occasions could properly and legally be inferred from the reason given by the accused for his conduct, namely, to avoid hazardous duty, the length of time during which he remained away, and the fact that he was apprehended on both occasions. (See CM ETO 5196, Ford, as to proof of both "regular" and "short" desertions under form of instant specification; CM ETO 1629, O'Donnell, CM ETO 12045, Friedman, CM ETO 15195, Evely, as to absence without leave with intent not to return to military service, and CM ETO 5396, Nursement, CM ETO 6637, Pittala; CM ETO 9878, Scheier, as to absence without leave to avoid hazardous duty).

6. The charge sheet shows that the accused is 23 years of age. Without prior service he was inducted at New York City, 13 March 1943.

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

8. The penalty for desertion 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 by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

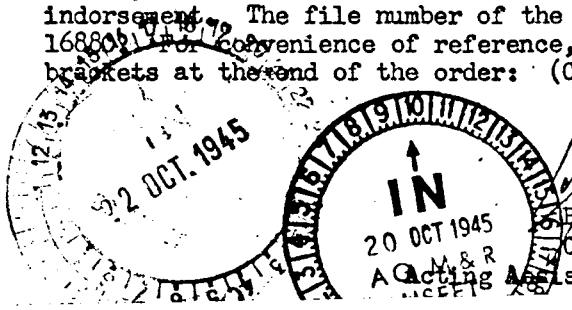
(ON LEAVE) Judge Advocate

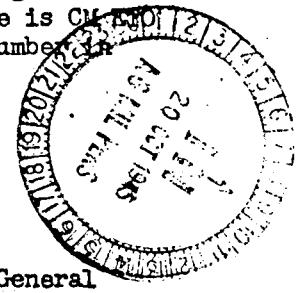
(222) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private FRANK FERRARA (32863204), Company C, 179th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16880. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16880).





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

(Sentence as commuted ordered executed. GCMO 538, USFET, 3 Nov 1945).

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

BOARD OF REVIEW NO. 1 — 29 Sep 1945

CM ETO 16886

UNITED STATES	9TH AIR DIVISION
v.	Trial by GCM, convened at Namur, Belgium, 16 June 1945. Sentence: To be shot to death with musketry.
Private EDWARD H. ROBINSON (34228693), Company B, 461st Signal Heavy Construction Battalion	

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

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

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

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

Specification: In that Private Edward H. Robinson, Company B, 461st Signal Heavy Construction Battalion, did, at Namur, Belgium, on or about 13 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technical Sergeant Walter B. Turner, Company B, 461st Signal Heavy Construction Battalion, a human being by shooting him with a carbine.

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

Specification: In that * * * did, at Namur, Belgium, on or about 13 May 1945, with intent to commit a felony, viz, murder, commit an assault upon Technician Fourth Grade William Crawford, Company

B, 461st Signal Heavy Construction Battalion, by willfully and feloniously shooting the said Technician Fourth Grade William Crawford in the arms and legs with a carbine.

He pleaded to the Specification of Charge I and Charge I not guilty of murder but guilty of manslaughter and not guilty to Charge II and its Specification. All of the members of the court present at the time the vote was taken concurring, he was found guilty of both charges and specifications. Evidence was introduced of three previous convictions by summary court, one for failure to report to the appointed place for guard mount and drunkenness in camp in violation of Articles of War 61 and 96, one for absence without leave for part of a day in violation of Article of War 61, and one for absence without leave for part of a day and breaking restriction in violation of Articles of War 61 and 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Air Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The vital question for consideration is whether the court which tried this case was legally constituted, and the answer to this question depends upon the determination whether Captain Randolph S. Wright, Quartermaster Corps, and First Lieutenant John A. Pullins, Air Corps, who sat as members of the court, were legally detailed thereon at the time of the trial.

4. The charges in this case were by 1st Indorsement, Headquarters 9th Air Division, 30 May 1945, referred for trial to Captain John A. Fulton, Air Corps, Trial Judge Advocate, court-martial appointed by paragraph 1, Special Orders No. 3, Headquarters 9th Air Division, 12 May 1945.

A general court-martial was appointed by paragraph 1, Special Orders No. 27, Headquarters 9th Air Division, 5 June 1945, which referred to the court appointed thereby all charges upon which there had been no arraignment theretofore referred for trial to the trial judge advocate of the court appointed by the mentioned Special Orders of 12 May 1945. Captain Wright and Lieutenant Pullins were not named as members of the court by these Special Orders of 5 June.

By paragraph 1, Special Orders No. 34, Headquarters 9th Air Division, 12 June 1945, Captain Wright and Lieutenant Pullins were:

"detailed as members of the General Court-Martial appointed by par. 1, SO 3, this Headquarters, 12 May 1945, for the trial of Pvt Edward H. Robinson * * * only".

Accused was arraigned 16 June before the court appointed by the above named Special Orders of 5 June, with Captain Wright and Lieutenant Pullins sitting as members thereof and participating in the trial.

5. By a long and unbroken line of decisions it has consistently been held as stated in CM 238607, Mashburn, 24 B.R. 307 (1943):

> "Where an officer who was not detailed thereon sat as a member of the court, the proceedings were thereby invalidated".

(CM 218157, Beadle, 11 B.R. 381 (1941); CM 218158, Steward, 11 B.R. 385 (1941); CM 218159, Thornal, 11 B.R. 389 (1941); CM 106409, Haust (1917); CM 129173 (1918); CM 132574 (1919); CM 131672, Carradi (1919); CM 152563, Stone (1922), Dig.Op. JAG, 1912-40, sec. 365(1), pp.169,170). The reason is that jurisdiction depends wholly upon appointment of courts in strict compliance with the 8th Article of War. The court has such powers and only those, as are granted by law, and if the court which tries an accused is not constituted according to the law which authorizes its creation, it is without jurisdiction and not a legal court and its actions are void. This is one of the reasons that the proceedings of such a court are the fit subject for attack by habeas corpus writs in the civil courts (Carter v. Roberts, 177 U.S. 496, 44 L.Ed. 861 (1900)). While not determinative, it behooves us to act with extreme caution in a death case, for execution of the sentence will forever put the accused beyond the reach of writs of the civil courts and erase the final opportunity to correct error on our part.

In the Beadle case, supra, the Board of Review had before it a case with questions closely parallel to those we now consider. The following excerpts are illustrative:

> "3. The only question requiring consideration is whether the court which tried this case was legally constituted, and involves the single question whether Captain J. R. Hunnicutt, M.A.C., who sat as a member of the court, was legally detailed thereon at the time of the trial.
>
> 4. The charges in this case were, by 1st Indorsement, Headquarters 1st Cavalry Division, August 4, 1941, referred for trial to First Lieutenant F. R. King, 8th Cavalry, Trial Judge Advocate, general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, Fort Bliss, Texas, August 2, 1941.
>
> By letter dated August 16, 1941, the charges referred to Lieutenant King for trial by the general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, were transferred to Lieutenant King as trial judge advocate of the general court-martial appointed by

paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941.

Paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941, appointing the court, did not detail Captain Hunnicutt as a member thereof. The court appointed by that order met at Fort Bliss, Texas, August 26, 1941, at 1:35 p.m., and proceeded to the trial of Private Jack J. Beadle (18018701), Troop G, 8th Cavalry (R.2). The record of trial shows (R.2) as present "Captain J. R. Hunnicutt, Med.Adm. Corps". No member of the court was challenged or excused (R.3). The court adjourned at 2:30 p.m., on the same day (R. 9).

Paragraph 1, Special Orders No. 192, Headquarters 1st Cavalry Division, Camp at Reeves, Louisiana, dated August 19, 1941, reads as follows:

'1. Captain J. R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Martial appointed to meet at Fort Bliss, Texas, by paragraph 1, Special Orders No. 185, this headquarters, dated August 2, 1941, vice, Captain WARD A. TREVERTON, O-280655, Ordnance Department, Post Headquarters, hereby relieved.'

Paragraph 1, Special Orders No. 204, Headquarters 1st Cavalry Division, Camp at Flora, Louisiana, September 3, 1941, reads as follows:

'1. Par. 1, SO 192, Hq 1st Cav Div, 19 Aug 1941, is amended to read as follows:
'"Captain J. R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Marshal appointed to meet at Fort Bliss, Texas, by paragraph 2, Special Orders No. 189, this headquarters, dated 13 August 1941, vice Captain WARD A. TREVERTON, O-280655, Ord Dept, Post Headquarters, hereby relieved."'

5. Paragraph 1, Special Orders No. 204, dated September 3, 1941, amending paragraph 1, Special Orders No. 192, dated August 19, 1941, effectively detailed Captain Hunnicutt as a member of the court appointed by paragraph 2, Special Orders No. 189, dated August 13, 1941, as of the date of that order, September 3, 1941. That paragraph however, had no legal effect upon the status of Captain Hunnicutt upon the date of trial of this case, August 26, 1941. It failed entirely to give

him the status nunc pro tunc of a detailed member of the court appointed by paragraph 2, Special Orders No. 189, dated August 13, 1941, and authorized to sit as a member of that court in the trial of this case on August 26, 1941.

* * *

7. In the opinion of the Board of Review, Captain Hunnicutt, who participated in the proceedings, was not on the date of the trial of this accused, August 26, 1941, a legally detailed member of the court which tried this case.

8. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings and sentence."

If in the case before us, it can be argued that the appointing authority intended to detail these two officers to the court appointed by the Special Orders of 5 June because the accused was named, it can be argued with equal facility that the same intent existed in the Beadle case for the distant place of actual meeting was named and the officer relieved was a member of the second court. The case is therefore controlling. Furthermore, the appointing authority may as well be deemed by his action to have intended to withdraw Robinson's case from the second court and refer it again to the first. Laxity in construction with regard to jurisdictional questions as to the possible intent of the appointing authority is not appropriate; the traditional rule of the common law is that jurisdictional requirements will be strictly construed and that power of a court to function and thereby take the life or freedom of a man must be shown plainly to have been gained by clear compliance with the parent law. The very inception of judicial power ought not to be clouded by doubt.

6. Nor will the action of the reviewing authority be such a ratification as would breathe life into the void proceedings. Since a nunc pro tunc order could not achieve that result, his approving action could not do so (CM 218157, Beadle, supra; CM 238607, Mashburn, supra; CM 8962 (1900), Dig. Op. JAG, 1912, p.277).

7. The charge sheet shows that accused is 29 years eight months of age and was inducted 11 August 1942 at Fort Benning, Georgia, to serve for the duration of the war plus six months. He had no prior service.

8. The court was not legally constituted and therefore had no jurisdiction of the person and offense. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of the court and the sentence.

WM. F. BURROW Judge Advocate

EDWARD L. STEVENS, JR. Judge Advocate

DONALD K. CARROLL Judge Advocate

1st Ind

War Department, Branch Office of The Judge Advocate General with the European Theater. 29 Sep 1945
TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private Edward H. Robinson (34228693), Company B, 461st Signal Heavy Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. It is recommended that steps be directed and taken to bring accused to trial anew, before a legally constituted court. Since the attempted trial was void, the accused may again be tried the same as if these proceedings had not been held. (Par. 149(3)(b), MCM 1921; CM No. 106409, Manst, December 3, 1917; CM No. 134857, Peacock, December 13, 1915; CM No. 152563, Stone).

3. 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 16886. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16886).

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

1 Incl
Record of trial.

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

BOARD OF REVIEW NO. 2

9 OCT 1945

CM ETO 16887

U N I T E D S T A T E S	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Kaufbeuren, Germany, 31 May 1945. Sentence: Dismissal, total forfeitures, confinement at hard labor for 10 years. The United States Penitentiary, Lewisburg, Pennsylvania.
Second Lieutenant WILLIAM C. CHADDOCK (01317603), Company F, 141st Infantry	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that 2nd Lieutenant William C. Chaddock, Company F, 141st Infantry, did in the vicinity of Kitzbuhel, Austria, on or about 12 May 1945, with intent to commit a felony, viz: murder, commit an assault upon 1st Lieutenant Ralph S. Healy Jr. by willfully and feloniously shooting him with a pistol.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for 10 years. The reviewing authority, the Commanding General, 36 Infantry Division, approved the sentence, designated the

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Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 48.

The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution: The accused, a platoon leader of Company F, 141st Infantry, was on 8 May 1945 stationed in Kitsbuhel, Austria (R7). There he became acquainted and enamored with (R26) a certain female, one Aly Isbary who occupied a room in a German Hospital across the street from his own quarters (R8,35). He called upon her during the evening of 10 May 1945 and brought with him Lieutenant Ralph S. Healy, Jr. who remained only 10 minutes. Accused remained all night (R36). On the evening of 11 May 1945, the two officers and two other officers attended an informal party with some women starting about 8:30 pm (R8,22). Lieutenant Healy left the party about 10:30 pm. The others left between 1:30 and 2:00 am (R9,17,18). At that time the accused, who was "somewhat excited and sober", said, "I'll bet you Lieutenant Healy is with my woman and if he is, I'll kill him". Several minutes later he said that "if he tries to get my woman, it will be over my dead body" (R9). Accused walked a part of the way back to the Command Post with the other officers and left them (R9).

Lieutenant Healy had the reputation of being a "ladies' man" (R14); accused was a "hot head" and given to making rash statements which he never carried out (R12).

Mrs. Isbary had expected a visit to her room by the accused during the night of 11 May. Instead Lieutenant Healy came into her room, locked the door and remained there about 3 hours. He had intercourse with her and was later sitting on her bed fully clothed except for his outside shirt when accused knocked on the door. After several knocks he burst into the room, switched on the lights, shot Lieutenant Healy in the face with a pistol, and left (R33). At 0214 hours 12 May 1945, accused appeared at the company command post to call the aid station and told those present, "I told you I'd do it * * * I just shot Healy" (R10). He was then sober (R15). Lieutenant Healy was taken to an aid station. Examination showed that a bullet entered his left cheek and came out through the right side of his neck shattering his jaw (R28-29).

4. The rights of the accused as a witness having been explained to him he elected to testify in his own behalf (R44). He and Lieutenant Healy were good friends (R49-50). On the afternoon of 11 May 1945, he started to drink an Italian liquor (R44) and continued to drink during the evening of the party. He began to feel the effects of the liquor toward the end (R45). It affected his ability to dance. He knew that Lieutenant Healy had left the party and also knew where he had gone, because Lieutenant Healy had told him earlier that he was going to go to Mrs. Isbary's apartment. He remembered seeking his quarters and the

next thing he recalls he was being summoned by Mrs. Isbary. He arose and dressed. Her statements about getting a surgeon did not seem strange to him. "It was as if I knew what was going on; it was as if I knew when Lieutenant Healy was shot and who shot him". He did not recall anything of the shooting — only a recollection "of experiencing the smell of smoke and a flash" (R47). He admitted that he and Lieutenant Healy had a dispute when Lieutenant Healy told him in the afternoon that he intended to visit Mrs. Isbary (R49-50). He denied that he said "I told you I'd shoot Healy" (R52). He did not have any appointment with Madame Isbary to visit her that night (R52) and had no intention of going there (R54).

The 36th Infantry Division Psychiatrist (R38) testified that during July 1944 he examined the accused and found that he was a constitutional psychopath with emotional inadequacy which manifests itself by unstable emotions and erratic behaviour. He examined him again in January 1945 and came to the same conclusion (R39). This condition did not interfere with accused's ability to perform successfully in combat. Emotional instability is likely to be aggravated by use of intoxicants or by shock. Amnesia may result from intoxicants (R40). If the amnesia is complete, one would not consciously know the difference between right and wrong. Excessive use of alcohol may dissolve normal inhibitions and impair the ability to exercise moral judgment and thereby cause a person to commit a murder or other serious offenses (R41). In his opinion accused was sane and was able to distinguish between right and wrong (R42).

On 12 May 1944 under AR 600-45 a silver star was awarded to accused for bravery in combat (R42; Def.Ex."A").

5. The accused has been found guilty of committing an assault upon Lieutenant Ralph S. Healy, Jr. with intent to murder. This offense is defined as an assault aggravated by the concurrence of a specific intent to murder. There must be an over act (MCM, 1928, par.149 l, p.178). The evidence conclusively shows that the accused committed an assault on Lieutenant Healy at the time and place alleged in the specification by shooting him with a pistol. In view of the nature of the weapon, the wound inflicted, the expressed and implied intent on the part of the accused to shoot Lieutenant Healy, the court properly and legally inferred the intent to kill which, under the circumstances, is tantamount to an intent to murder. The courts findings of guilty are amply supported by the evidence (CM ETO 78, Watts; CM ETO 2899, Reeves).

6. The accused contended that he was under the influence of liquor at the time, and, being a constitutional psychopath could not entertain the specific intent which must exist in order to sustain the Charge (MCM, 1928, par.149 l, p.177-179).

"Drunkenness - It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.

Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

In courts-martial, however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence"(MCM, 1928, par,126a, p.136).

The distinction between a psychotic - one who is insane - and one who has a psychopathic personality is well defined in law, when considered in defense of the commission of a crime (CM ETO 4219, Price). The inability of a psychotic to adhere to the right constitutes a defense to misconduct, for "a person is not mentally responsible for an offense unless he was at the time so far free from mental defects, disease or derangement as to be able concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par.78a, p.63). On the other hand "the inability of a constitutional psychopath who is without psychosis to adhere to the right is not mental irresponsibility and does not constitute a defense for wrong doing" (CM ETO 3717, Farrington; CM ETO 4219, Price, supra; CM ETO 5747, Harrison; see also: "Mental Accountability under Military Law" by Lepcomb, The Judge Advocate Journal, Vol.II, No.2, p.14 and CM ETO 314, Mason).

Applying the foregoing principles of law to the case under discussion the fact that the accused was a constitutional psychopath constituted no defense. The question of whether his drunkenness destroyed his ability to entertain the specific intent to murder was, under the circumstances shown, a question of fact for the court to determine. Several witnesses were of opinion that accused was not drunk shortly before and after the incident. His ability to walk into and shoot Lieutenant Healy in the face after his previous threat to do so negatives drunkenness to the extent claimed. The court's findings were therefore amply supported by substantial evidence that the accused was capable of entertaining the specific intent charged (CM ETO 14745, Rowell - 1945).

7. This case is of the typical pattern of a homicide or an attempt to commit a homicide by a man upon discovery of the infidelity of his paramour. With respect to the degree of homicide, viz: whether it is murder or manslaughter the rule is well established that

> "If a husband detects his wife in the act of adultery, there is sufficient provocation to reduce the homicide to manslaughter if he immediately kills the wife or paramour, provided that the killing is due to passion aroused by the provocation and not to revenge or malice" (29 C.J., sec.125, p.1142).

(See also 1 Wharton's Criminal Law, 12th Ed., sec.426, p.50). However, the courts have been unwilling to extend the above rule to the case where the accused killed his mistress or the "other man" (29 C.J., sec.126, p.1143, fn 70). Although accused, when he discovered Lieutenant Healy sitting on Mrs. Isbary's bed, may have been angered to a degree that he acted under heat of passion when he shot Healy, there was absent the important element of adequate legal provocation which is necessary to reduce a homicide from murder to manslaughter (CM ETO 506, Bryson, 2 B.R. (ETO)425). The assault under the circumstances could only be with intent to commit murder.

8. The charge sheet shows that the accused is 26 years of age. After serving as an enlisted man for 9 months, he was commissioned Second Lieutenant on 15 April 1943.

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 an officer who is convicted of an assault with intent to commit murder is such punishment as a court-martial may direct exclusive of death (AW 93). Confinement in a penitentiary is authorized upon conviction of the crime of assault with intent to commit murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the 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. 9 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant WILLIAM C. CHADDOCK (01317603), Company F, 141st 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 16887. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16887).

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

(Sentence ordered executed. GCMO 518, USFET, 30 Oct 1945).

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

28 SEP 1945

BOARD OF REVIEW NO. 3

CM ETO 16888

U N I T E D S T A T E S	42ND INFANTRY DIVISION
v.	Trial by GCM, convened at Kitzbuhel, Austria, 28 and 29 May 1945.
Second Lieutenant ROBERT D. THOMPSON (O-2006920), Service Company, 232nd Infantry	Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 92nd Article of War.
(Finding of not guilty)
Specification: (Finding of not guilty)

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

Specification: In that Second Lieutenant Robert D. Thompson, Service Company, 232d Infantry, did at Allach, Germany, on or about 30 April 1945, wrongfully, and in the presence of enlisted men, cause Erna Fohmann, Allach, Germany, a female person, to remove her clothing.

He pleaded not guilty, and was found not guilty of the original Charge and Specification and guilty of the Specification and Additional Charge. No evidence of previous convictions was introduced. The reviewing authority, the Commanding General, 42nd Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. Competent evidence shows that, at the time and place alleged, accused and two enlisted men occupied, as an emergency billet, the lower floor of a German residence, while permitting the regular occupants, Erna Fohmann, her nephew and sister-in-law, to share for the night a room on the floor above (R7-8,21,60). Accused found, in the bedroom downstairs, a photograph of Erna in the nude, which he showed to the enlisted men (R8,21,60). Later - at 1.30 am - carrying a pistol and a flashlight, he entered the bedroom upstairs and insisted that Erna accompany him below, where in the presence of both enlisted men, he confronted her with the photograph (R8,21,31, 60-61). There, weeping and shivering, she was required to remove all of her clothing - by accused's orders, according to her testimony and that of the two enlisted men (R8,21) - by their orders but in his presence and without his protest, according to accused (R61,68). He had been to Dachau that afternoon and seen "the horrors that those Germans perpetrated on both men and women", (R60) and characterized forcing Erna to undress under the circumstances as "perhaps a whimsical action on the part of the men" (R61). For further evidentiary details see the statement of evidence included in paragraphs 5 and 6 of the review by the staff judge advocate of the confirming authority.

4. The allegations of the Specification were competently proved. Regardless of accused's resentment of German atrocities, the conduct shown exhibits individual standards of decency and decorum falling below the limit of tolerance authoritatively prescribed for officers and gentlemen (MCM, 1928, par.151,p.186).

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

6. The charge sheet shows that accused is 34 years one month of age and that, with no prior service, he was inducted at Camp Grant, Illinois, 10 August 1943, and appointed second lieutenant, Army of the United States, 17 February 1945.

7. A sentence of dismissal is mandatory upon conviction of Article of War 95.

B R Keeper Judge Advocate

Malcolm C. Sherman Judge Advocate

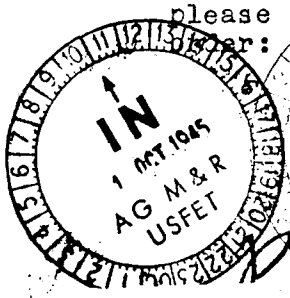
B. H. Sawyer Jr Judge Advocate

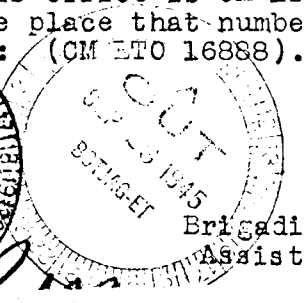
1st Ind.

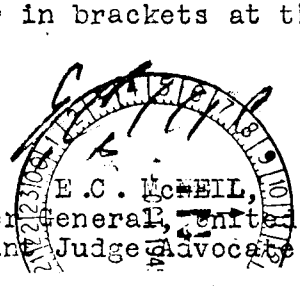
War Department, Branch Office of The Judge Advocate General with the European Theater. 28 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant ROBERT D. THOMPSON (O-2006920), Service Company, 232nd 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 16888. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16888).







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

(Sentence ordered executed. GCMO 488, USFET, 13 Oct 1945).

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

BOARD OF REVIEW NO. 3

CM ETO 16889 — 5 OCT 1945

U N I T E D S T A T E S	65TH INFANTRY DIVISION
v.	
Second Lieutenant CHESTER KLISH (01133106), 261st Infantry	Trial by GCM convened at Enns, Austria, 4 June 1945. Sentence: Dismissal and total forfeitures

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

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

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

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

Specification: In that 2d Lieutenant CHESTER KLISH, 261st Infantry, did, without proper leave, absent himself from his organization and duties, at or near Kapfelberg, Germany, from about 26 April 1945 to about 29 April 1946

CHARGE II: Violation of the 75th Article of War.

Specification: In that * * *, did, at or near Kapfelberg, Germany, on or about 28 April 1945, misbehave himself before the enemy, by failing to advance with his command, which had been ordered forward by the Commanding Officer of the 3rd Battalion, 261st Infantry, to engage with the enemy, which enemy forces the said command was then opposing.

He pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous conviction was introduced. He was sentenced to be dishonorably discharged the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 65th Infantry Division, approved the sentence, which he characterized as wholly inadequate in view of the seriousness of the offenses of which the accused was convicted, and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, characterizing it as wholly inadequate for an officer guilty of such grave offenses, and directed that the execution of the sentence be withheld pursuant to the provisions of Article of War 50½.

3. Accused was platoon leader, third platoon, Company K, 261st Infantry, bivouaced at an assembly area about 2 miles from the Danube river, whence it moved out in accordance with combat orders known to accused, at about 0130 26 April 1945, charged with the military mission of crossing the river and attacking the enemy on the opposite bank (R4-7,15). When a halt was called before the river was reached, Company K extended from the outskirts of Kapfelberg approximately 900 yards to the town of Schulteradorf, where accused and his runner sat down together and both dozed off (R16,28). When the runner awoke, accused was gone (R28). Before the company resumed its march, half an hour after the commencement of the halt, an unsuccessful search was made for the accused (R24,25,28). He did not rejoin his organization until the 29th (R37). In the meantime, the crossing and attack mission were accomplished against active enemy resistance (R7-9, 17-18,28).

Accused was seen at the priest's house in Kapfelberg, Germany, on the evening of the 26th (R31-32) and again on the 27th, when he explained that he was lost (R36). The following day he left Kapfelberg with an enlisted detachment from regimental headquarters, crossed the Danube and secured transportation to his company, arriving and reporting on the 29th (R37-38). Boats were crossing and recrossing the river at the bridgehead during the day of the 26th (R9)

After his rights were explained to him, accused elected to remain silent (R44-45).

For further evidentiary details, see paragraphs 5 and 6 of the review by the Staff Judge Advocate of the confirming authority.

4. Accused was charged with misbehaviour before the enemy by failing to advance with his command, 26 April 1945, and with absence without leave from the 26th until the 29th. Both offenses were proved by uncontradicted evidence. Failure to advance and participate--with the platoon of which he was leader - in the imminent attack upon the enemy, to which to his knowledge, it was then and there committed, was a violation of Article of War 75 (CM ETO 1685, Dixon; CM ETO 1663 Ison; CM ETO 2471 McDermott; CM ETO 11637, Monti). The absence

proved, initiated by such failure to advance and continuing for three days, was shown also to have been unauthorized, and thus in violation of Article of War 61. There was no prejudicial multiplication of charges.

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

6. The charge sheet shows that accused is 24 years 11 months of age and that with prior enlisted service from 17 August 1942 to 16 June 1943, he was commissioned second lieutenant 17 June 1943, at the Infantry School, Fort Benning, Georgia.

7. Dismissal is authorized upon conviction of a violation of Article of War 75 or Article of War 61.

Benjamin R. Sleeper Judge Advocate

MALCOLM C. SHERMAN Judge Advocate

B. H. DEWEY, Jr. Judge Advocate

1st Ind

War Department, Branch Office of The Judge Advocate General with the European Theater 5 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Second Lieutenant CHESTER KLISH (O-1183106), 261st 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 16889. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16889).

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

(Sentence ordered executed. GCMO 521, USFET, 30 Oct, 1945).

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

BOARD OF REVIEW NO. 2

20 OCT 1945

CM ETO 16891

U N I T E D S T A T E S	)	IX TACTICAL AIR COMMAND
	)	
v.	)	Trial by GCM, convened at APO 595, U. S. Army, 21 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant CECIL D. MARRS, JR. (O-677821), 428th Fighter Squadron, 474th Fighter Group	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Cecil D. Marrs, Jr., Air Corps, 428th Fighter Squadron, 474th Fighter Group, was in and about Thamsbruck, Germany, on or about 23 April 1945, drunk in public, to wit; in and about the streets of Thamsbruck, Germany.

Specification 2: In that * * *, did, at or near Thamsbruck, Germany, on or about 23 April 1945, assault Private First Class Louis C. Cook, 959th Quartermaster Service Company, a sentinel in the execution of his duty, by pointing a dangerous weapon, to wit; a pistol, at the said Private First Class Louis C. Cook.

Specification 3: In that * * * having received a lawful order from Private First Class Freddie Nelson, 959th Quartermaster Service Company, a sentinel in the

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execution of his duty, to refrain from entering upon the property he was guarding, did, at Thamsbruck, Germany, on or about 23 April 1945, fail to obey the same.

Specification 4: In that * * *, did, at or near Thamsbruck, Germany, on or about 23rd April 1945, assault Corporal Samuel H. Betha, Private First Class Earth L. Jones, and Private First Class Freddie Nelson, all of the 959th Quartermaster Service Company, by pointing a dangerous weapon, to wit, a pistol, at the said Corporal Samuel H. Betha, Private First Class Earth L. Jones, and Private First Class Freddie Nelson.

Specification 5: In that * * *, did, at Thamsbruck, Germany, in the vicinity of a United States Government warehouse, on or about 23 April 1945, wrongfully discharge a pistol.

Specification 6: In that * * *, did, at Thamsbruck, Germany, in the vicinity of a United States Government warehouse, on or about 23 April 1945, drink intoxicating liquors with an enlisted man, to wit; Corporal Samuel H. Betha, 959th Quartermaster Service Company.

Specification 7: (Finding of not guilty).

He pleaded not guilty and was found not guilty of Specification 7 and guilty of the Charge and remaining specifications. Evidence was introduced of one previous conviction by general court-martial for wrongfully pointing a revolver at three officers in a threatening manner; appearing in a German Army overcoat and cap in a United States Government Army vehicle with a United States driver, thereby endangering the lives of himself and said driver; wrongfully using insulting and defamatory language towards an officer and, with intent to do him bodily harm, assaulting an officer by wrongfully and unlawfully grabbing said officer and violently shaking him, all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority, the Commanding General, IX Tactical Air Command, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

On 23 April 1945, Private First Class Louis C. Cook, 959th Quartermaster Service Company, was on guard at post number one, which was a gate entrance to a warehouse in Thamsbruck, Germany. About 1700 hours on that day he saw accused across the street, about twenty feet away from him, "beating" on a civilian house situated there (R7,8). Private Cook called

"the Corporal" and accused stood up and pointed a 45 caliber pistol at him (R8,10). Private Cook was afraid and "stooped down" and ran around a hedge, meeting accused at a fence. Accused stated that he and Cook "liked to had a duel" but he told Private Cook to "forget it". He further stated he wanted a place to sleep and Private Cook told him to go to the Red Cross. Accused mounted his bicycle and proceeded to the number two gate (R8,11). In Private Cook's opinion accused was "high * * * rather high * * * he was waving his gun" (R9,11).

About 1745 hours on this day Corporal Samuel H. Betha saw accused coming up the road on a bicycle and as he crossed a bridge he fell off the bicycle. Some soldiers helped him off the ground. One took the bicycle and they all came to gate number two at the warehouse (R14), where Private First Class Freddie Nelson was on guard (R23). Accused desired to enter the gate but Private Nelson told him he could not do so. Accused asked who was in charge. Private Nelson informed him Corporal Betha was the responsible non-commissioned officer (R14,23). Corporal Betha appeared at this moment and accused asked him if there was another entrance. Corporal Betha showed him gate number one. Accused proceeded to gate number one where Private Nelson and another sentry met him. Accused asked Private Nelson to open this gate and the latter replied, "Sir, you'll have to have a permit to come in". Accused said, "Open this God damned gate", drew his pistol and with his left hand shoved the gate and knocked Private Nelson's gun out of his hand (R15,23). He picked up Private Nelson's gun and pointed both weapons at him, ordering him to put his hands up, which Private Nelson did. At this time Corporal Betha approached from another house and accused pointed his pistol at him and ordered him "to fall in" also. Corporal Betha put up his hands as ordered by accused and the latter then marched them towards the warehouse (R15,16,23). Private First Class Earth L. Jones who was standing in the background between gates number one and two throughout these happenings, was observed by accused, who pointed a pistol at him and ordered him "to get in line" with Betha and Nelson. Private Jones put his hands up, got in the line, and the group was marched into the warehouse (R16,23,26-28). After they entered the warehouse accused dropped his gun, and when he stooped down to retrieve it Private Jones slipped out of the building. Accused then "staggered out the door and fired a shot into an empty building outside the warehouse" (R16,23). After firing this shot he re-entered the warehouse "and staggered around in there and asked what we had in the warehouse". When Corporal Betha told him the building contained whiskey, he said, "Let's get some of it". Corporal Betha then opened a case of Vermouth whiskey, gave a soldier who accompanied accused eight bottles and both Betha and accused each took a bottle in their hands. Accused gave the bottle he had to the soldier who was with him and ordered Corporal Betha to open the bottle he had and "take a drink". Accused and the others present then took a drink (R16). Private Nelson testified accused "was drunk because he was 'high'. He wasn't sober enough to handle himself", and Technician Fourth Grade John W. Loomis stated that on the date in question accused was "drunk" at the warehouse (R25,32).

4. Accused after his rights as a witness were fully explained to him

(R47), was sworn and testified substantially as follows:

He is a 2nd Lieutenant in the 428th Fighter Squadron, is 27 years of age and has been in the service five years, 19 months of which has been spent overseas (R47,48). The date of the alleged incident was his first day in Germany and together with two other officers he walked into the town in question. They did not have any liquor with them but were shown through the warehouse "by one of the black boys". Before they went through the warehouse, a "black boy" stopped them on the street and asked them if they wanted a bottle of liquor or cognac. He told this soldier they were not particularly interested but if they had a surplus, they would take it back to camp with them. The "black boy" then pulled a bottle out of his overcoat and told them he had plenty of it as he was guarding a warehouse. The officer asked to see the warehouse and the soldier who had given them the bottle of liquor conducted them through it. He was not asked for a pass, did not require any more liquor and remained there about twenty minutes. As they left the warehouse a white soldier, seeing the bulk under the flying jacket of one of the officers said, "Lieutenant, you can't take liquor out", and to avoid an argument they surrendered the bottle to him. Approximately two or three hours later accused returned to the gate of the warehouse to inquire as to which road led back to the air base. The other officers had left him and returned to camp (R49). He told the sentry on duty at the gate that he was sleepy and asked him the way back to the camp. He started down the road towards the air base and about a block down the road around the corner he fell off his bicycle. Some medical soldiers from a nearby hospital picked him up and he returned to one of the warehouse gates, where he asked a "black boy" stationed there to allow him to enter the warehouse. A corporal standing nearby told him there was another gate to the left and as he approached this last mentioned gate "a nigger there" calledout and told him not "to come over there" (R49,50). Not understanding the reason for this he went over and he saw this soldier take his gun out of its holster. He then drew his gun, "clicked it", and told the soldier to drop his gun and the soldier did so (R51). He picked up the soldier's gun and told the soldier to take him to his commanding officer. When told a corporal was in charge he said, "Let's get the Corporal". When he saw "the nigger corporal" he thought "there wasn't any use causing any more trouble" so he just stood around and "passed the time of day". He started kidding "about this boy's gun" and the Corporal asked if he was going to return the gun. The corporal then asked if he wanted a drink and he replied, "Sure" and the corporal went into the warehouse and brought out a bottle. All of them there had a drink. He was still kidding about the gun when suddenly a white soldier appeared in front of him, pointed a gun at him and said, "Give the man back his gun". He threw "the Luger over to one of the niggers" and the white soldier told him not to make "any false moves" or he would shoot. At his request he was taken to see an Allied Military Government officer and when questioned by this officer he replied "that I didn't know what the fuss was being raised about". The "niggers" were called in and they accused him of forcing open the warehouse and carrying out "quite a number of bottles". He denied this accusation and asserted he could substantiate his version of these incidents by the statements of an enlisted man named Lane who had accompanied him up to the point he was taken to the Allied Military Government office. He has

not been able to ascertain Lane's whereabouts (R52-54).

A lieutenant in the Signal Corps, testifying for the defense, stated he had known accused since approximately August 1944 and that to the best of his knowledge accused is "absolutely honest" and has not been involved in any trouble (R46).

5. a. The record contains substantial evidence that accused was drunk in public as alleged in Specification 1 of the Charge. Such conduct is clearly a violation of Article of War 96 (Winthrop's Military Law and Precedents (Reprint 1920), pp.722,723; CM ETO 1388, Madden).

b. In Specifications 2 and 4 of the Charge, accused is charged with assaulting four enlisted men by pointing a dangerous weapon at them. "An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. * * *Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another", etc., are examples of assault (MCM, 1928, par.149, p.177). That accused pointed his pistol in a threatening manner at the various enlisted men as alleged in these specifications is clearly established by the evidence. Such conduct by an officer constitutes an offense under the 96th Article of War (CM ETO 8456, Thorpe).

c. Concerning Specification 3 of the Charge, wherein accused is charged with failure to obey the lawful order of a sentinel, there is substantial evidence that such an order was given him and he failed to obey it. This constitutes a violation of Article of War 96 (MCM, 1928,par.152a, p.187).

d. Specification 5 of the Charge alleges that accused wrongfully discharged a pistol in the vicinity of a United States Government warehouse and substantial evidence was produced by the prosecution in support thereof. "Careless or wanton discharge of fire-arm, so as to endanger man or animal" is an offense under Article of War 96 (Winthrop's Military Law and Precedents (Reprint, 1920), p.731; CM ETO 866 O'Connell and Haza; CM ETO 3801, Smith).

e. That accused drank intoxicating liquor with an enlisted man as alleged in Specification 6 of the Charge was fully established by competent, substantial evidence and is a violation of Article of War 96 (CM 119492 (1918), CM 124799 (1919), Dig.Op.JAG, 1912-40, sec.453(9), p.342; CM ETO 6235, Leonard).

6. The charge sheet shows that accused is 27 years six months of age, that he enlisted 13 January 1941 at Dallas, Texas, and served as an enlisted man until 22 April 1943 when he was commissioned as an officer. He had no prior service.

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

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

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

Carle Asplund Judge Advocate

Ronald D. Miller Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 20 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U. S. Army.

1. In the case of Second Lieutenant CECIL D. MARRS, JR. (O-677821), 428th Fighter Squadron, 474th Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16891. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16891).

B. FRANKLIN RITER
Colonel, JAGD
Acting Assistant Judge Advocate

(Sentence ordered executed. GCMO 613 , 651, USFET 17 Dec 1945).

16891

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

29 September 1945

BOARD OF REVIEW NO. 1

CM ETO 16892

U N I T E D S T A T E S	)	17TH AIRBORNE DIVISION
	)	
v.	)	Trial by GCM convened at APO 452, U. S. Army, 15 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
First Lieutenant RHOADES McCUTCHEN (0309210), Anti-Tank Company, 194th Glider Infantry	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that First Lieutenant Rhoades McCutchen, Anti-Tank Company, 194th Glider Infantry, did, at or near Dulmen, Germany, on or about 31 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill a human being known to the accuser as Viktor Winnemann, whose other correct name, if any, is to the accuser unknown, by shooting him with a pistol.

Specification 2: In that * * * did, at or near Dulmen, Germany, on or about 31 March 1945, with malice

aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill a human being known to the accuser as Willi Hartz, whose other correct name, if any, is to the accuser unknown, by shooting him with a pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Specifications 1 and 2, in each case, except the words "with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation", substituting therefor the words "willfully, feloniously and unlawfully", of the excepted words not guilty, and of the substituted words guilty, and not guilty of the Charge, but guilty of a violation of the 93rd Article of War. Evidence was introduced of one previous conviction by general court-martial for being drunk and disorderly in a public place while in uniform and wrongfully lifting a weapon, to wit: a knife, against his superior officer in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 ten years. The reviewing authority, the Commanding General, 17th Airborne Division, approved the sentence, recommended that the execution of the sentence be suspended due to the special circumstances of the case, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, stating that it is wholly inadequate punishment for one guilty of such grave offenses and that in imposing such meager punishment the court has reflected no credit upon its conception of its own responsibility, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence of the prosecution showed substantially the following: On the morning of 31 March 1945 at or near Dulmen, Germany, accused's company took over a German residence as its command post and ordered the civilian occupants out (R33). Four of them, two men and two women, returned at about 0630 hours to feed the livestock (R33) and to get some personal possessions. Their attitude in asking for their clothes was polite (R28), and accused had no argument with them (R14,36). They were given permission to be on the premises (R7). As they were leaving accused stood in the door with a pistol in his hand, and when they had gone from five to eight meters, shots were fired, the two men fell and the two women ran (R34). The two men who fell were identified as the persons named in the specifications of the Charge; they died as a result of gunshot wounds (R45). As they lay on the ground, one motionless and the other moaning, accused fired another shot at the one who moaned (R22,24). Accused, shortly after the shooting, admitted that he had done it (R49), and later signed a written statement, in question and answer form. After a showing that this statement had not

been obtained by improper inducement and that accused had been advised of his rights prior to its making (R57-58), it was received in evidence (Pros. Ex.D). Portions of the statement are as follows:

"Q. Can you tell me in your own words just how this occurred?
A. Well, these civilians came into this house where we had a company CP set up, and they were gathering up some gear, personal belongings, and I told them to get the hell out of there. They, of course, probably didn't understand what I said. Their attitude made me mad, and I guess I blew my top. They went outside and I shot them.

* * *

Q. Did they make any threats at you?
A. I don't believe so.

* * *

Q. Had you ever seen them before?
A. Not to my knowledge.

* * *

Q. Did any of them attack you?
A. No, sir.

Q. Did you have any particular reason for shooting them?
A. I guess not, sir.

* * *

Q. When did you first decide to shoot them?
A. I haven't any idea, I guess at the time I started shooting.

* * *

Q. Did you shoot these people through the back, side, or front?
A. The back, I believe, sir" (Pros.Ex.D)

Three days earlier, accused's platoon sergeant, Sergeant Lund, had been killed in combat (R19). Thereafter accused "changed", becoming embittered and morose (R10,20,30). Apparently his first remark after the shooting, after he reentered the command post, was, "Those two out there are for Sergeant Lund" (R29), and stated later as provocation that he had lost a "damn good sergeant" in combat a few days earlier (R49). Accused had been drinking during the day (R10,18) but one prosecution witness could not satisfy himself whether accused was drunk or sober (R50), another testified that (shortly after the shooting) accused "conducted himself in a very soldierly manner" (R54), and another that (shortly before the shooting) he didn't appear to have been drinking (R35). Without objection by the defense, a report of a psychiatric board, dated 20 April 1945, offered by the prosecution was received in evidence (R60; Pros.Ex.E). Accompanying this report is what purports to be a dissenting opinion thereto, concurred

in by "a number" of the eight-man board (R60, Pros.Ex.F). This dissent, however, concludes, as does the report itself, that accused "was able to distinguish right from wrong at the time of the alleged offense, and was further able to adhere to the right", and that he was able "to instruct counsel in his behalf at a trial by court-martial".

4. For the defense, accused's company commander testified that while accused "was inclined to drink a lot" it did not interfere with his duties, and that he had seen him take two or three drinks on the morning of 31 March (R62). Accused became very bitter after Sergeant Lund's death and spoke very bitterly about the Germans (R63). The testimony of the company officers was in substantial accord (R64-73), one of them expressing the additional opinion that at 1430 hours on the day of the shooting, accused "was definitely not capable of a sane or sober performance of his duties" (R71). A further witness testified that on the day of Sergeant Lund's death, he was in the back seat of a jeep driven by the sergeant, and accused was in the right front seat. Their mission was to clear out some enemy snipers. A burst of machine gun fire killed the sergeant instantly and accused was slightly wounded on a finger of his right hand (R74-75). Witness saw accused take two or three drinks on the day of the shooting and thought "he wasn't too sober" (R75).

Having been fully advised of his rights, accused elected to remain silent (R76).

5. a. The court found accused not guilty of murder but guilty of manslaughter; the latter is a lesser included offense within the former and such a finding was legal (MCM 1928, par.148a, p.162; CM 165268 (1925), Dig.Op.JAG 1912-40, sec.450 (2), p.310). None of the distinguishing characteristics of involuntary manslaughter being here present, the offense found was voluntary manslaughter, the only remaining alternative. This offense is described as follows (MCM, 1928, par. 149a, p.166):

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.
>
> In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or for doing bodily harm".

The court indicated by its findings that it accepted the accused's statement that there was no malice aforethought or premeditation (in his

written statement he says he decided to shoot "at the time I started shooting"), and that, considering the state of accused's mind at the time, sufficient provocation for his act was present. Some additional evidence of a lack of premeditation and malice aforethought may be found in his apparently spontaneous shooting ("I guess I blew my top") of persons whom he had never seen before. There was evidence that accused acted in the heat of a sudden passion engendered by such provocation as would have excited a reasonable man to such an act, and the court in effect found such to have been the case.

The proof with respect to manslaughter contains factors which are in common with those in CM ETO 82, McKenzie. The following quotation from the holding in that case is appropriate:

> "There is no evidence of malice on the part of accused in this situation. Rather the conclusion appears to be irrefutable that accused was seized with surprise and fright and lost all powers of deliberation and reason. His judgment was unseated. He acted under the impulse of passion accentuated by his intoxication. Provocation existed, not in its usual formal design of an opponent threatening bodily harm to an accused but in a set of circumstances which operated as powerfully and directly upon deceased's mental processes as would have occurred had deceased seized a revolver and pressed it to accused's head" (Cf; CM ETO 4945, Montoya).

b. Although no defense of insanity was here raised the defense sought to show that accused's mental state at the time of offense was not normal. A psychiatric report finding accused legally responsible and recommending that he be "returned to his unit to face whatever disciplinary measures may be pending against him" was received without objection by the defense. The question of accused's legal responsibility was one of fact for determination by the court, and was affirmatively determined by its findings of guilty (CM ETO 16573, Sabella; CM ETO 9877, Balfour; CM ETO 2023, Corcoran) which are supported by substantial evidence and may not now be disturbed (CM ETO 13376, Aasen).

6. The charge sheet shows that accused is 32 years of age, and was appointed second lieutenant, Officers Reserve Corps, 29 May 1933, recalled to active duty 13 March 1942, and promoted to first lieutenant 29 April 1944. He had no prior service.

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

8. Confinement in a penitentiary is authorized upon conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is authorized (AW 42; Cir. 229, WD S June 1944, Sec. II, pars. 1b (4), 3b).

WM. F. BURROW Judge Advocate

EDWARD L. STEVENS, JR. Judge Advocate

DONALD K. CARROLL Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 29 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant RHOADES McCUTCHEN (0309210), Anti-Tank Company, 194th Glider 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 16892. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16892).

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

(Sentence ordered executed. GCMO 484, USFET 13 Oct 1945).

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

BOARD OF REVIEW NO. 3

25 SEP 1945

CM ETO 16897

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Marburg,
	)	Germany 1,4 August 1945. Sentence:
Private JOSEPH BRUNO (32690589),	)	Dishonorable discharge, total for-
Attached Unassigned, 480th	)	feitures and confinement at hard
Replacement Company, 69th	)	labor for life. Eastern Branch,
Replacement Battalion, 3rd	)	United States Disciplinary Barracks,
Replacement Depot	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joseph Bruno, attached unassigned to the 480th Replacement Company, 69th Replacement Battalion, 3rd Replacement Depot, did, at St. Gobain, France, on or about 16 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended in Etampes, France, on or about 23 May 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "was apprehended", substituting therefor the words "surrendered himself", and guilty of the Charge. Evidence was introduced of one previous

conviction by summary court for absence without leave for one day 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 from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the period of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution introduced in evidence without objection a duly authenticated extract copy of the morning report of accused's organization for 16 September 1944, showing accused "Dy to AWOL at 0640" (R8, Pros.Ex. A). Accused's company clerk testified that on 16 September 1944, accused absented himself while the company was at St. Gobain, France, and never reported back to the company after that date. He had no pass or furlough, and although his name was called at roll calls and was posted on the bulletin board, he did not respond (R7-8).

It was stipulated that accused surrendered himself to military control in Etampes, France, on or about 23 May 1945 (R9).

4. After his rights as a witness were explained to him, accused elected to make an unsworn statement (R9). He stated that about 15 September 1944, while he and "another fellow" were walking at night along a highway toward a town near St. Gobain, three men, who spoke perfect English, picked them up and took them to a cafe where they danced until "about 1200", at which time accused said he was going back to his organization. The men agreed to take them back, but on the highway they pulled a gun and forced accused and his friend to go to a house with them. The following morning, accused and his friend were forced at the "point of a gun" to put on civilian clothes and were taken to the attic of the house, where they stayed for 48 hours, after which they were taken outside each day for several hours and required to pull weeds to keep them busy. Accused noticed they had "all kinds of stuff in the house--ten-in-one rations, tires and everything; and the liners they had taken from us were painted with white 'MP's' on them". One night the men came to the attic and took accused and his friend downstairs and returned their clothes to them but kept their "dog tags". At about 0100 hours during the morning of about 17 May, accused and his friend were taken in a car for about 3 miles and told to get out. When daylight came, they found themselves on the outskirts of Paris. Accused tried to get "the other fellow to 'turn in' and give the story we had, but he didn't want to. I did, and here I am" (R10).

5. Absence without leave of accused from his organization from 16 September 1944 to 23 May 1945 is clearly established by the evidence and is

admitted by accused in his unsworn statement. The absence began in an active theater of operations and ended a short time after the fighting had ceased. The court was without question fully warranted in disbelieving the story in accused's unsworn statement and in inferring from his unauthorized absence for 249 days that he intended, at some time during such absence, to remain permanently away from the service (CM ETO 1629, O'Donnell; CM ETO 5406, Aldinger; CM ETO 6093, Ingersoll; CM ETO 13018, Ostrowski; CM ETO 15593; Joseph).

6. The charge sheet shows that accused is 21 years ten months of age and was inducted 19 December 1942 at New York, New York,

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

16897

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

BOARD OF REVIEW NO. 5 22 SEP 1945

CM ETO 16900

UNITED STATES	SEVENTH UNITED STATES ARMY
v.	
Private ARTHUR R. KENNIGER (35096730), attached-unassigned, 351st Reinforcement Company, 72nd Reinforcement Battalion	Trial by GCM, convened at Marburg, Germany, 1 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. The evidence is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding of guilty of absence without leave for the period alleged, in violation of Article of War 61; legally sufficient to support the findings of guilty of Charge I and its Specification 2; legally insufficient to support the finding of guilty of Specification 3 of Charge I, or of the lesser included offense of absence without leave; and legally sufficient to support the findings of guilty of Charge II and its Specification.

JOHN WARREN HILL Judge Advocate

JOE L. EVINS Judge Advocate

ANTHONY JULIAN Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 9 OCT 1945 TO: Commanding General, Seventh United States Army, APO 758, U. S. Army.

1. In the case of Private ARTHUR R. KENNIGER (35096730), attached-unassigned, 351st Reinforcement Company, 72nd Reinforcement Battalion, 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. The evidence is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding of guilty of absence without leave for the period alleged, in violation of Article of War 61; legally sufficient to support the findings of guilty of Charge I and its Specification 2; legally insufficient to support the finding of guilty of Specification 3 of Charge I, or of the lesser included offense of absence without leave; and legally sufficient to support the findings of guilty of Charge II and its Specification.

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 16900. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16900).

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

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

BOARD OF REVIEW NO. 1

9 OCT 1945

CM ETO 16901

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Gutersloh, Germany, 23 July 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Privates THEODORE JOHNSON (34252553), WILLIE SMITH (34857036) and GEORGE MINOR (33542664), all of 697th Ordnance Ammunition Company	

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

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

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

JOHNSON

CHARGE I: Violation of the 61st Article of War.
(Nolle prosequi).
Specification: (Nolle prosequi)

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

Specification 1: In that Private Theodore Johnson, 697th Ordnance Ammunition Company, did, at Senne I, Germany, on or about 7 May, 1945, forcibly and feloniously against her will, have carnal knowledge of Gustel Aldag.

Specification 2: In that * * * did, at Senne I, Germany, on or about 7 May 1945, forcibly and feloniously against her will, have carnal knowledge of Frau Else Gassel.

CHARGE III: Violation of the 93rd Article of War.
(Nolle prosequi)

Specifications I, 2,3: (Nolle Prosequi).

SMITH

CHARGE I: Violation of the 61st Article of War.
(Nolle Prosequi).
Specification: (Nolle Prosequi)

CHARGE II: Violation of the 92nd Article of War

Specification 1: In that Private Willie Smith, 697th Ordnance Ammunition Company did, at Senne I, Germany, on or about 7 May, 1945, forcibly and feloniously, against her will, have carnal knowledge of Gustel Aldag.

Specification 2: In that * * * did, at Senne I, Germany, on or about 7 May, 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Else Gassel.

CHARGE III:Violation of the 93rd Article of War
(Nolle Prosequi)

Specifications 1 and 2 (Nolle prosequi).

MINOR

CHARGE I: Violation of the 61st Article of War.
(Nolle prosequi)
Specification: (Nolle prosequi)

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

Specification 1: In that Private George Minor, 697th Ordnance Ammunition Company did, at Senne I, Germany, on or about 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Gustel Aldag.

Specification 2: (Finding of not guilty)

CHARGE III: Violation of the 93rd Article of War.
(Nolle prosequi)

Specifications 1 and 2: (Nolle prosequi).

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, each was found guilty of the Charge and specifications preferred against him except that accused Minor was found not guilty of Specification 2 of Charge II. No evidence of previous convictions was introduced against Johnson or Smith. Evidence was introduced against Minor of one previous conviction by summary court for absence without leave for 16 hours in violation of Article of War 61. Three

fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

About 2130 hours, 7 May 1945, the three accused, an unidentified colored soldier, and two other men variously described in the record as a Pole and a Belgian, or two Poles, entered a German home at Senne I, Germany (R14-15). A Pole, the unidentified colored soldier and Johnson, who was armed with a carbine, dragged Frau Gustel Aldag, a 49-year-old widow, into her bedroom. The pole and Johnson tore her clothes off and the latter threw her on the bed, struck her with his fists, and had sexual intercourse with her while the unidentified colored soldier stood by with a pistol at her head. While her clothes were being torn off her and she was being beaten, there were "several" people "standing around" but Frau Aldag could not identify the other accused as being among them. Minor was definitely not in the room at that time (R16-18). After Johnson finished, the unidentified colored soldier had intercourse with her and during that time colored men were coming into and going out of the room (R19). Smith, who was unarmed, then came into the room after the others had left. Frau Aldag was lying on the couch and Smith permitted her to hold her legs together because she was in pain. While she rested Smith undressed. He took her feet and put them up on the bed. She tried to protect herself with her feet and hands. She was "scared". Smith then had sexual intercourse with her. During this time people were coming in and out of the room and the Pole and a colored soldier took a radio out of the room. (R19,22,29-30). As Smith left the room, Minor, who was unarmed, entered. He permitted her to get up and wash herself. He then pushed her down on the couch and had sexual intercourse with her. She tried to resist by using her hands but she was too weak (R19-20). She was "scared" but could do nothing because Minor was too powerful. When Minor left she dressed but the Pole and Johnson returned and the latter again had sexual intercourse with her. (R20). Smith had sexual intercourse with her for the second time (R21). Minor came into the room repeatedly and suggested to his companions that they should go home (R21). She smoked a cigarette with one of accused so she could have a longer rest period (R32-33).

Frau Else Gassel, also 49 years of age, occupied a room adjoining that of Frau Aldag. She heard Frau Aldag scream and, shortly thereafter, Johnson and an unidentified colored soldier entered the room. Johnson tore her clothes off and had sexual intercourse with her while his companion stood by with a pistol pointed at her (R35,37,38). Smith then had sexual intercourse with her while the unidentified soldier, still armed, put his penis in her mouth (R39). Minor did not have sexual intercourse with her. He urged his companions to leave (R40). They did leave about 1:00 or 1:30 am. Frau Gassel's husband, who had been in the house all the time, testified that both his wife and Frau Aldag were distraught (R51) A physical examination of Frau Aldag on 8 May 1945 revealed that "there was a tear at the back part of

her vagina". There were "blood splotches" (contusions or abrasions) on the left cheek bone, the eye and at the top and back part of the head (R45-46). Physical examination of Frau Gassel was negative (R46-47).

At the pre-trial investigation all accused admitted having sexual intercourse with Frau Aldag (R56-57).

4. Evidence for the defense

In an effort to show that accused were searching for a house of prostitution on the night in question, the defense offered in evidence the testimony of Karol Pastruck, 19, who stated that he and a companion were picked up in a truck by four drunken colored soldiers, three of whom were accused, and that they directed the negroes, who were looking for girls, to a certain residence (R62-63). They then went to another residence where they were given schnapps by the owner (R63,65). The unidentified colored soldier pointed a carbine at the owner and demanded more schnapps and when the latter said that he did not have any more, the soldier struck him with the carbine (R64,66). The same soldier pointed his carbine at the witness, in the presence of accused, and demanded that he get some girls (R65).

Minor after an explanation of his rights elected to be sworn and testify. He stated that a soldier named Coleman picked up him and the others accused in a truck and then picked up two Polish boys. They drove to a farm house and were admitted by one of the occupants (R69). They were given schnapps. Smith and the witness remained in the house about 15 minutes and then went out and sat in the truck. Coleman, who was armed with a carbine, made them get off the truck because he was afraid they would leave (R70). Coleman gave his carbine to one of the Poles who apparently brought a woman out of the house. Coleman snatched the carbine from the Pole and was going to shoot the woman but Smith and the witness prevented him. Coleman then fired about 15 rounds into the house (R71). The two Poles and Coleman went into the house. Witness and Smith followed. They went upstairs and saw Coleman in the room with Frau Aldag (R71). The Pole told the witness "she was doing business". Smith preceded him into her room. When he went in the woman was "scared" (R76). He asked her to have sexual intercourse with him and promised to give her cigarettes (R78). She told him to wait until she washed. They then sat down on the lounge and smoked a cigarette. When they finished the cigarette he had sexual intercourse with her (R77). When he came out of the room Coleman was hitting Herr Gassel over the head with a suitcase (R76). He saw Johnson and Smith go into Frau Gassal's room (R79).

Smith after an explanation of his rights elected to be sworn and testify. His testimony corroborated Minor's in all substantial particulars. He admitted having sexual intercourse with Frau Aldag but denied that he had anything to do with Frau Gassel (R84,87). He followed Johnson into Frau Aldag's room. She was sitting on a lounge when he came in and he offered her cigarettes and candy if she would have sexual intercourse with him. She told him to sit down while she washed. When she finished he had sexual intercourse with her. Then he gave her some cigarettes and chocolate (R84). Not only did she not resist but she cooperated with him (R87). He denied having more than one act of intercourse with her (R91). When he came out he looked into the adjoining room and saw Coleman and Johnson there.

Johnson, after being advised of his rights, elected to be sworn and testify. His testimony did not vary substantially from that of the other two accused. He admitted one act of intercourse with Frau Aldag but denied that he had intercourse with Frau Gassel (R95,98,100).

5. In reviewing this record of trial we examine it to see whether there is substantial evidence to support the findings, with the limitation that the credibility of the witnesses and the weight to be given to their testimony are for the court (CM ETO 895, Davis et al). In this case where more than one act of intercourse is shown with the same prosecutrix we assume that the prosecution relies on the first (CM ETO 14564, Anthony and Arnold, and authorities therein cited). As to accused Johnson, the evidence meets the above test. He conceded his presence in the house on the night in question and admitted having intercourse with Frau Aldag. She testified that he beat her and that he had intercourse with her while his companion pointed a gun at her. Frau Gassel told a somewhat similar story. The record is legally sufficient to sustain the findings of guilty of both specifications of Charge II, as to Johnson (CM ETO 14596, Bradford et al; CM ETO 14564, Anthony and Arnold; CM ETO 12180, Everett).

The Smith episode with Frau Gassell followed a similar pattern. She testified that he had intercourse with her while Coleman, who had a pistol in his hand, forced her to commit sodomy. Although Smith denied having intercourse with her, the court did not believe him. The record is legally sufficient to sustain the findings of guilty of Specification 2 of Charge II, as to Smith.

A more difficult question is presented by the alleged Smith and Minor rapes of Frau Aldag. Neither of them was armed. Neither of them threatened her. Both of them permitted her to rest before they engaged in intercourse with her. She testified that she tried to protect herself against Smith but could not; that he kept insisting and she was "scared". So far as Minor is concerned, she stated that she used her hands against him but she was too weak and that he pushed her down on the couch. She admitted that she smoked a cigarette with one of them and Minor claimed it was he. On the other hand he admitted that she was "scared". The court in view of all the surrounding circumstances was fully warranted in finding that she did not consent to these acts of intercourse. The question is whether that lack of consent was brought home to these accused. If it was not, then the requisite mens rea would be lacking (CM ETO 10446; Ward and Sharer). Smith had sexual intercourse with her first and Minor followed him. Both of these accused were conscious of the atmosphere of terror and violence caused by Coleman and Johnson in that home. They knew they had entered it relatively late at night. They knew that Coleman had already pumped 15 bullets into it in a fit of rage. Just before both Smith and Minor had sexual intercourse with her, Frau Aldag had been beaten and raped by Johnson. She had been threatened with a pistol. Minor conceded that she was "scared". The indications of the dreadful experience this 49-year-old woman had just been through, indications not only physical but mental, must have been apparent to them. On all the evidence the court could conclude that accused, as reasonable men knowing what they admittedly knew or could infer, should have realized, and did in fact realize, that she did not consent to their having sexual intercourse with her (CM ETO 11779, Bohn and Bourbon)

6. The charge sheets show that accused Johnson is 24 years and one month of age and was inducted 27 February 1942 at Fort Bragg, North Carolina; that Smith is 38 years and four months of age and was inducted on 14 January 1944 at Fort Bragg, North Carolina; and that accused Minor is 19 years and nine months of age and was inducted 21 October 1943 at Richmond, Virginia. Each was inducted to serve for the duration of the war plus six months. None of accused had prior service.

7. The court was legally constituted and had jurisdiction of the persons and 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.

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

Wm. T. Sumrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 1

30 OCT 1945

CM ETO 16922

U N I T E D S T A T E S	XX CORPS
v.	Trial by GCM, convened at Starnberg, Bavaria, Germany, 18 July 1945.
Private First Class ARMAND B. Di MAMBRO (36565912), and Private LEONARD J. PTAK (36565803), both of Battery C, 257th Field Artillery Battalion	Sentence as to each accused: Di Mambro, forfeiture of $30 per month for six months and reduction to the grade of private; Ptak, Dishonorable discharge (suspended), total forfeitures (forfeitures in excess of $33 per month for six months suspended) and confinement at hard labor for six months. XX Corps Stockade, Starnberg, Bavaria, Germany.

OPINION by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

1. The record of trial in the case of the accused Ptak (who was tried with Private First Class ARMAND B. Di MAMBRO (36565912) of the same organization) has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the sentence. The record of trial as to accused Ptak 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 Ptak was tried upon the following Charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Private Leonard J. Ptak did, at Mission House, Reimlingen, Landkries, Nordlingen, Germany, on or about 28 June 1945, feloniously take, steal and carry away a flute, value about $8.00, the property of Karl Nieberler.

He pleaded not guilty, and was found not guilty of Specifications 1 and 2, guilty of Specification 3, and guilty of the Charge. Evidence was introduced of two previous convictions by summary court, one for absence without leave for 16½ hours and for breach of restriction in violation of Articles of War 61 and 96, and one for failure to obey the lawful order of a non-commissioned officer 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 six months. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge and forfeiture of pay in excess of $33 per month for six months. Pending further orders he designated the XX Corps Stockade, Starnberg, Bavaria, Germany, as the place of confinement. The proceedings were published in General Court-Martial Order Number 81, Headquarters XX Corps, APO 340, U. S. Army, 8 September 1945.

3. The evidence in this case shows that a flute, the property of Karl Nieberler, was missing under circumstances which would warrant a finding that it was stolen. Captain Lynn R. Leonard, accused's commanding officer, testified:

"A. I asked the First Sergeant to get Ptak and to have him report to me when he came in off patrol. Then Ptak came in and I asked him where he had got the flute that he sent home the day previous.

Q. What did he say?

A. He just said that he picked it up"(R16).

He then detailed how a vain search was made of Ptak's room for the flute. The officer testified further as follows:

"Q. Did you put any further questions to the accused Ptak, concerning the flute?

DC. I object to that question as being too general.

Law Member: The question as asked is proper and the objection is overruled.

A. When the brother identified the clarinet, I asked him if he had got the flute in the room upstairs

and he said 'yes'. Then, I asked him how he had gotten into the room and he said that he had picked the lock.
Q. Did he say when he had been in the room?
A. No, he didn't say.
Q. Did you ask him where the flute was at that time?
A. Yes, and he said that he had mailed it to his brother in Detroit.
Q. Did you see a flute at any time?
A. No, I didn't" (R18).

Thus the only evidence to establish that accused was the thief is his own confession made to his superior officer without a showing that he was first warned of his rights under Article of War 24. The Manual provides that:

> "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. Thus, where all the available evidence as to the circumstances merely shows that the accused, a private, confessed to a friend, another private, the confession may be regarded as voluntary.
>
> "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).

No such inquiry was made by the court and there is no other evidence to indicate that the statement was voluntarily made. In these circumstances we have held that the confession should not have been admitted in evidence (CM ETO 6301, Kirby). The decisions of the Board of Review in Washington are to the same effect (CM 220604, Antrobus, 13 B.R.11(1942); CM 252772, Gentry Jr., 34 B.R.181 (1944); CM 254423, Gonzalez, 35 B.R. 243 (1944)). The rationale of the rule was well stated in the case last cited (p.248):

> "The accused had not been informed of his rights under the 24th Article of War and he had not been advised that he need not make a statement if he did not wish to do so. In the absence of such advice it may reasonably be assumed that accused would feel under compulsion to answer the questions asked of him by the officer who had him in custody, and the absence of threats, promises or duress was not sufficient to establish the voluntary character of the statements. Under the circumstances the confession was incompetent and should not have been received in evidence".

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Similar considerations obtain where the statement was made to accused's commanding officer, even though accused was not in custody at the time. Since there was no other evidence to connect accused with the crime, the conviction must fall (CM ETO 1201, Pheil). The record is legally insufficient to support the findings and the sentence as to accused Ptak.

4. The charge sheet shows that accused is 22 years of age and was inducted on 1 February 1943, at Detroit, Michigan to serve for the duration of the war and six months. He had no prior service.

5. The court was duly constituted and had jurisdiction of the person and offenses. For the foregoing reasons, the Board of Review is of the opinion that the record of trial as to accused Ptak is legally insufficient to support the findings of guilty and the sentence.

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

[signature] Judge Advocate

(275)

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 30 OCT 1945 TO: Commanding General, European Theater (Main), United States Forces, APO 757, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the act of 1 August 1942 (56 Stat. 732; 10 USC 1522) is the record of trial in the case of Private LEONARD J. PTAK (36565803), Battery C, 257th Field Artillery Battalion.

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,

(As to accused Ptak, Findings and sentence vacated. GCMO 575, USFET, 13 Nov 1945).

RESTRICTED

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

BOARD OF REVIEW NO. 1

6 OCT 1945

CM ETO 16936

U N I T E D S T A T E S	) 90TH INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at Nabburg, Germany,
	) 17 August 1945. Sentence: Dishonorable
Private RUDOLPH G. KEMPAIN (31327447), Company F, 358th Infantry	) discharge (suspended), total forfeitures
	) and confinement at hard labor for 5 years.
	) Delta Disciplinary Training Center, Les
	) Milles, Bouches du Rhone, France.

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

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

2. Errors reciting the year 1945 in two of the prosecution's exhibits (A and B) were rendered obviously clerical with 1944 clearly intended, by the place and by the date of the entry as 1944 in the case of Prosecution's Exhibit A, and by the citation in Prosecution's Exhibit C of Prosecution's Exhibit B as a 1944 order. American troops have occupied the city of Metz in December in only the year 1944 since World War I. Furthermore the parties apparently attempted to correct the error by stipulation (R9). The delay in the preparation of the records of Prosecution's Exhibits C and D did not affect their competency (CM ETO 12951, Quintus; CM ETO 14362, Campise). Since the absence without leave was shown by presumption and Prosecution's Exhibit D to have continued at least until 6 June 1945, the prosecution's judicial admission of prior termination was appropriate as beneficial to the accused (MCM, 1928, par.130a, p.143; CM 199641, Davis, 4 B.R.145 (1932)).

Wm. J. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

RESTRICTED

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

BOARD OF REVIEW NO. 1

6 OCT 1945

CM ETO 16940

U N I T E D S T A T E S	)	IX TROOP CARRIER COMMAND
	)	
v.	)	Trial by GCM, convened at Paris,
	)	France, 28 May 1945. Sentence:
First Lieutenant GERALD D.	)	Dismissal, total forfeitures and
McCOY (0745843), 75th	)	confinement at hard labor for three
Troop Carrier Squadron,	)	years. Eastern Branch, United
435th Troop Carrier Group	)	States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Gerald D. McCoy, 75th Troop Carrier Squadron, 435th Troop Carrier Group, did, at USAAF Station A-48, on or about 23 March 1945, behave in an insubordinate manner by stating, "I can't do it," or words to that effect, in answer to a lawful command given him by Major Lewis A. Curtis, 75th Troop Carrier Squadron, 435th Troop Carrier Group, his superior officer, to fly on 24 March 1945 as pilot of a C-47Btype aircraft on a combat mission.

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

3. The undisputed evidence of the prosecution showed substantially the following: On the evening of 21 March 1945, accused went to the room of his squadron commander, and told him "very frankly and straight-forward" that he was afraid to fly a combat mission. A three-hour discussion did not in any way alter this feeling (R16). The squadron operations officer testified that on 22 March 1945 he made up an operations order making crew assignment for a mission to be flown 24 March 1945, of which one copy was posted on the Flying Schedule Bulletin Board (R13-14). The 24 March flight was known as the Wesel mission (R28). On the morning of 23 March the squadron commander, having caused two other officers to be present (he was participating in the Wesel mission and wanted witnesses to be available in case he did not himself return (R17)), ordered accused to report to him. Thereupon, the squadron commander testified:

> "I asked Lt. McCoy [accused] if he had straightened out and he said that he hadn't, and I then explained to him that I would read him the Articles of War 75 and 64, and then I would repeat an order that was posted on the bulletin board relative to operations. And I then ordered him to fly on a combat mission to take place the following day in an aircraft, the last three numbers of which are 401. I asked him if he was able to do so and Lt. McCoy said 'No, I can't do it'. I asked him again if he would act as pilot on this aircraft and he said, 'I can't do it'" (R6-7).

Witness then placed accused under arrest and ordered that he be removed from flying status. Accused did not participate in the mission (R7). The testimony with reference to this interview was corroborated by the two other officers present (R9-10,11-12). During the interview accused was courteous and respectful (R11). He had previously participated in five or six combat missions (R19).

The squadron surgeon testified that he examined accused on 3 April 1945 and found him "physically qualified for flying and also mentally capable of flying". His written report of the examination, concluding that his "estimated adaptibility for military aeronautics" was satisfactory and that he was "physically qualified for flying duty", was received in evidence (R25; Pros.Ex.B).

4. Accused, having been advised of his rights, elected to remain silent and no evidence was presented on his behalf (R22-23).

5. The evidence leaves no doubt that accused at the time and place alleged behaved in an insubordinate manner toward his squadron commander when lawfully ordered by the latter to fly as pilot on a combat mission as alleged, by persistently stating "I can't do it" and refusing to obey the command. The findings of guilty are supported by competent substantial evidence (CM ETO 1366, English; CM ETO 1920, Horton; CM ETO 2212, Coldiron; Cf: CM ETO 2469, Tibi; CM ETO 5167, Caparatta; Military Justice Cir. No. 8, Branch Office of The Judge Advocate General with European Theater of Operations, par. IV 1).

6. The charge sheet shows that accused is 28 years of age and enlisted in May 1942 at Morgantown, West Virginia, to serve for the duration of the war plus six months. Date of commission is not stated. He had no prior service.

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

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

Wm. T. Sarson Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Cecil Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 6 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant GERALD D. McCOY (0745843), 75th Troop Carrier Squadron, 435th Troop Carrier Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16940. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16940).

IN 9 OCT 1945 AG M&R USFET

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

(Sentence ordered executed. GCMO 519, USFET, 30 Oct 1945).

RESTRICTED

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

BOARD OF REVIEW NO. 2

3 OCT 1945

CM ETO 16955

U N I T E D S T A T E S	)	83RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Bad Harzburg, Germany, 24 May
First Lieutenant GEORGE A. BROWNE (O-1308593), Company K, 330th Infantry	)	1945. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that First Lieutenant GEORGE A. BROWNE, Company K, 330th Infantry, was, at or near Ilsenburg, Germany, on or about 17 April 1945, found drunk while on duty as Company Commander, Company K, 330th Infantry.

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 conviction was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 83rd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence, "though wholly inadequate punishment for an officer guilty of such a grave offense", and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that the accused, on 17 April 1945, was the company commander of Company "K", 330th Infantry located at Ilsenberg, Germany (R7,14). About 8:30 am, in accordance with instructions, he ordered his company to get ready to move to nearby Plessenburg at 10:00 am (R7). When he gave the order and as he waited for its execution, he sat at his desk at his command post and consumed three-quarters of a bottle of champagne (R8). By ten o'clock his eyes became "hazy". His head drooped and it required some effort on his part to raise his head. He was "well on the way to becoming drunk" (R13). At one o'clock, when he left, he staggered and was unsteady on his feet (R9-10,13,15-16). Although the company moved on to Plassenburg the accused returned to the house where he had spent the morning in Ilsenburg, but from which everything had been removed except the champagne (R25). He remained there until five o'clock drinking champagne (R11,17). In the opinion of witnesses who observed the accused at various times during that day he was drunk (R12,19,21,27,30). Accused then rode to Plassenburg in a jeep. He had to be held in the jeep so as to prevent him from falling out (R19). The jeep conveyed him to a road block beyond Plassenburg in order to reach his company because it had moved again and was in action at the front with the "jerries". There the accused was ordered to report to his battalion commander. When the battalion commander observed his condition about 6:00 pm he told the accused that he was drunk and relieved him of his command (R30). Until thus relieved accused was on a duty status as company commander (R31).

4. The rights of the accused as a witness having been explained to him, he elected to remain silent (R31).

5. Article of War 85 provides that:

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

The prosecution's evidence clearly, and without contradiction, established that the accused, an officer, was found drunk on duty in time of war. The findings of guilty are supported by substantial evidence and his conviction should not be disturbed (CM ETO 9423, Carr; CM ETO 12924, Calvo).

6. The charge sheet shows that accused is 31 years of age. He was commissioned Second Lieutenant 20 January 1943 and promoted to First Lieutenant on 29 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. Dismissal of an officer is mandatory in time of war upon conviction of a violation of Article of War 85.

Earle Hepburn Judge Advocate

Ronald Judge Advocate

John J. Collins, Jr. Judge Advocate

(286)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 3 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant GEORGE A. BROWNE (O-1308593), Company K, 330th 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 16955. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16955).

IN 6 OCT 1945 AG M&R USFET

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

(Sentence ordered executed. GCMO 485, USFET, 13 Oct 1945).

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

BOARD OF REVIEW NO. 1

27 OCT 1945

CM ETO 16970

U N I T E D S T A T E S	) XIII CORPS
	)
v.	) Trial by GCM, convened at APO 463,
	) U. S. Army, 4 June 1945. Sentence as
Privates JOSEPH D. F. VEILLEUX (11029877), FRANK LaROSE (39917251) and EDGAR E. BELTZ (13083971), all of Headquarters Company, XIII Corps	) 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
STEVENS, CARROLL and O'HARA, Judge Advocates

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

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

VEILLEUX

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

Specification 1: In that Private Joseph D. F. Veilleux, Headquarters Company, XIII Corps, did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Emma Nottrott.

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

Specification 1: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Herr Adolph Nottrott, with intent to commit felonies, viz, rape, larceny, and assault therein.

Specification 2: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, with intent to do him bodily harm, commit an assault upon Herr Edward Engel, by willfully and feloniously striking the said Herr Edward Engel on the head with a pistol.

Specification 3: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 30 April 1945, in the nightime, feloniously and burglariously break and enter the dwelling house of Doctor Kurt Zepernick, with intent to commit felonies, viz, rape, larceny, sodomy and assault therein.

Specification 4: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 30 April 1945, with intent to commit a felony, viz, sodomy, commit an assault upon Fraulein Ruth Zepernick, by willfully and feloniously, forcing her mouth against his penis and attempting to have carnal connection per os with the said Fraulein Ruth Zepernick.

Specification 5: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 30 April 1945, with intent to do bodily harm, commit an assault upon Doctor Kurt Zepernick, by willfully and feloniously striking and kicking the said Doctor Kurt Zepernick in the body with his hands and feet.

Specification 6: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 6 May 1945, unlawfully enter the dwelling house of Frau Gerda Steininger, with intent to commit a criminal offense, to wit, sodomy therein.

Specification 7: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 6 May 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Frau Gerda Steininger.

LaROSE

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

Specification: In that Private Frank LaRose, Headquarters Company, XIII Corps, did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Emma Nottrott.

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

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

Specification 1: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Herr Adolph Nottrott, with intent to commit felonies, viz, Rape, larceny, and assault therein.

Specification 2: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, with intent to do him bodily harm commit an assault upon Herr Adolph Nottrott, by willfully and feloniously striking the said Herr Adolph Nottrott in the face with his hands and a pistol.

Specification 3: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 30 April 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Doctor Kurt Zepernick, with intent to commit felonies, viz, rape, larceny, sodomy, and assault therein.

Specification 4: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 30 April 1945, with intent to do him bodily harm commit an assault upon Doctor Kurt Zepernick, by willfully and feloniously striking the said Doctor Kurt Zepernick in the face with his fists and a pistol.

Specification 5: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 30 April 1945, with intent to commit a felony, viz, rape, commit an assault upon Fraulein Ruth Zepernick, by willfully and feloniously, at the point of a pistol forcing her to undress, lay down on a bed, and getting on top of her and attempting to have sexual intercourse with her, the said Fraulein Ruth Zepernick.

Specification 6: In that * * * did, on or about 6 May 1945, unlawfully enter the dwelling of Frau Gerda Steininger, with intent to commit criminal offenses, to-wit, rape and larceny therein.

Specification 7: (Finding of guilty disapproved by Reviewing Authority).

Specification 8: (Finding of guilty disapproved by Reviewing Authority).

Specification 9: (Finding of guilty disapproved by Reviewing authority).

BELTZ

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

Specification 1: In that Private Edgar E. Beltz, Headquarters Company, XIII Corps, did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 6 May 1945, unlawfully enter the dwelling house of Frau Gerda Steininger, with intent to commit criminal offenses, to-wit, rape and larceny therein.

Specification 2: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, in the nighttime feloniously and burglariously break and enter the dwelling house of Herr Adolph Nottrott, with intent to commit felonies, viz, rape and assault therein.

Specification 3: In that * * * did, at Gifhorn, Kreis Gifhorn, Hanover, Germany, on or about 1 May 1945, with intent to do him bodily harm, commit an assault upon Herr Adolf Nottrott, by willfully and feloniously striking the said Herr Adolf Nottrott, on the face and on the head with a pistol.

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

Specification 1: In that * * * did, at Gifhorn, Kries Gifhorn, Hanover, Germany, on or about 1 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Emma Nottrott.

Each accused pleaded not guilty and in the case of accused Veilleux and La Rose all, and in the case of accused Beltz two-thirds, 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. Evidence was introduced against Veilleux of one previous conviction by special court-martial for fraternization with German civilians in violation of Article of War 96. No evidence of previous convictions was introduced against LaRose. Evidence was introduced against Beltz of two previous convictions, one by summary court for failing to obey the order of a military policeman to leave town at curfew and one by special court-martial for fraternization with German civilians, both in violation of Article of War 96. All of the members of the court present at the time the votes were taken concurring, Veilleux and LaRose were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. Three-quarters of the members of the court present at the time the vote was taken concurring, Beltz was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority, the Commanding General, XIII Corps, in the case of Veilleux approved only so much of the findings of guilty of Specification 1 of Charge II and Specification 3 of Charge II as found accused guilty at the times and places alleged, and in the nighttime, of feloniously and burglariously breaking and entering the dwelling houses of Herr Adolph Nottrott and Doctor Kurt Zepernick, respectively,

with intent to commit the felonies of rape and larceny in the house of Nottrott and with intent to commit the felonies of rape and sodomy in the house of Zepernick. He approved the findings in all other respects. In the case of LaRosehe disapproved the findings of guilty of Specification 2 of Charge I and Specifications 7,8, and 9 of Charge II, approved only so much of the findings of guilty of Specification 1 of Charge II as found accused guilty, at the time and place alleged, and in the nighttime, of feloniously and burglariously breaking and entering the dwelling house of Herr Adolph Nottrott, with intent to commit the felonies of rape and larceny therein, and approved only so much of the findings of guilty of Specification 3 of Charge II as found accused guilty, at the time and place alleged, and in the nighttime, of feloniously and burglariously entering the dwelling house of Doctor Kurt Zepernick with intent to commit the felony of rape therein. He approved the findings in all other respects. In the case of both Veilleux and LaRose he approved only so much of the sentences as provided that they be hanged by the neck until dead, but because of special circumstances in the case, recommended that the sentences be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life, and forwarded the record of trial for action until Article of War 48. In the case of Beltz he approved only so much of the findings of guilty of Specification 1 of Charge I as found the accused guilty, at the time and place alleged, of unlawfully entering the dwelling house of Frau Gerda Steininger with intent to commit a criminal offense, to wit, larceny, therein and approved only so much of the findings of guilty of Specification 2 of Charge I as found the accused guilty, at the time and place alleged and in the nighttime, of feloniously and burglariously breaking and entering the dwelling house of Herr Adolph Nottrott with intent to commit the felony of rape therein. He approved the findings in all other respects, and the sentence, designated the "U.S." Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½. The confirming authority, the Commanding General, United States Forces, European Theater, in the case of Veilleux and LaRose, confirmed the sentences, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted the sentences 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 each accused's natural life, designated the "U.S." Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

3. The prosecution adduced the following evidence:

a. The incident in the Zepernick home.

About 2230 hours on 30 April 1945 accused, Veilleux and LaRose knocked at the door of the home of Dr. Kurt Zepernick in Gifhorn, Germany. When the door was not opened they triedto force a window by using an axe and a bench. Not succeeding immediately, they again tried to open the door

and eventually fired three shots through it. Finally, they managed to open the window and threw into the house burning paper which started a fire and thereby forced the occupants to open the door (R16,17). Zepernick and his daughter, Ruth, 16 years of age, were compelled to go to the kitchen where the former was beaten over the head with a pistol and punched and kicked by both accused (R17,18,20,30). La Rose at gun point forced Fraulein Zepernick to accompany him into the bedroom and disrobe. He tried without success to have sexual intercourse with her. She resisted by pushing him away with herhands (R23). After about 15 minutes LaRose and Veilleux changed places. Veilleux who was armed pulled her head down with his hands and made her take his penis in her mouth (R24). Upon expiration of about 15 minutes the soldiers again changed places and LaRose again attempted to have sexual intercourse with her but failed to effect penetration. Once when she screamed he choked her (R25). Both accused departed about 0245 hours (1May). When they left, Zepernick was bleeding, semi-conscious and he had lost a tooth (R19,26).

In voluntary extra-judicial statements both Veilleux and LaRose admitted trying to break into the house, and that they threw lighted paper through a broken window, and beat Zepernick. Veilleux admitted an attempt to commit sodomy with a girl who was present in the house and La Rose admitted that on two occasions during the evening he tried to have sexual intercourse with her (R53;Pros.Exs 4 and 5).

b. Incidents in the Nottrott home.

On 1 May 1945 about 2300 hours, the three accused sought entrance to the home of Adolf Nottrott. They turned the handle of the door, announced they were Americans, and said "Open, Open". When they were not admitted promptly they "opened the little transom already in the door" and smashed a window. The door was then opened by Edward Engel, an occupant of the house (R40,41). Accused were armed with pistols (R39). The members of the household, Nottrott, his wife Emma, his daughter, and Engel and his wife, were herded into the kitchen. Veilleux struck Nottrott with his pistol in the right side of his body (R36). At gun point accused relieved Engel and Nottrott of their watches. Beltz, Veilleux, and LaRose then hit Nottrott with their fists and Beltz and Veilleux also struck him with their pistols so severely that he was rendered unconscious (R36-38,42). Engel was also beaten with a pistol about the face and head by Veilleux (R42,43). LaRose with pistol in hand dragged Frau Nottrott into an adjoining bedroom and had sexual intercourse with her. When she tried to leave the room, he threw her back on the bed (R29,30). When he was finished he called Veilleux into the bed room and after the latter had threatened her with a pistol he had sexual intercourse with her (R31). A third man whom she "imagine /d/"to be Beltz had sexual intercouse with her. She defended herself "a little bit" against him but it "didn't help" (R32,33). She did not consent to any of these acts of intercourse (R31,32). Accused left the house about 0030 hours (R43).

LaRose in a voluntary extra-judicial statement admitted that he entered a German home with Veilleux and Beltz on 1 May 1945 and struck two German civilians, one with his pistol and the other with his fists. He admitted that he engaged in sexual relations with a woman in this house (R46;Pros.Ex.1).

Veilleux in his voluntary extra-judicial statement admitted that he entered a German home with Beltz and LaRose "after we /tried/ to force our way in". He admitted that he hit a German with his fist and had sexual relations with a woman in the house. He injured his hand when he hit the German (R53;Pros.Ex.2).

Beltz in his voluntary extra-judicial statement admitted that he entered a German home on 1 May 1945 and hit one of the Germans with his fist several times. He admitted sexual intercouse with a woman while he was in the house (R53;Pros.Ex.3).

c. Incidents in the Steininger home.

Sometime between 2100 and 2200 hours on 6 May 1945 the three accused and a Russian after knocking on the door, were admitted into the house of Frau Elizabeth Lambrecht in Gifhorn, Germany (R54,55). Present in the house were Frau Gerda Steininger and her daughter, Herr Schroder, Frau Lambrecht and the two Lambrecht children (R65). The Russian entered the house ahead of accused, took a revolver, and banged it down on the table (R63). When LaRose entered he went over to Herr Schroder, grabbed his hand, took his watch, and then removed a watch from the wrist of the daughter. All accused were armed with weapons (R55,63). After they looked around the room and at the women, LaRose came to Frau Steininger and made a beckoning motion with his hand toward the door. He took her watch from her wrist, they went outside, and he pointed to her to lie down. She testified that she did not want to lie down but she "had to" (R56), and that

> "I didn't do anything, any resisting hardly, because I survived this war, all the bombs and shells and I just raised a little and that is about all" (R57).

They had sexual intercourse, but she "tried to talk him out of it several times and motioned to go in the house". He had a revolver which he laid alongside them. After the intercouse they entered the house (R57). All accused threatened the occupants of the house with pistols (R66). Veilleux made advances toward Frau Steininger's daughter but Beltz protected her. Veilleux then "requested" the mother to come outside with him. She acceded to his demands. In the rear of the house he forced her to take his penis in her mouth (R59).

LaRose in a voluntary extra-judicial statement admitted he entered a German home on 6 May 1945. He admitted that he and a female member of the

household had sexual relations outside the house. He also admitted he took a wrist watch from her (R53;Pros.Ex.6).

Veilleux similarly admitted his prsence in the German home and the fact that he took a wrist watch from a woman. He admitted that he committed sodomy witha woman whom LaRose had previously taken out of the house (R53;Pros.Ex.7).

Beltz also admitted that he was present in a German home on 6 May 1945 with Veilleux and LaRose (Pros.Ex.8;R53).

4. Accused, after being advised of their rights, elected to remain silent (R68) and no evidence was introduced on their behalf.

5. a.Specifications relating to rape, sodomy, and assaults with intent to commit rape and sodomy.

Accused Veilleux was found guilty of rape of Frau Nottrott (Specification of Charge I), of sodomy with Frau Steininger (Specification 7 of Charge II) and of assault with intent to commit sodomy on Fraulein Zepernick (Specification 4 of Charge II). Accused LaRose was found guilty of rape of Frau Nottrott (Specification 1 of Charge I) and of assault with intent to rape Fraulein Zepernick (Specification 5 of Charge II). Beltz was found guilty of rape of Frau Nottrott (the Specification of Charge II).

1. Dealing with the Nottrott rape first, the evidence showed that the three accused, all of whom were armed, were admitted to the Nottrott home about 2230 hours. From the beginning they demonstrated that they were not on a peaceful mission. Impatient at the occupants' delay in opening the door, they smashed a window. In the presence of the other two accused, LaRose at gun point dragged Frau Nottrott into a bedroom and had sexual intercourse with her. Once when she tried to escape he threw her back on the bed. Veilleux then had sexual intercourse with her, after threatening her with a pistol. Beltz followed Veilleux in the execution of the sexual act. Although the woman's identification of Beltz was weak, he admitted he engaged in sexual intercourse with a woman in the house that night. The court properly admitted his statement as the corpus delicti was otherwise established (CM ETO 14040, McCreary). Similarly, the statements of the other two accused were properly admitted. With intercourse conceded, the only question is one of consent. The prosecutrix testified that she consented to none of the acts of intercourse. Insofar as Veilleux and LaRose are concerned, there is no doubt that they were aware of this. As to Beltz, she stated that she defended herself "a little bit". However, he was present when LaRose dragged her into the room and he participated fully in creating an atmosphere of terror and violence in the household. He could hardly have been unaware that vigorous resistance was not likely to be forthcoming. We conclude from all the circumstances of this case that he was sufficiently aware of the prosecutrix's lack of consent. Moreover, the court was authorized to find that he was engaged in a joint enterprise with LaRose and Veilleux. It is not necessary to recite all the evidence again. It is sufficient to state that the court was at liberty to find that Beltz, by

subduing the male Germans of the household, aided and abetted LaRose and Veilleux in the commission of rape. With the abolition of the distinction between principals and aiders and abettors by Federal Statute (sec.332, Federal Criminal Code, 18 USCA 550) conviction on this ground was proper even though he was charged as a principal (CM ETO 5068, Rape and Holthus). The record is legally sufficient to sustain the findings of guilty of the Specification of Charge I as to Veilleux, Specification 1 of Charge I as to LaRose, and the Specification of Charge II as to Beltz (CM ETO 11376, Longie; CM ETO 11608, Hutchinson; CM ETO 14338, Reed).

2. Veilleux was found guilty of sodomy with Frau Steininger. She testified to, and he admitted, the commission of the crime as alleged. Since sodomy is a crime regardless of the consent of the victim, that point need not detain us (MCM, 1928, par.149k, p.177). The record is legally sufficient to sustain the findings of guilty of Specification 7 of Charge II, as to accused Veilleux.

3. Veilleux was also found guilty of assault with intent to commit a felony, viz., sodomy, on Fraulein Zepernick. An assault with an intent to commit a felony is an assault made with the specific intent to murder, rape or commit sodomy, or other felony (MCM, 1928, par. 149,p.177). Whether or not there was consent to this act is important because with consent there could be no assault (1 Wharton's Criminal Law (12 Ed. 1932) sec. 835, p.1122). Fraulein Zepernick, 16 years of age, testified that accused attempted to commit sodomy by making her takehis penis in her mouth. In fact, she testified that penetration was effected. Veilleux in his extra-judicial statement, which wasproperly admitted in evidence (CM ETO 14040, McCreary), acknowledgedthat he attempted to commit sodomy with a woman in a German home on 30 April 1945. The court could properly find that this woman was Fraulein Zepernick. The evidence showed that Veilleux and LaRose forced the occupants of the Zepernick house to admit them by setting fire to furniture in one of the rooms, after they failed to effectuate entry by force and that they brutally assaulted the prosecutrix's father. It further showed that Veilleux was present when LaRose forced the prosecutrix at gun point to accompany him to an adjoining room. After LaRose had finished, Veilleux, still armed, went into the room and by grasping Fraulein Zepernick's head made her take his penis in her mouth. We think that this constitutes substantial evidence from which the court could conclude that she did not consent to his actions and that, accordingly, he was guilty as charged. The record is legally sufficient to sustain the findings of guilty of Specification 4 of Charge II, as to accused Veilleux (CM 231610, Montoya, 18 BR 249 (1943)).

4. LaRose was found guilty of assault with intent to commit a felony, viz, rape on Fraulein Zepernick. She testified that he made two attempts to have sexual intercourse with her. In an extra-judicial statement which was properly admitted in evidence (CM ETO 14040, McCreary) LaRose corroborated her testimony. For the purposes of this case we assume

the prosecution relied on the first of these acts (CM ETO 7078, Arthur L. Jones; CM ETO 14564, Anthony et al). We need not detail again the evidence as to accused's conduct in the Zepernick home that night. In our opinion there is substantial evidence to support the findings of the court. The record is legally sufficient to sustain the findings of guilty of Specification 5 of Charge II as to LaRose (CM ETO 492, Lewis; CM ETO 2500, Bush; CM ETO 10728, Keenan).

b. The assaults with intent to do bodily harm.

Veilleux was found guilty of such an assault on Engel by striking him on the head with a pistol (Specification 2 of Charge II) and on Zepernick by striking him and kicking him in the body with his hands and feet (Specification 5 of Charge II). LaRose was convicted of such an assault on Nottrott by striking him in the face with his hands and a pistol (Specification 2 of Charge II), and on Zepernick by striking him on the fact with his fists and a pistol (Specification 4 of Charge II). Beltz was found guilty of such an assault on Nottrott by striking him on the face and head with a pistol (Specification 3 of Charge I).

An assault with intent to do bodily harm is an assault aggravated by the specific intent to do bodily harm by means of the force employed (MCM, 1928, par.149n, p.180).

1. The evidence revealed that Veilleux struck Engel several times on the head and face with his pistol. In his extra-judicial statement which was properly admitted in evidence (CM ETO 14040, McCreary) accused conceded that he struck a German male with his fist in a German home on 1 May 1945. From the other evidence in the case, the court could conclude that this man was Engel. The intent to do bodily harm could be inferred from the weapon used and the repeated attacks on Engel. The record is legally sufficient to support the findings of guilty of Specification 2 of Charge II (CM ETO 3366, Kennedy).

2. With respect to Zepernick, the evidence showed that both Veilleux and LaRose beat Zepernick with their pistols and kicked and punched him. Both accused in their extra-judicial statements, admitted being in a German home on 30 April 1945. Veilleux admitted he hit a man in the house with his fists and a pistol. These statements were competent and the court could find that the man assaulted was Zepernick. The evidence further showed that the assailants knocked a tooth out and left him bleeding and semi-conscious. The record is legally sufficient to support the findings of guilty of Specification 5 of Charge II, as to Veilleux, and Specification 4 of Charge II, as to LaRose (CM ETO 4606, Geckler).

3. In the case of Nottrott the evidence showed that LaRose struck Nottrott with his fists and Beltz beat him with a pistol. The combined assaults rendered him unconscious. Both LaRose and Beltz in their extra-judicial statements admitted that they were present in a German home on 1 May 1945.

LaRose in his extra-judicial statement admitted he struck one German male with his fists and another with a pistol. Beltz admitted he hit one German male with his fists. The court could find that the man they beat was Nottrott. Although there were two German males in the house — Nottrott and Engel — the latter claimed to have been assaulted by Veilleux only. The extra-judicial statement was, accordingly, competent (CM ETO 14040, McCreary). The record is legally sufficient to support the finding of guilty of Specification 2 of Charge II, as to accused LaRose, and Specification 3 of Charge I, as to Beltz.

c. The burglaries and the housebreaking.

Veilleux and LaRose were found guilty, as approved, of burglarizing the Nottrott house with intent to commit rape and larceny therein (Specification 1 of Charge II, as to both) and Beltz wasfound guilty, as approved, of burglarizing the same house with intent to commit rape therein (Specification 2 of Charge I). Veilleux and LaRose were found guilty, as approved, of burglarizing the Zepernick home, Veilleux with intent to commit rape and sodomy therein (Specification 3 of Charge II) and LaRose with intent to commit rape therein (Specification 3 of Charge II). Veilleux, LaRose and Beltz were found guilty (as approved as to Beltz) of housebreaking in connection with the Steininger incident, Veilleux with intent to commit sodomy (Specification 6 of Charge II), LaRose with intent to commit rape and larceny (Specification 6 of Charge II) and Beltz with intent to commit larceny (Specification 1 of Charge I).

Burglary is breaking and entering in the night of another's dwelling house while occupied with intent to commit a felony therein (MCM, 1928, par. 149d, p. 168). There need not be an actual breaking.

> "There is a constructive breaking when the entry is gained * * * by intimidating the inmates through violence or threats into opening the door * * *(Ibid. p.169).

> "Where the owner, either from apprehension or force, or with the view more effectually to repel it, opens the door through which the robber enters, this is burglary"(2 Wharton's Criminal Law (12 Ed., 1932) sec. 986, p.1285).

The intent to commit a felony in the house may of course be inferred from all the facts. The fact that accused did commit a felony therein furnishes a strong inference that the entries were made with that intent (Wharton, supra, sec.1027, pp.1309,1310; CM ETO 78, Watts; CM ETO 3775, Moore, et al).

1. With respect to the Nottrott home the evidence reveals that the three accused sought entrance thereto about 2300 hours. They announced they were Americans, turned the handle on the door, opened a transom, and

broke a window. Although the door was opened by one of the occupants this was a sufficient demonstration of violence to form the basis of an inference that Engel opened the door for that reason. Under the authorities cited above, that is sufficient to sustain a finding of burglary, present the requisite intent. As we have said, the intent may be inferred from the commission of the crime subsequent to the entrance, at least in those circumstances where the commission of the crime is reasonably close in time to the entry. We have already discussed the rape of Frau Nottrott by these accused and we need not cover that ground again. Watches were stolen from both Engel and Nottrott. Only Veilleux and LaRose were charged with the specific intent to commit larceny. The identify of those who took the watches is not disclosed by the record, but it is manifest that all were principals and properly chargeable as such and that they entered the house with the joint purpose to commit larceny (CM ETO 3754, Gillenwaters, et al). The record is legally sufficient to support the findings of guilty of Specification 1 of Charge II as to both Veilleux and LaRose and Specification 2 of Charge I as to Beltz.

2. Veilleux and LaRose were charged with the Zepernick burglary. The evidence showed that accused effected their entrance into this home in the nighttime by a course of violent conduct finally culminating in an attempt to set fire to the house. Veilleux then committed sodomy and LaRose attempted to commit rape. While Veilleux did not commit rape the court could find that he aided and abetted LaRose in the latter's attempt to commit it in pursuance of a common design. The record is legally sufficient to sustain the findings of guilty of Specification 3 of Charge II as to both Veilleux and LaRose.

3. There remains the housebreaking charge. Housebreaking is the unlawful entrance into another's building with intent to commit a criminal offense therein (MCM, 1928, par. 149e, p.169). We need not decide whether there was a technical trespass here, or whether the occupants were terrorized into opening the door and admitting accused, because it seems settled that if an entry is made with the requisite criminal intent it is per se unlawful.

> "Where, however, the statute eliminates the common-law requirement of a breaking and punishes as burglary an unlawful entry with the requisite criminal intent, one entering an open business building with criminal intent may be convicted of burglary, * * *" (12 CJS, sec.12,p.676).
>
> "Under statutes changing the common-law definition of burglary so that the offense may be committed without a breaking and making an unlawful entry sufficient, it has been held that one entering a building with a larcenous intent

is guilty of burglary although the proprietor actually knew of his entry and permitted it for the purpose of entrapping him" (id.p.677).

The Manual in this discussion of "proof" under housebreaking does not separate the illegality of the entry from the unlawful intent and assumes that proof of the latter establishes the former (MCM, supra). Similarly the District of Columbia Code seems not to regard the unlawfulness of the entry as an element of the offense distinct from the intent (sec.22-1801).

Accordingly, if the entry was made with an intent to commit a criminal offense therein, the offense is complete. The evidence shows that Veilleux committed sodomy in this house and this furnishes a basis for inferring that he entered with that intent, as alleged (Wharton, supra, sec.1027, pp.1309,1310; CM ETO 3775, Moore, et al).

As to LaRose, he is charged with entering with intent to commit rape and larceny. The reviewing authority disapproved the finding that he was guilty of raping Frau Steininger (Specification 2 of Charge I) and also the finding that he was guilty of robbery in the Steininger house (Specifications 7,8, and 9 of Charge II), the latter necessarily carrying with it a disapproval of the lesser included offense of larceny. This action was not necessarily inconsistent with the approval of Specification 6 of Charge II alleging that LaRose unlawfully entered the house with intent to commit rape and larceny therein (Cf. Dig. Op. JAG 1912 - 40, sec. 451 (32), p.321). Even under a holding that after entering the house he did not actually commit rape because of the woman's consent to the act of sexual intercourse, there was yet sufficient evidence in the record from which the court could properly infer that, when he entered the house, he had the intent to engage in intercourse regardless of the consent of the woman involved. The entire course of conduct of LaRose and his companions in the house was one of violence committed against the occupants in utter disregard of their rights and wishes. Upon entering, LaRose seized the watches from the persons of two occupants, looked around the room at the women prsent, went over to Frau Steininger, and beckoned her to the door. He took her watch from her and, after they went outside, pointed for her to lie down. Laying his revolver on the ground beside them, he had sexual intercourse with her. All accused had weapons and threatened the occupants with them. Regardless of the propriety of a holding that Frau Steininger may have consented to the intercourse, certainly the court was within its province in finding nevertheless that LaRose had the intent to commit rape when he entered the house.

With respect to the intent to commit larceny -- with which Beltz is charged also -- the evidence shows that LaRose took watches from the occupants of the house and gave them to Beltz. Under principles already discussed, the court could find that LaRose entered with that intent. They

could also find that both accused were engaged in a joint enterprise and that Beltz, in receiving the stolen goods, wasmerely carrying out a design that was conceived before they entered. The record is legally sufficient to sustain the findings of guilty of Specification 6 of Charge II as to Veilleux, Specification 6 of Charge II as to LaRose, and Specification 1 of Charge I, as to Beltz.

6. The reviewing authority in his action with reference to Specification 3 of Charge II, as to LaRose, approved only so much of the findings of guilty as found him guilty of "feloniously and burglariously entering", thus omitting an element of the offense of burglary, to wit, breaking. A reading of the Staff Judge Advocate's Review reveals that this was an oversight. However, the word "burglariously" sufficiently indicates the omitted element (cf: CM ETO 3754, Gillenwater et al) at least in the situation involving the action of the reviewing authority where no question can arise about misleading accused in the preparation of his defense (CM ETO 11987, Johnston).

7. The charge sheets show that accused Veilleux is 25 years 11 months of age and enlisted on 24 December 1941, at Portland, Maine; that accused LaRose is 20 years eight months of age and was inducted on 1 July 1943 at Salt Lake City, Utah; and that accused Beltz is 22 years of age and enlisted on 22 August 1942 at Altoona, Pennsylvania. The enlistments and induction were to serve for the duration of the war plus six months. None of accused had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of 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 as approved and the sentences as commuted.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567), on conviction of sodomy by Article of War 42 and section 22-107, District of Columbia Code, (see CM ETO 3717, Farrington, and authorities therein cited), on conviction of burglary and housebreaking by Article of War 42 and section 22-1801 (6:55), District of Columbia Code, and on conviction of assault with intent to rape and assault with intent to commit sodomy by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

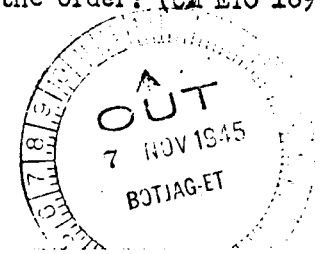
Judge Advocate

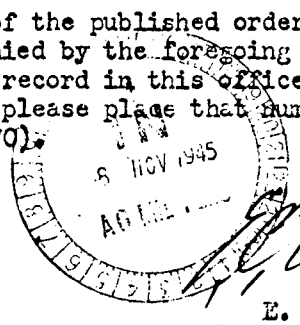
1st Ind.

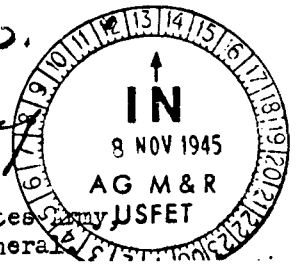
War Department, Branch Office of The Judge Advocate General with the European Theater. 6 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Privates JOSEPH D. F. VEILLEUX (11029877) and FRANK LaROSE (39917251), both of Headquarters Company, XIII Corps, 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 as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences as commuted.

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 16970. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16970).







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

(As to accused VEILLEUX, sentence as commuted ordered executed. GCMO 600, USFET, 27 Nov 1945).
(As to accused LaROSE, sentence as commuted ordered executed. GCMO 601, USFET, 27 Nov 1945).
(As to accused BELTZ, sentence ordered executed. GCMO 67, USFET, 8 March 1946).

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

BOARD OF REVIEW NO. 1 9 OCT 1945

CM ETO 16971.

U N I T E D S T A T E S	)	XIX CORPS
v.	)	
Private ALFRED L. PRINLEY (36698622), Service Battery, 959th Field Artillery Battalion	)	Trial by GCM, convened at Friedberg, Germany, 25,26 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Alfred L. Prinley, Service Battery, 959th Field Artillery Battalion, did, at Durrestrasse, Holzminden, Holzminden, Hanover, Germany, on or about 10 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Isle Mohlmann.

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

Specification: In that * * *, did, at Durrestrasze, Holzminden, Holzminden, Hanover, Germany, on or about 10 May 1945, unlawfully enter the dwelling of Miss

Isle Mohlmann, with intent to commit criminal offenses, to wit, Rape and wrongful sexual intercourse, therein.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both 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 shot to death by musketry. The reviewing authority, the Commanding General, XIX Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the finding of guilty of Charge II and its Specifications as involved a finding that accused, at the time and place alleged, wrongfully entered the dwelling of Isle Mohlmann in violation of Article of War 96, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement of hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence showed substantially the following: About 0030 hours on the date and at the place alleged, in the vicinity of his billet, accused, bearing a flashlight and a pistol similar to an American .45, without invitation and after attempting a forcible entry, was admitted into the home of the prosecutrix, 14 years of age (R37-38, 42,44-45, 57-58.) She and her family had previously retired, but arose when they heard accused (R38,58.) After learning the girl's age and directing her parents and the proprietor and his wife at pistol point to remain in the kitchen, accused placed his pistol in the girl's back and forced her to accompany him outside (R39,46,58,59). The Prosecutrix testified that they eventually went to a field, where he forced her to undress by threatening her with the pistol. He endeavoured to rape her, but failed because she defended herself (R60). Thence they proceeded to another field, where he laid his pistol on the ground nearby, struck her face, held her firmly, forced her to take his penis in her mouth, and twice penetrated her vagina with his penis. She resisted by rolling around and defending herself with her hands. Thereafter he gave her two pieces of chocolate and a pack of cigarettes. When she attempted to run away, he caught her, but a security patrol searchlight on the road enabled her to elude him by crossing before it. He parted the wire rods in a fence near his billet and slipped through, and she ran home. (R61-62).

Her testimony was corroborated by that of her mother to the effect that when the girl returned home at 0330 hours (R47), she was excited, pale and weeping bitterly, her hair in disorder and her clothing dirty and torn; that she threw the chocolate and cigarettes upon the floor, and kicked them; and that she complained she had been raped twice (R47-48), 56). She exclaimed "It is too terrible, Mother, I should like he had shot

me down; I can no more live" (R48). Her mother administered a douche (R43,62). Further corroboration appeared in stipulated medical testimony of Captain James W. Pick, Medical Corps, that on the morning following the alleged attack, the girl's hymen bore lacerations of recent origin (R6,34-36; stipulation attached to record), and in testimony as to the presence of Army shoe tracks and disturbance of the soil, discovered on the day following the affair, at places to which she testified accused took her en route to the fields (R21-23).

At the trial accused was definitely identified as the rapist by the victim (R57) and as the soldier who abducted her by each of her parents (R37, 41,44). Two days following the night of the alleged attack, the girl, and her mother, possibly with her aid, positively identified accused in mess line as the soldier involved (R10,18-19,30-31,52,63-64). Later that day he was again identified by the girl and each of her parents at a second line-up (R24-26,32,41,53,64-65). On the first occasion he protested lack of knowledge of the affair and that he had not left the post (R13,19), and on the second he protested his innocence and addressed the girl as a "little bitch" (R25).

His identity was further shown by the proximity of his room to the loose wire rods in the fence between which the prosecutrix testified he departed when she escaped (R23); the presence on his person of rings and a wrist watch similar to those worn by the culprit (R20,65); and the presence in his room of an American .45 caliber pistol and a flashlight, on each of which was dried mud (R21,68).

4. Testimony was adduced by the defense that on the night in question, accused was ill and in his quarters until 2300 hours, and that he was in his bed at reveille the next morning (R71-73).

After being warned of his rights, accused elected to be sworn as a witness (R74), and testified that on that evening he was ill in the stomach, announced the intention of getting sleep in preparation for the next day's work, retired and slept until he was awakened the next day for reveille (R74). At that time he was still ill, but instead of reporting to sick call, he went to work. The first time he ever saw the prosecutrix was when she pointed at him when he was in the chow line and said something in German. When she identified him, on the second occasion he

> "was beginning to realize what it was, and I was getting kinda sore and I told her she was a lying bitch" (R76).

He admitted ownership of the .45 caliber pistol (R77). Asked how far the girl's house was from his billet, he replied he did not know where she lived (R76).

5. Considerable hearsay testimony on the subject of accused's identity as the rapist was introduced by the prosecution. Witnesses who participated in the investigation of the case testified to what the prosecutrix told them in describing accused's physical characteristics, and the rings and wrist watch he were (R12-14,17,21) and in identifying a .45 caliber pistol as the type of weapon he carried (R13,17). There was also testimony that after she

identified accused in the mess line, she told her mother he was there (R31). In view of her testimony at the trial concerning these matters (R59,63-65) and of competent identifying evidence, however, the improper testimony could not have prejudiced accused's substantial rights (CM ETO 709, Lakas).

Testimony was also introduced that after identification of accused in the mess line by the prosecutrix, her mother said to him "You have raped my daughter" (R10,13), whereupon he stated "I don't know what you are talking about" (R13) and, to one of the officers present, "Why, Major, I haven't been off this post" (R19). At the second line-up when the mother stopped before him, he again protested his innocence, and that he had never seen her (R25). As the accusation, as distinct from the identification, was not part of the res gestae and was obviously not admissible as the basis of an admission by silence of accused, it was within no exception to the hearsay rule and was inadmissible (20 Am.Jur.,sec.570,p.484,and fn.16). Accused's denial in itself, however, rendered the error harmless, particularly in view of other evidence of identity including the mother's identification of him as the rapist at the trial.

It may be noted that the law member's cautioning instruction to the court to consider the testimony as to the giving of a description of accused out of his presence only as proving that definite descriptions were in fact given (R78) has little bearing upon the effect of the incompetent testimony. The instruction followed the reception of this inadmissible testimony and its meaning was somewhat cryptic. As indicated, however, no substantial rights of accused were prejudiced even in the absence of the caution.

6. The 14-year-old prosecutrix' testimony established that an American soldier had unlawful carnal knowledge of her by force and fear and without her consent. It was corroborated by that of her parents that the soldier threatened them and her with his pistol and forced her out of the house and that when she returned some three hours later in distraught condition, she made immediate complaint of the attack. Stipulated American medical testimony and evidence of a struggle in the soil with an American soldier further corroborated her. The prosecution's evidence of accused's identity as the rapist is substantial. In addition to the direct testimony at the trial by the prosecutrix and each of her parents, there is the testimony given by them and by other witnesses as to their identification of accused at the two line-ups before the trial, and uncontroverted circumstantial evidence of opportunity and possession by accused of identifying rings and watch, and mud-caked pistol and flashlight. With respect to the testimony as to the extrajudicial identifications of accused, the following language of the Board of Review in CM ETO 8270, Cook, is peculiarly applicable:

> "This Board of Review held in accord with the federal and majority rule that testimony with regard thereto [extrajudicial identification], including statements made by the identifying parties, should be freely accepted in evidence (CM ETO 3837, Bernard W. Smith).

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There is subsequent obiter dicta in two other cases, entirely unnecessary to the holding thereof, that such statements are hearsay (CM 270871, IV. Bull. JAG 4; CM ETO 6554, Hill). The holdings do not conflict with the Bernard W. Smith case. The language of the Hill case was that testimony by third parties of such statements is not prejudicial where the identifying parties are present at the trial and identity the accused from the stand, and the holding was that of legal sufficiency. Thus, under the holding of the Hill case, there is no reason to disturb the testimony in the case at bar concerning the pre-trial identifications by the Carrettos, for they identified accused in court. Likewise, no civil or military court according to available authorities, has held that a witness at the trial may not testify to personal prior recognition of the accused as Madame Dugois has done in this case (CM ETO 7209, Williams). Therefore the only question to be decided anew (since the intervening cases) is whether it was competent evidence for third persons to testify that the prosecutrix 'recognized' and 'pointed out' the accused. Such actions could not be hearsay under any theory; signs of recognition are observed in facial expression and gesture. Testimony thereof was of circumstance, and it is the opinion of the Board of Review that it was properly admissable. While under the language of CM 270871, supra, and the Hill case, her statement that she 'could not forget his face' might be artificially argued as hearsay, which is not conceded here, none would upset the findings because of its admission. Under the Bernard W. Smith case, which has not been overruled, for holdings are not upset by dicta, it is competent evidence and if the defense had quarrel with the fact of the statement having been made or the concurrent verity thereof, the prosecutrix was available at the trial under oath for cross-examination."

In the instant case, as in the Cook case, the identifying parties testified at the trial and identified accused from the stand. While the Board of Review adheres to its holding in CM ETO 3837, Bernard W. Smith, it is of the opinion that the identity of accused was sufficiently established and that under the most restrictive rules, the admission of the evidence was not prejudicial. Against the foregoing evidence the defense sought to establish an alibi by showing accused was ill and in his quarters at the vital time. Defense witnesses other than the accused established only that he was in his quarters up until 2300 hours at the latest. The rape was committed after 0030 hours the next morning at a nearby field. Therefore not even an issue of fact was created by this evidence, which merely tended to prove alibi (CM ETO 3837, Bernard W. Smith; CM ETO 12592, Kolanko and Sanchez). The only evidence which actually raised an issue as to identity consisted of accused's persistent denials of guilt and of any knowledge of the crime, both when

accused of the crime by the girl's mother and in his testimony at the trial. This issue was purely factual, and it was the duty of the court to weigh the evidence, judge the credibility of the witnesses, draw legitimate, corroborative inferences from the circumstantial evidence, and resolve the issue upon all the evidence. This it did against accused. Whether or not the Board of Review agrees with the court's conslusion that accused was guilty of rape, we have not been given power by Congress in the exercise of our appellate function to set aside the findings of guilty, supported, as they are, by direct and substantial evidence (CM ETO 895, Davis et al; CM ETO 12592, Kolanko and Sanchez). The findings of guilty of rape of the victim by accused, in the opinion of the Board of Review, are supported by evidence which is competent, substantial and legally sufficient (CM ETO 3837, Bernard W. Smith; CM ETO 12465, Standberry; CM ETO 14338, Reed). The findings of guilty, as modified by the confirming authori ty, of wrongful entry of the dwelling of the prosecutrix in violation of Article of War 96, are supprted by substantial evidence (Cf: CM ETO 5362, Cooper and Wilson).

7. The charge sheet shows that accused is 23 years six months of age and was inducted 15 October 1943. No prior service is shown.

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

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

Wm. J. Lynch Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(ON LEAVE) Judge Advocate

1st Ind.

War Department, Branch Office of the Judge Advocate General with the European Theater. 9 OCT 1945 TO: Commanding General, United States Army, European Theater (Main) APO 757, U.S. Army.

1. In the case of Private ALFRED L. BRINLEY (36698622), Service Battery, 959th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as commuted.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 16971. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16971).

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

(Sentence as commuted ordered executed. GCMO 525, USFET, 31 Oct 1945).

16971

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

BOARD OF REVIEW NO. 4

CM ETO 16973

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 SIDNEY P. COODY (18012713), Casual Pool, Headquarters Army Air Force Reinforcement Depot (Provisional) (Main), United States Strategic Air Forces in Europe, 153rd Reinforcement Company, 129th Reinforcement Battalion	) Trial by GCM, convened at Army Air Force Station 594, APO 652, 15 August 1945. Sentence: Dishonorable discharge, (suspended) total forfeitures, and confinement at hard labor for one year. The Loire Disciplinary Training Center, Le Mans, Sarthe, France.

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

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

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

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

Specification: In that Private Sidney P. Coody, Casual Pool AAF/ETO Reinforcement Depot (PROV) (MAIN) attached to 153rd Reinforcement Co, 129th Reinforcement Bn (AAF), U. S. Strategic Air Forces in Europe, AAF Station 594, APO 652, formerly of 309th Troop Carrier Sq, 315th Troop Carrier Gp, AAF Station 493, APO 133, did, without proper leave, absent himself from his command at AAF Station 493 and AAF Station 594 from

Encl 1

about 7 April 1945 to about 21 June 1945.

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

Specification: In that * * *, did, at London, England, on or about 21 June 1945, wrongfully wear the chevrons of a Technical Sergeant, U. S. Army, and otherwise pretend to the Military Police that he, the said Private Sidney P. Coody, was a Technical Sergeant in the U. S. Army.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and ordered it execution, suspended execution of that portion thereof adjudging dishonorable discharge until accused's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, Sarthe, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 197, Headquarters Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, 12 September 1945.

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

a. Specification, Charge I (Absence without leave).

An extra-judicial written confession shown to have been voluntarily made by accused on 26 July 1945 was received in evidence over objection by defense counsel (R17, Pros. Ex 4). In it accused told of being wounded on 22 June 1944, of being hospitalized as a result, and of thereafter being transferred to various organizations until on 6 February 1945 he became a member of the 9th Air Force Troop Carrier Command, stationed at Kettering, England. The material part of the confession is as follows:

"While stationed at Kettering, I left the post on a class "B" pass at about 1800 hours, April 7, 1945, the pass being valid until 0100 hours. I went to Birmingham and stayed the night there and then went to London on April 8, 1945. I stayed in London at the American Red Cross Inner-State Club at 37 Dover Street until picked up by the Military Police 21 June 1945. During this time I saw

my wife every afternoon. She was staying at the Ladies Carlton Club where she had to stay in six (6) nights per week, and on the seventh spent the night out with me. She didn't know that I was AWOL until she came to visit me Monday, July 23, 1945 at the guardhouse at AAF Station 594.

I did not leave on furlough since I have not had one since 1942."

The only additional evidence for the prosecution is the testimony of a receptionist at the American Red Cross Interstate Club, London. She stated that she first saw accused in the club during the latter part of April or the first part of May 1945, and that she saw him thereafter quite frequently until sometime in June (R6,7,11). During some weeks she saw him possibly as many as three times, and then there were intervals as long as a week during which she did not see him at all (R7,12). From time to time messages arrived at the club for accused and were delivered to him. Some were addressed to "Coody", others to "Cody", both of which names were used by him (R11,12). The receptionist had no knowledge of accused staying often at the club, and did not know where he stayed during the period in question (R8). She last saw him about ten days before he was "taken in" (R11). Accused was arrested by military police on 21 June 1945 at the Interstate Club (R14, stipulation).

b. Specification, Charge II (Wrongfully wearing the chevrons of a Technical Sergeant).

The receptionist at the Red Cross Club stated that upon the occasions when she saw accused, he was wearing the chevrons of a sergeant, and to the best of her belief, the chevrons of a Technical Sergeant (R9,13). No evidence was introduced to show what accused's grade was at the time or times in question.

4. After his rights with reference to testifying were explained to him by the court, accused elected to remain silent, and no evidence was introduced in his behalf (R18).

5. a. A conviction cannot be legally sustained upon the unsupported extra-judicial confession of an accused. There must be evidence independent of the confession and corroborative thereof tending to establish that the offense charged has probably been committed (MCM, 1928, par. 114a, p. 115; Dig. Op. JAG, 1912-40, sec. 395 (11), pp. 207-8). There is no evidence, apart from the confession, tending to establish that accused was absent without leave as alleged. The mere fact that he was seen at the Red Cross club in London from

time to time, and even frequently, during the period he is alleged to have been absent without leave, does not tend necessarily to show that his presence there was unauthorized. He is not shown to have been living at the club, he was seen there only at intervals and for brief periods of time, and his presence there under the circumstances shown was not incompatible with either a duty or a leave status. Neither does arrest at a Red Cross Club, without more, prove absence without leave. The facts in this case are clearly distinguishable from those in CM ETO 4915, Magee where the accused occupied sleeping quarters for several nights in an American Red Cross Club, distant from his station, which was shown by the evidence. Here accused simply visited the Interstate Red Cross Club at intervals and the location of his station is not even suggested by the evidence. Magee also committed an act of larceny on the day prior to his apprehension. In CM ETO 9271, Cockerham the evidence showed accused lived in a French town from about the time charged as the initiation of his desertion until apprehended. As stated by the Assistant Judge Advocate General in his indorsement, "the entire evidence is inconsistent with a duty or authorized status." Not so as to the instant accused. Periodic calls at a Red Cross Club is as consistent with a legitimate status as an illegal one; otherwise it would be presumed that every soldier seen in a Red Cross Club was there without authority. That is reductio ad absurdum. The record of trial failing to establish that the offense charged probably was committed, the confession of accused should not have been received and is of no probative value, and the record of trial is not legally sufficient to support the findings of guilty of the Specification of Charge I, and Charge I.

b. The Specification of Charge II alleges that on or about 21 June 1945 accused wrongfully wore the chevrons of a Technical Sergeant and otherwise pretended to the military police that he was a Technical Sergeant. The record is devoid of evidence tending to show that accused came into contact with the military police, or that he at any time made false pretenses of any character to them. While there is evidence to show that he wore the chevrons of a Technical Sergeant on occasions between the latter part of April and the middle of June 1945, there is no evidence to show that he was not authorized to do so or that his conduct in so doing was wrongful. There is no evidence showing what accused's grade was at the time he was wearing the chevrons, or evidence from which it may be inferred that he was not a Technical Sergeant. Although the evidence discloses that he was a private at the time of trial, the presumption does not obtain that he was a private theretofore. The presumption that a condition or status shown to exist is presumed to continue until a different one is shown, is a presumption which operates prospectively and not reprospectively, and may not, therefore, be employed to aid the proof here (20 Am. Jur, sec. 210, p 208).

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

6. The charge sheet shows that accused is 23 years of age, and that he enlisted at Fort Sam Houston, Texas on 21 September 1940. He had no prior service.

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

[signature] Judge Advocate

[signature] Judge Advocate

(ON LEAVE) Judge Advocate

(316)

1st Ind.

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

1. 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 SIDNEY P. COODY (18012713), Casual Pool, Headquarters Army Air Force Reinforcement Depot (Provisional) (Main), United States Strategic Air Forces in Europe, 153rd Reinforcement Company, 129th Reinforcement Battalion.

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, 619, 645, USFET, 7 Dec 1945).

8039-5

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

BOARD OF REVIEW NO. 1

26 OCT 1945

CM ETO 16978

U N I T E D S T A T E S	)	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private JACK H. MORGAN (34829160), Detachment Medical Department, 104th (United States) General Hospital	)	Trial by GCM, convened at Ringwood, Hampshire, England, 23 May 1945. Sentence: To be hanged by the neck until dead.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

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

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

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

Specification 1: In that Private Jack H. Morgan, Detachment Medical Department, 104th (US) General Hospital, United States Army, did, at Boundary Lane, St. Leonards, Ringwood, Hampshire, England, on or about 12 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one John Charles Payne, a human being, by striking him on the head with an unknown blunt instrument.

Specification 2: In that * * * did, at Boundary Lane, St. Leonards, Ringwood, Hampshire, England, on or about 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Amy Eliza Payne.

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

Specification 1: In that * * * did, at Ringwood, Hampshire, England, on or about 11 April 1945, feloniously take, steal, and carry away one "Golden Sunbeam" Lady's Bicycle, value about nine pounds and fifteen shillings sterling (£9-15-0) lawful money of the United Kingdom of the Exchange value of about thirty-nine dollars ($39.00) lawful money of the United States, the property of Bridget Leslie.

Specification 2: In that * * * did, at Boundary Lane, St. Leonards, Ringwood, Hampshire, England, on or about 12 April 1945, feloniously take, steal, and carry away three pounds and ten shillings sterling (£3-10-0) lawful money of the United Kingdom of the Exchange value of about fourteen dollars ($14.00) lawful money of the United States, the property of Mrs. Amy Eliza Payne.

Specification 3: In that * * * did, at Boundary Lane, St. Leonards, Ringwood, Hampshire, England, on or about 12 April 1945, with intent to do her bodily harm, commit an assault upon Mrs. Amy Eliza Payne, by striking her on the head with a dangerous weapon, to wit, a hammer.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Prosecution evidence:

Accused was assigned on permanent kitchen police duty at the 104th General Hospital at St. Leonards, Ringwood, England (R7,32). On the night of 11 April 1945, he was given a pass until 2300 hours, and went into Ringwood where he drank some whiskey and bitters (R7,9). He was not drunk at 2130 hours when he left his soldier companion in Ringwood (R10). He returned to camp at about 2210 drunk, dirty and disheveled. He remarked, "I am riding a bicycle, or it is riding me" (R8). His speech was, however, coherent (R9). By pretrial statement, he admitted returning on a bicycle (R37; Pros.Ex.5). At 2200 hours Bridget Leslie discovered that her bicycle, which she had parked near an inn in Ringwood, had been taken without her permission (R19-20). The next morning accused told a fellow soldier the bicycle he had ridden home was in some bushes behind the officers' mess (R69). The bicycle belonging to Miss Leslie was found upon search in the place accused described (R19-20,29,69). Its market value at that time and

place was $38.00 (R29,30).

At about 2300 hours, accused knocked on the door of the trailer or "caravan" home of deceased and his wife, Mr. and Mrs. John Charles Payne, which was located in the vicinity of the hospital. Upon request, although he was a stranger (at least to Mrs. Payne), he was invited to enter (R12,17). He sat down and said, "I have brought you some tea", packages of which were visible in his pockets (R12). Although drunk, he spoke to his two hosts coherently and politely for some time, talking of his family and exhibiting photographs of them, and drank and ate proffered tea and food. Mrs. Payne retired to the next room, but heard her husband urge the accused to go home to bed, and his acquiescence without show of quarrel. When accused "stumbled down the steps", Payne volunteered to "show him the way" and left with him. Payne never returned (R12-13).

Payne was found dead by a civilian the next morning (12 April) at 0730 hours in a ditch by the side of a lane about 100 yards from his home. There were no signs of any struggle, and the body lay on its back in a natural position with the hands in the trouser pockets. A few coins lay nearby, and on the lane in the direction of deceased's home a quantity of tea was found. In line with the head there were patches of blood on the road and spots thereof leading to the body (R27-28,41-42; Pros.Ex.2,3). English money, approximately $500 in value, and four books of national saving certificates were in his pockets (R47). A roadside medical examination at 0900 hours resulted in the doctor's estimate that death occurred about ten hours previously (R63). An autopsy showed two forehead wounds: one over the left eyebrow which "had smashed the bone of the skull and driven it into the brain to a depth of about 1 inch", not fatal; and one in the midline which pierced the skull and penetrated the brain "downwards and backwards and then going upwards again to reach the back of the skull" and which pierced the back of the skull in two places — the fatal blow. Brain substance was carried through the back of the skull, and some of it was also found beside the body. The fatal blow was caused by a long curved blade such as that of a pick axe or entrenching tool, and not by the hammer in evidence, hereinafter referred to in this opinion (R65). A sample of the deceased's blood was determined to be type "AB", which is rare and found among only three percent of the British people, and the same type was found upon the inner surface of the cuffs (especially the right) of accused's bloody shirt taken from him the next morning (R32,59,61,65). Accused's blood was type "O" (R59). The blood from the shirt and blood from deceased and accused were traced to the possession of the expert testifying (R32,37,45,48,50,51,58,65). Tea found on the road was of the type used by the hospital and not similar to that in deceased's home. The exhibits were traced to the possession of the expert witness (R40,41,43,51,58,61-62).

Fifteen minutes after accused left the trailer home with Payne, he returned, entered, and went into the bedroom of the 67-year-old Mrs. Payne. There he immediately struck her on the forehead with a hammer which inflicted a wound or cut one and a half or two inches long. He

sought to strike her again, but she grasped the hammer and struggled with him. She asked where her husband, Jack, was and he replied, "I will tell you where Jack is presently". She weakened and lost consciousness. When she regained consciousness, accused came into the bedroom and she screamed. He hit her and said, "If you scream again I'll kill you" (R13). He had sexual intercourse with her three or four times against such resistance as she could still muster. Accused was drunk but not "very drunk". After about three hours, by a ruse she succeeded in getting him out of the house and locked the door, whereupon he sought re-entry but did not break in the door. As he departed from the interior of the caravan he took a pound note and a few shillings from her handbag, and demanded other money. She told him there was money on the mantlepiece, which he took in the amount of three pounds and some shillings (R13-19).

The next morning at about 0745 hours when a neighbor called on Mrs. Payne to tell her of her husband's death, her hair was down and matted with blood; she had bruises on her right wrist and right eye in addition to the wound on her left temple; and her upper garments were bloody (R30,35). Her nightgown and bedding were saturated with blood, and there was a pool of it on the floor (R42; Pros.Ex.7). Blood was taken from her body and found to be type "A", and that type was found on the right sleeve, right top and lower pockets, and left sleeve of accused's blouse, on the right leg of his trousers, and upon the fly of his drawers. There were also seminal stains on the fly of the trousers (R59,65). Tea found upon the floor of the house and upon the steps to it were of the hospital type (R44,45,61). White hairs, one of them blood stained, found on the right cuff of accused's blouse, were white human hairs, which laboratory examination revealed to be similar to those of Mrs. Payne (R60). A smear taken from her cervix showed the presence of spermatozoa (R67). These subjects of scientific analysis were carefully traced to the possession of the expert witness (R32,37,44-51,58,65,70). Mrs. Payne identified accused from a stretcher at 1410 hours on 12 April among sixteen similarly dressed men (R18,37,48), and at the trial, as her assailant (R17).

About 30 minutes after leaving Mrs. Payne's house, at 0330 hours, 12 April, accused appeared at his kitchen, with cap askew, shirt and blouse unbuttoned, shirttails out of his trousers, and chicken feathers on his sleeve. He inquired whether there was blood upon him, and when he received the reply that he was "covered with blood", he asked a soldier to wash his clothes but the request was refused. He also wanted the gloves he wore burned. He was drunk enough to stagger a little. He washed himself with soap and water and left the kitchen at about 0400 hours. While he was there the boiler room door was heard to close. There was a stove in the boiler room (R21-24,26). Later he awakened his roommate and asked him to clean the blood off his clothes. The roommate agreed to do so the next morning if accused would put them on "the rack". Accused then seemed "all right" (R10-11). The next morning he was seen by his commanding officer in the mess hall "slightly dazed" (R32-34). His roommate pointed out the bloody clothes to this officer, who identified them as accused's by the serial number. The blouse, pants, hat and shirt were bloody; there were grey hairs on the blouse and shirt; tea was found in the pockets (too small a quantity to test); and about £3-10 were also in his pockets (R32,33,45). The head of a hammer was found 15 yards from the kitchen in the stove at the latrine, which accused and other enlisted men

customarily used. It had been burned, but was identified as English of common variety and of a type not seen or used at the hospital (R52-58,62). Payne had owned a similar one (R56,57).

On the same day, 12 April, accused made a voluntary statement, introduced in evidence at the trial, to the effect that he was drinking, took some tea from the mess hall when he returned to camp about 2230 or 2245 hours, and did not remember anything thereafter (R36,37; Pros.Ex.5). On 18 April, after being cautioned as to his rights and told

> "It will probably help you out to come clean with it, we have enough evidence against you without your statement",

accused made a further statement. It was introduced in evidence without objection (R38-39; Pros.Ex.6). He stated therein that after leaving the soldier with whom he was drinking at about 2130 hours, he went to another pub. After leaving the latter place he walked to a railroad bridge where he met a civilian named "Paul", whose last name or residence he did not know, but who frequented May's Cafe near the St. Leonard's Hotel. Paul gave him a drink of liquor. He had learned the name of Paul from hearing "May" so address him. Paul and he were together for some time and took other drinks. Paul waited for him at the gate while he went to the mess hall and got some packages of tea which Paul requested. They left camp together and went down the road to have some tea as Paul suggested, and then Paul told him to:

> "Go in and get the old man to come down the road a bit, I want to talk to him".

He then went to the caravan, knocked and entered. His story of the events in the caravan on this first visit and his departure with Payne coincided with Mrs. Payne's version. As he and Payne were walking down the road, Paul overtook them and said:

> "Old man are you going to give me what you owe me".

He did not understand the reply of Payne, who "kind of turned his head sideways", but Paul hit Payne in the back of the head. Accused was walking with his arm around Payne, and felt him sag backward. He slipped his arm up his back and laid him on the edge of the road. He did not remember if Paul hit Payne again. Paul gave him some bills and change, and threatened him if he "squawked". He went back to the caravan where Paul joined him in about 15 minutes. He did not remember entering the caravan again, nor any subsequent events of the night except that someone in the mess hall told him to go to bed. When he left camp that night he had only eight shillings. He had been at the caravan about a week before and talked to the old man. He described Paul's appearance.

Neither the owner of the Adastra Cafe (Emily Ethel May Hayes) nor the proprietor of the St. Leonard's Hotel knew or had seen a civilian in their establishments named "Paul" or who fitted the accused's description of him, but they knew the accused as a patron (R70-73).

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A psychiatric examination of accused, conducted by a board of officers on 5 May 1945, resulted in the following conclusions by the board: Accused was sane and responsible at the time of the examination and at the time of the alleged offense; he had "sufficient intelligence to cooperate intelligently with his own trial"; he knew the difference between right and wrong; at the time of the alleged offense and at the time of the examination he was not mentally deranged or abnormal, but was mentally deficient; he had a mental age of eight years by one test and ten years by another test, which placed him in a level of mental deficiency, but that level of mental deficiency was not sufficiently low to rule out his ability to interpret right from wrong; he was mentally deficient but was responsible for his actions (R74-82).

4. Defense evidence:

Accused was not an average soldier but had caused no trouble in the company. He had, however, been taken to a hospital in March 1944 for acute alcoholism, and it had then taken two men to hold him because of his violent struggling. On one occasion he was seen drunk and standing barefoot in the snow, with his shoes in his hands. "He was gritting his teeth, staring straight forward". Another time he carried his bicycle on his back because "his bike had got drunk" (R85-89). Accused after his rights were fully explained to him elected to remain silent and no other evidence was introduced in his behalf (R90,91).

5. a. Testimony of pretrial recognition and identification of accused by Mrs. Payne, who identified him at the trial, was admissible and competent evidence (CM ETO 3837, Bernard W. Smith; CM ETO 7209, Williams; CM ETO 8270, Cook; CM ETO 16971, Brinley; State v. Buschman, _____ Mo. _____, 29 S.W.(2d) 688,70 A.L.R.904(1930); Annotation, 70 A.L.R.910; United States v. Fox (C.C.A. 2d, 1938), 97 F(2d) 913).

b. The psychiatric testimony was to the effect that, although the mental powers of accused were deficient, he was sane and mentally responsible for his actions. Subnormal mentality is no excuse for crime, and no defense was shown by this expert testimony (MCM, 1928, par.78a, p.63; CM ETO 14380, Hall; CM ETO 9877, Balfour; CM ETO 9424, George E. Smith; CM ETO 5747, Harrison; CM ETO 3717, Farrington; 14 Am. Jur., sec.32, pp.788,789; State v. James, 96 N.J.L.132,114 Atl. 553, 16 A.L.R. 1141 (1921); Annotation, 44 A.L.R. 584).

6. a. Specification 1, Charge I:

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

Circumstantial evidence so overwhelming as to exclude any reasonable possibility to the contrary, placed accused at the scene of the crime, with deceased's blood on him, and with the motive of removing deceased from the scene as an obstacle in the way of satisfying lust for deceased's wife. Accused admitted presence at the killing with his arm about deceased, but claimed the murder was committed by someone named Paul. This presented a question of fact which was within the exclusive province of the court, and not for the Board of Review to decide, for it has not the power to determine conflicts in evidence. Nevertheless, accused's story was inherently improbable because:

(1) Paul was not known in the places accused said he frequented.

(2) Paul, who accused said demanded money, would not reasonably have left a large amount on deceased's person.

(3) Deceased received no wound in the back of the head, contrary to accused's version.

(4) Accused's actions upon his first visit to the caravan were not those of one seeking to entice Payne outside, for Payne left to help him and not upon invitation.

(5) The fatal blow must have been struck by a man standing to the rear of the head of Payne as he lay prostrate, because of its course, and a common Army issue entrenching tool would inflict the wound.

(6) After the murder, accused immediately wreaked violence on deceased's wife, without disclosing her husband's death, an act consistent with guilt and not with innocence.

(7) Accused sought to destroy the evidence of his crimes when he returned to camp.

It is concluded that the finding of guilty of murder was proper (MCM, 1928, par.78a, p.63; CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; CM ETO 7702, Shropshire; CM ETO 10860, Smith and Toll).

b. Specification 2, Charge I:

Both direct and circumstantial evidence not contradicted and of a substantial, competent and compelling nature proved that accused engaged in sexual intercourse with Mrs. Payne by use of force and violence and without her consent at the time and place alleged. The acts shown were barbaric and savage and committed against an old woman whose husband

had been killed by accused immediately prior to the rape. The proof supports the findings of guilty (CM ETO 14338, Reed; CM ETO 14284, Casey and Kirkland; CM ETO 14224, Page; CM ETO 14174, Hitchcock).

c. Charge II and specifications:

The larceny of the bicycle was shown by recent possession unexplained and by admissions; that of the money was proved by direct evidence plus possession by accused of a similar sum which he did not have in his possession at 1800 hours. The assault with intent to do bodily harm with a dangerous weapon was proved beyond reasonable doubt by part of the same evidence which established rape (MCM, 1928, par.112a, p.110; par.149g, pp.171-173; par.149m, p.180; CM ETO 1201, Pheil; CM ETO 1486, MacDonald et al; CM ETO 2569, Davis).

7. The charge sheet shows that the accused is 29 years 10 months of age and was inducted 30 September 1943 at Fort McPherson, Georgia, to serve for the duration of the war plus 6 months. He had no prior service.

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

9. The penalty for murder and for rape is death, or life imprisonment, as a court-martial may direct (AW 92).

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

Gerard D. Allison Judge Advocate

1st Ind.

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

1. In the case of Private JACK H. MORGAN (34829160), Detachment Medical Department, 104th (US) General Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Members of the board of officers appointed to examine this soldier testified that he is mentally deficient (R74,75,77,79,82), with a mental age of eight or ten years (R74,80) and that he is to be classed as feeble minded or mentally deficient (R80). The Manual provides that a person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able

> "concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (MCM, 1928, par.78a, p.63).

The board found "that he is not so mentally deficient as not to know the difference between right and wrong" (see report of board attached to record; also R74), but it failed to find that such ability concerned "the particular acts charged" and failed to find that the soldier was,concerning those acts, able to adhere to the right at the time of the offenses. In a case of this kind, involving the extreme penalty, I believe that these requirements of the Manual should be rigidly complied with, and that, therefore, under the circumstances of this case, a complete mental examination should be ordered to determine the above matters.

3. 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 16978. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 16978).

4. 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.

C/1 Incl:

(Sentence confirmed but after reconsideration commuted to dishonorable discharge, total foefeitures and confinement for life. Persuant to Par: 87b, MCM 1928 so much of previous action dated 8 Sept 1945 as inconsistent with this action recalled. GCMO 615, USFET, 13 Nov 1945).

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

BOARD OF REVIEW NO. 1

10 NOV 1945

CM ETO 16998

U N I T E D S T A T E S	) 3RD INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at Salzburg,
	) Austria, 29 June 1945. Sentence:
Private FRANCIS C. INZITARI (11094737), Company B, 7th Infantry	) Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 10 years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

OPINION by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Francis C. Inzitari, Company "B", Seventh Infantry, did, near La Chapelle, France, on or about 12 January 1945, desert the service of the United States, by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at St. Die, France, on or about 24 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification excepting the words "was apprehended at St. Die, France", substituting therefor the words, "returned to military control at a place unknown", and

guilty of the Charge. Evidence of three previous convictions was introduced, one by special court-martial for absence without leave for 20 days in violation of Article of War 61, and two by summary court, one for absence without leave for one day in violation of Article of War 61, and one for failing to obey a lawful order to present himself for shipment 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 20 years. The reviewing authority approved the sentence, but reduced the period of confinement to ten years, ordered the sentence as thus modified executed but suspended that portion thereof adjudging dishonorable discharge during the soldier's confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of the confinement. The proceedings were published in General Court-Martial Order No. 299, Headquarters 3RD Infantry Division, APO 3, U. S. Army, 6 September 1945.

3. On 12 January 1945 accused was by letter orders, Headquarters 7th Infantry, assigned to Company B. These letter orders recited that accused had reported in compliance with special orders from "Headquarters 2nd Replacement Depot" (R7;Pros.Ex.A). On that date the acting supply sergeant of Company B was sent to S-1 rear to pick up supplies, rations and "RTUs" and take them to the company (R10). S-1 rear was five miles from the front lines but there was no evidence of enemy activity there. Accused was an "RTU" and knew it (R9). The sergeant was unable to locate him at S-1 rear, after searching for him for one-half hour (R10-11), although he was seen at S-1 rear on that day (R9). Accused did not report to Company B that day and a witness who was present for duty with that company between 12 January and 24 April 1945, with the exception of four days in February, testified that accused was not present for duty at any time during that period (R12). The prosecution introduced a morning report of Company B, 7th Infantry, , containing the following entry:

"Inzitari, Francis C. Pvt
Ab EM asgd Co PP 1, LO 8, Hq
7th Reg dtd 12 Jan 45, not jd
to AWOL time unkn 12 Jan 45.
(left fr S-1 rear).

S/ RICHARD L. KERR, 1st Lt. Inf."

(R8;Pros.Ex.B).

4. Accused, after an explanation of his rights elected to make an unsworn statement (R13).

He first read into the record an excerpt from the psychiatric report dated 18 June 1945. This report showed that he was in combat for five days in Tunisia and 30 days in Sicily; that he had been court-martialed three times for absence without leave from a replacement depot; that he was wounded in action twice; that he was hospitalized for enuresis "questionably related to combat fatigue", and that he might be credited with two or three minor wounds and 155 combat days (R14).

Defense counsel then read into the record an extended statement relative to accused's combat record. It revealed that he fought in Africa and Sicily with the 1st Division and in Italy with the 3rd Division. He crossed the Volturno with that organization and fought with it before Cassino. Hospitalized, he rejoined the 3rd Division at Anzio and took part in "the push" to Rome. He landed in Southern France and was in combat until he was wounded at Besancon. He was wounded twice more in the Vosges. The statement recited many instances when accused narrowly escaped death or serious injury. It concluded with the statement, "It will soon be three years I have not seen my family but just for one day and getting wounded three times is about all anybody would want to get. I know that I was a good soldier and I still can soldier" (R14-16).

5. Accused was found guilty of desertion with the specific intent to avoid hazardous duty, i.e., combat with the enemy. Such an intent can be established by accused's admissions (CM ETO 9597, Jusiak, Jr.; CM ETO 14359, Hart; CM ETO 16573, Sabella) or by showing that accused could not have failed to know that hazardous duty was impending when he absented himself without leave (CM ETO 8147, Pierce; CM ETO 9857, Harrell; CM ETO 14510, Collins). Accused's statement falls far short of being an admission that when he absented himself without leave he did so with the intent to avoid combat and there is no showing that the tactical situation was known to him. All that the record reveals is that accused was at S-1 rear and absented himself without leave. S-1 rear was five miles from the front lines but there is no evidence that accused knew, or even ought to have known, this. There was no sign of enemy action at S-1 rear. True, orders were issued assigning him to a rifle company but we do not know whether he ever saw them, or whether he was not already absent without leave when they were issued (cf: CM ETO 11518, Rosati). The record is legally sufficient to sustain only so much of the findings of guilty as involves a finding that accused did, at the time and place alleged, absent himself without leave and did remain absent without leave until he returned to military control at a place unknown, at the time alleged, in violation of Article of War 61 (CM ETO 8358, Lape and Corderman; CM ETO 9665, Hamilton and McCormick; CM ETO 15223, Skuczas).

6. The charge sheet shows that accused is 21 years two months of age and was inducted 1 September 1942 at Stamford, Connecticut, to serve for the duration of the war plus six months. He had no prior service.

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7. The court was legally constituted and had jurisdiction of the person and the offense. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, at the time and place alleged, absent himself without leave and did remain absent without leave until he returned to military control at a place unknown, at the time alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

8. The designation of the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement is proper (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP - AGO, 20 August 1945).

_____ Judge Advocate

(DETACHED SERVICE) _____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 10 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private FRANCIS C. INZITARI (11094737), Company B, 7th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty be vacated, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, 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.

IN 13 NOV AGN USFET

(Findings of guilty vacated, except so much as involves findings of guilty of absence without leave in violation of Artivle of War 61. GCMO 615, 649, USFET, 7 Dec 1945).

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

BOARD OF REVIEW NO. 1

30 OCT 1945

CM ETO 17018

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class JAMES COPELAND (33313284), 385th Engineer Battalion (Separate)	Trial by GCM, convened at Mannheim, Germany, 9 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James (NMI) Copeland, Company "B", 385th Engineer Battalion, did, at or near Schwetzingen, Germany, on or about 24 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Technician Fifth Grade George Woods, a human being by shooting him with a rifle.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for unlawfully carrying a concealed weapon, viz., a hunting knife, in violation of the 96th Article of War. All of the members of the court present at the time the vote was taken concurring, he was sentenced

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to be hanged by the neck until dead. The reviewing authority, the Commanding General, Continental Advance Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the U.S. Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. About 2300 hours on 24 May 1945, accused and deceased were engaged in an argument in the kitchen of the home of Frau Irma Schafer, Ludwigstrasse #2, Schwetzingen, Germany. During the course of the controversy, which lasted about 15 minutes, both participants twice pointed their rifles at each other (R6,7,9). When Frau Schafer remonstrated with them they both put their rifles down. At the conclusion of the argument accused went out the kitchen door, turned and fired from the hip. At this time the butt of deceased's rifle was on the floor and his hands were over the muzzle (R7, 8, 12). The bullet struck deceased on the hip and he sank to the floor. Accused aimed again but Frau Schafer closed the kitchen door. Accused shot through the door, the bullet this time striking deceased in the neck and causing death within an hour (R7,12,16).

In an extra-judicial statement accused admitted that he and deceased were arguing in the Schafer home. Deceased said that "he could beat me shooting and also said that he had one in the chamber and that it was unlocked". Deceased then stepped back toward the window and accused moved toward the door. Accused opened the door and put a round in the chamber. Deceased started to raise his rifle and accused shot from the hip (R18; Pros. Ex. 1).

Captain Charles W. Rippey, accused's company commander, testified he talked to accused and deceased at 2215 hours on the evening in question and that he noticed they had been drinking, but they had not had an "awful lot" to drink because they were "very well in control of themselves" (R14).

4. After being warned of his rights accused elected to be sworn and testify (R19). He stated that he and deceased left their company area together about 1800 hours. Deceased wanted to get drunk, so they drank about four bottles of wine together. They obtained more wine, returned to camp to sign in, and then went to Schafer's house. Deceased refused to leave when accused suggested it, stating that "I had what he wanted" (R20). He asked accused if the latter wanted to kill him. Accused then described the shooting substantially the same as he did in his extra-judicial statement. He denied shooting through the door into the kitchen (R19,20,22).

5. Murder is the unlawful killing of a human being with malice aforethought. Malice does not necessarily mean ill will. It may consist of knowledge that the act which causes death will probably cause

the death of, or grievous bodily harm to, the person killed or any person (MCM,1928, par.148a, p.163). Accused conceded that he fired one shot at deceased intentionally. He denied firing the second shot but the prosecution's evidence showed that he aimed at deceased, and then fired through a door which had been closed on him. While accused contended that he fired in self-defense, the evidence for the prosecution showed that the butt of deceased's gun was on the floor and that deceased had his hands over the muzzle. The resolution of these conflicts in the evidence was for the court (CM ETO 895, Davis et al), which apparently chose to disbelieve accused's version of the tragedy. There is sufficient substantial evidence from which the court could infer that accused deliberately killed deceased without justification or excuse. The court could properly conclude that accused was not so drunk as to be unable to entertain malice (CM ETO 16581, Atencio). The record is legally sufficient to sustain the findings of guilty of murder (CM ETO 6682, Frazier; CM ETO 7315, Williams; CM ETO 10740, Rollins).

6. The charge sheet shows that accused is 27 years 11 months of age and was inducted 14 May 1942 at Philadelphia, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

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

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

Edward L. Stevens, Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

James P. Holmes Judge Advocate

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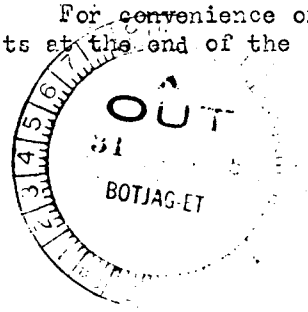
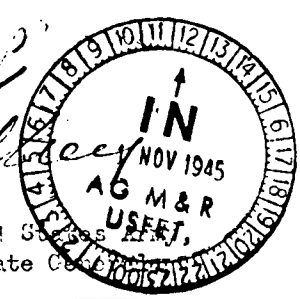
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 30 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U.S. Army.

1. In the case of Private First Class JAMES COPELAND (33313284), 385th Engineer Battalion (Separate), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17018. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 17018).





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

(Sentence as commuted ordered executed. GCMO 566, USFET, 14 Nov 1945).

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

BOARD OF REVIEW NO. 2

20 OCT 1945

CM ETO 17023

U N I T E D S T A T E S	) OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)
Private JOSE M. SANCHEZ, (10404936) Company D, 65th Infantry	) Trial by GCM, convened at Nancy, France, 9 and 10 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Jose M. Sanchez, Company D, 65th Infantry Regiment, did, at or near Wasselonne, France, on or about 18 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Jacques Ann, a human being, by shooting him with a rifle.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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 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 the term of his natural life. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and for

warded the record of trial pursuant to Article of War 50½.

3. Evidence for the Prosecution: Accused is a member of Company D, 65th Infantry which organization was stationed at Wasselonne, France on 18 March 1945 (R56). At about 2200, 18 March 1945, accused knocked on the door of a restaurant, 102 Rue Principale (R30), Wasselonne, France that had been closed earlier in the evening. When the window of the door was opened by Paul Krauth, a refugee helper (R9), accused asked for schnapps and was told there was none and that the restaurant was closed. Krauth closed the window, which was made of tin (R10), and accused knocked again and harder. Krauth opened the window again whereupon accused held his rifle against him, said "Military Police", and asked for the Chief of the bar. Krauth then opened the door and accused came in. Krauth told him he was not the Military Police because he did not have the shoulder and helmet insignia and arm band. Accused again asked for schnappes and was again told there was none available. He started to leave and when about two meters from the door, turned around and looked at "everyone". As accused left the room, M. Jacques Ann, owner of the restaurant (R28), arrived and shut and locked the door. "At this moment" five shots were fired on the outside. M. Ann then about half a meter from the door (R10), immediately fell to the floor (R6-7). Five holes were in the tin window of the door (R10). M. Ann was hit in the head (R10). His body remained at 102 Red Rue Principale until interment, was there throughout 20 March 1945. His body was the only corpse there on that day (R30). On 20 March 1945, Captain Sears, 84th Medical Battalion examined the body of a thirty-five year old man at that address and found a large hole in the right occipital region of the head and also one in the left temporal region. Death had been caused by complete lack of central nervous system resulting from decerebration apparently caused by a high velocity type of missile. (R39-40). Krauth positively identified the accused as the soldier who came into the restaurant and went out in the manner described above (R8,11,36). Another occupant of the restaurant also identified him (R28). Previous to the incident described above accused had been with another soldier at various cafes but was sober and had had only about two drinks of wine (R44). The two parted company between 9 and 10 o'clock (R45). A guard, Private First Class Perez, while walking on Principale Street, Wasselonne, France, that night, heard shots at about 2200 and 2½ to 3 minutes later as he neared his billet he saw and challenged accused who was walking in the same direction. Accused carried a rifle on his shoulder (R52), and, in answer to the guard's question whether he "had shot" said that he had "down in town" and that "they had pushed him out of one of the cafes" (R47-48,54). Shortly after the shooting, four empty cartridges (R57) and later a fifth (R34) were found near the tavern door. On 1 April 1945, the accused's rifle, together with the five empty .30 calibre cartridges were delivered to a ballistics expert for examination (R13). In the opinion of this expert, two of the shells were fired from the rifle of accused because there were 25 positive points of similarity between those shells and the shell known to have been fired by accused's rifle for the purpose of comparison. Only 21 positive points of similarity are necessary to remove all doubt (R14-15). He could not make a positive statement as to the other three because they did not have sufficient points of similarity to the shell used as the test shell (R13).

4. Accused remained silent throughout the trial.(R17). A Technical Sergeant of his Company testified that Private First Class Perez had a bad reputation for truth and voracity (R78) because he was always bluffing and boasting (R79). Three men of accused's Company saw accused after supper on 18 March 1945. He did not have a gun (R80,81,84,85) and said he was going home to sleep. The ballistics expert stated in his report prior to trial that Exhibits B,D and E for the prosecution (three of the empty cartridges found near the tavern)"could not have been fired from Exhibit A" (accused's rifle). (Def. Ex 3).

The defense asked for continuance to present proof that accused had been reduced to grade of private in support of a plea in bar of trial. The law member denied the request subject to objection of any member of the Court.

5. "Murder is the unlawful killing of a human being with malice aforethought." With respect to malice aforethought, "It is sufficient that it exist at the time the act is committed" (MCM 1928, par 148, p.162-163). The firing of the shots immediately after accused's exit, his subsequent admission to the guard and the testimony of the ballistics expert leaves no doubt, in the absence of evidence to the contrary, that accused fired the shot which caused the death of M. Jacques Ann as alleged. His action prior to leaving the restaurant and the indiscriminate shooting through the window of the door, which had just been closed by the deceased, justify the inference that he knew the shooting would probably cause death or grievous bodily harm to M. Ann or other occupants of the room and that such shooting was with malice aforethought (CM ETO 4292, Hendricks; CM ETO 7815, Gutierrez). Firing a deadly weapon with reckless disregard of human life may properly be held to evidence the general criminal intent to kill and constitute malice aforethought (CM ETO 15425, Lemons and the authorities therein cited). The evaluation of the testimony of the witnesses, whose credibility defense attacked, was one solely for the court. (CM ETO 817, Yount). Although accused did not testify or make an unsworn statement and the record is silent as to whether he was advised of his rights, it will be presumed that the usual and ordinary procedure of court was followed (CM ETO 531, McLurkin). The evidence clearly satisfies all of the elements of proof. (MCM 1928, par 148a, p.164).

6. The motion of the defense for a continuance in order to permit it to produce evidence as to accused's reduction in rank from private first class to private was properly denied. The record is obscure as to the purpose of the defense in producing such evidence, but if such proof was intended to support a plea in bar of trial that accused had been punished for the crime with which he was charged, the contention had no merit. Murder is not a "minor" offense under the 104th Article of War. Summary punishment in the nature of a reduction in rank would be no bar to prosecution for the homicide (CM ETO 110, Bartlett; CM ETO 1057, Redmond).

7. The Charge Sheet shows that accused is 36 years and two months of age and that he enlisted without prior service on 7 May 1942 at Fort Buchanan, Puerto Rico.

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

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

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

Earle Stephens Judge Advocate

Ronald D. Miller Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 1

13 NOV 1945

CM ETO 17056

U N I T E D S T A T E S	) 2ND INFANTRY DIVISION
	)
v.	) Trial by GCM, convened at Pilsen,
	) Czechoslovakia, 3 and 4 June 1945.
First Lieutenant HAROLD C.	) Sentences: BOGER: Dismissal, total
BOGER (O-1292462), Headquarters	) forfeitures and confinement at hard
Company, First Battalion, 9th	) labor for 10 years; REED: Dishonora-
Infantry, and Private First	) ble discharge, total forfeitures and
Class KENNETH E. REED (18034274),	) confinement at hard labor for 10
Headquarters Company, 9th	) years. United States Penitentiary,
Infantry	) Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW NO. 1
STEVENS, CARROLL and O'HARA, Judge Advocates

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

2. Accused were tried together on the following charges and specifications:

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

Specification 1: In that First Lieutenant Harold C. Boger, Headquarters Company, First Battalion, 9th Infantry, and Private First Class Kenneth E. Reed, Headquarters Company, 9th Infantry, acting jointly and in pursuance of a common intent, did, at or near Zakava, Czechoslovakia, on or about 17 May 1945, with intent to commit a felony, viz, rape, commit an assault upon Vera Nova, by willfully, and feloniously, and forcibly grasping and holding her, by forcibly throwing her to the ground, by forcibly tearing and removing her clothing, by beating her about the face and body, by biting her ears, by twisting her arms, by lewdly fondling her genitals, by dragging her by her hair, and by detaining her by physical force and threats of violence.

Accused Reed was also tried upon the following Specification of Charge I:

Specification 3: In that Private First Class Kenneth E. Reed, Headquarters Company, 9th Infantry, did, at or near Zakava, Czechoslovakia, on or about 17 May 1945, with intent to commit a felony, viz, rape, commit an assault upon Vera Nova, by willfully and feloniously and forcibly grasping and holding her, by forcibly throwing her to the ground, by forcibly tearing and removing her clothing, by beating her about the face and body, by biting her ears, by twisting her arms, by lewdly fondling her genitals, by dragging her by her hair, and by detaining her by physical force and threats of violence.

Accused Boger was also tried upon the following Specification of Charge I and also upon the following Charge II and specifications:

Specification 2: In that First Lieutenant Harold C. Boger, Headquarters Company, First Battalion, 9th Infantry, did, at or near Zakava, Czechoslovakia, on or about 17 May 1945, with intent to commit a felony, viz, rape, commit an assault upon Vera Nova, by willfully, and feloniously and forcibly grasping and holding her, by forcibly throwing her to the ground, by forcibly tearing and removing her clothing, by beating her about the face and body, by biting her ears, by twisting her arms, by lewdly fondling her genitals, by dragging her by her hair, and by detaining her by physical force and threats of violence.

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

Specification 1: In that * * *, at or near Zakava, Czechoslovakia, on or about 17 May 1945, while in his presence Private First Class Kenneth E. Reed, Headquarters Company, 9th Infantry, was committing an assault upon Vera Nova with intent to rape her, he, the said First Lieutenant Boger, did wrongfully fail to take action to prevent such misconduct by Private First Class Reed.

Specification 2: In that * * *, did, at or near Zakava, Czechoslovakia, on or about 17 May 1945, without her consent, forcibly grapple Vera Nova, twist her arms, kiss her, and place her hand on his penis, under such circumstances as to bring great disgrace upon the military service.

Each accused pleaded not guilty. Boger was found guilty of the charges and specifications preferred against him except the words of Specification 2 of Charge I "by forcibly throwing her to the ground, by forcibly tearing

and removing her clothing, by beating her about the face and body, by biting her ears" and "by lewdly fondling her genitals, by dragging her by her hair", and Reed was found guilty of the Charge and specifications preferred against him. No evidence of previous conviction was introduced against either accused. Two-thirds of the members of the court present at the time the vote was taken concurring, Boger 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 10 years. Three-fourths of the members of the court present at the time the vote was taken concurring, Reed 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, the Commanding General, 2nd Infantry Division, approved the sentence as to Boger and forwarded the record of trial for action under Article of War 48, and approved the sentence as to Reed, 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. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence as to Boger, 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, and owing to the special circumstances in the case of Reed remitted so much of the sentence as to him as pertained to confinement at hard labor in excess of 10 years.

3. The evidence of the prosecution was substantially as follows: Vera Nova, a single girl 19 years of age, testified that on the evening of 17 May 1945, she rode toward Zdenyslice, Czechoslovakia, on a bicycle (R10). A jeep containing two men overtook her. The jeep was driven by the accused Reed and the other occupant was the accused Boger (R11). Boger tried to catch her by the belt (R12), but she went down a hill and away from them. Later the jeep again overtook her. She accepted a ride therein. Reed placed her bicycle in the back of the jeep (R13). She sat between the two accused. Boger put his arm around her (R14), and also endeavored to place her arm about his body, but she removed it (R16). She pointed to three "turn-offs" which would have taken them to where her parents lived, but the jeep was driven straight ahead (R14,16,17). It was eventually turned from the road and passed through a woods for a distance of about 2 kilometers into a quarry (R17). This quarry measured approximately 30 to 50 yards in width and of the same length. It had high walls and only one narrow entrance (R57). The girl and two men left the jeep. Reed drew his pistol and went to this entrance (R17). The girl started to leave the quarry, but Boger grabbed her by the wrists and twisted them outwards with rough motions. She jerked free and ran towards the entrance of the quarry (R18). Reed stopped her and took her back to the jeep, where she tried to get her bicycle, but it was too heavy for her to lift (R19). She told Reed that he was a gentleman and that she wanted to go home to her mother and father, but he replied that American soldiers were not gentlemen and said she would be his mistress and that she would not go home until "Some word beginning with "F" (R21). He pushed her against the back of the jeep and kissed her, although she resisted him, indicated that she should take off

her clothing, and jerked the neckerchief from her neck. During this time he was twirling a revolver on his finger (R22).

He threw her to the ground, and hit her on the chin with his fist each time she raised her head, but she fought back and broke away. He caught her and they again scuffled and fought (R23). She wore a scout shirt, brassiere, shorts, panties, anklets and shoes. Reed tore the shorts, panties and half the brassiere from her person, and ripped the shirt up the middle. During this period of the attack she was on her back. Reed knelt on her and felt her breasts (R24). She kicked and struck at Reed and managed to free herself again. When she had run three steps Reed caught her by the hair, threw her on a pile of rocks and beat her on the chin, face and eyes. Her head "was getting dizzy". She hit him with a rock (R25) and he became still rougher and hit her in the mouth, breaking her lips. He knelt between her legs and "punched" her genital organs with his finger, bit her finger when she resisted (R26), and also bit her ears. Again she freed herself, and this time tried to scale the wall of the quarry. Reed jerked her down and she apparently fainted. When she regained consciousness, Boger laid beside her and kissed her, and placed her hand on his penis but she jerked it away. Boger went to the jeep and she arose and ran away (R28,43).

She ran six kilometers to her home, still clothed only in shoes, anklets, half a brassiere and a torn shirt (R29). Her eyes and forehead were skinned, she had a bump on her head, her lower lip was broken through, the upper lip was broken from the inside, there was a blue ring around her neck where she had been choked. Her breasts, chest, stomach, hip and legs were scratched (R31). She did not see Boger from the time Reed first took her arm until she regained consciousness (R38,43). Boger did not throw her to the ground, remove her clothes, hit her, bite her, touch her indecently, drag her by the hair, or threaten her with a weapon (R40). No penetration of her genitals was accomplished by either accused (R81).

The victim's father testified that when she reached home that night she was nude except for shoes, anklets and a ripped shirt (R47). Her face was bruised and he could hardly recognize her (R48). She told him where she had been, and the next morning he went to the quarry and secured the bicycle and articles of her clothing which had been removed from her body (R49).

A military police officer who conducted a preliminary investigation testified that the victim identified Reed in ranks and also identified Boger when she unexpectedly encountered him in headquarters; both identifications were unhesitating and positive (R58-59).

A medical officer who examined the victim the following day testified that she was then a virgin. She had contusions about the face and both eyes and jaw, and abdomen and had a small bleeding laceration on the external genital organs (R64).

An officer of Boger's organization testified that on the following morning Boger wore a field jacket without a shirt. When he asked

him the reason for his dress, Boger said he had been on "quite a party the night before" and that he "got into" a little argument with a girl; he stated he pushed the girl, she fell and hit her head on a rock, and it caused bleeding, and he got some blood on his shirt so that it had to be washed (R71).

The various items of the victim's clothing were received in evidence (R78; Pros.Exs. A,B,C,D and E). Defense objected to the admission of these exhibits on the ground that neither accused had been shown the exhibits (R77), and the investigating officer testified that in the investigation he did not hear the witnesses in the presence of either accused and gave neither an opportunity to cross-examine the witnesses against them (R79). After a showing that it had not been obtained by improper inducement and that there had been a full warning as to rights prior to its execution, a sworn statement signed by Reed was received in evidence (R76; Pros.Ex.F). A motion by defense at the close of the government's case for a finding of not guilty of the specifications of Charge I as to Boger was overruled (R82).

4. Having been fully advised as to his rights, Boger elected to testify as a witness in his own behalf (R83). He stated that on the afternoon in question he drove into town to make arrangements for an approaching organization dance (R84). While there he drank "approximately the better portion of a quart of champagne and a quart of cognac," and in the jeep as he left town imbibed another drink of cognac. He next remembered being in a house (R85). He dismissed his driver, intending to stay at the house all night. He met Reed at this house and they left together in his vehicle (R86). The next thing he remembered was that someone was crying, he looked around and saw Vera Nova on the ground. He walked over to her, knelt down beside her and raised her head. She was bleeding and he got blood on his shirt. She ran away and he and Reed returned to their billets in the jeep (R87).

Two letters commending Boger were received in evidence without objection and read to the court (R98; Def.Ex.1). A defense witness testified that Boger's character was excellent and that he heard another officer say that Boger's character and performance of duty were excellent and that Reed's character and performance of duty were very good (R99-100). Boger drank about the same amount as other officers in his unit and it affected him as alcohol does an average man (R101). After having been fully advised of his rights, Reed elected to remain silent and no other evidence was offered by the defense (R102).

5. A preliminary question is presented by the fact that the investigation was conducted without either accused being present; neither was given opportunity to cross-examine any witness nor to offer testimony in his own behalf. Such action is in direct violation of the provisions of Article of War 70 and is open to criticism. However, it has been held that the investigation of charges under the 70th Article of War is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional (CM 229477, Floyd, 17 B.R. 149; CM ETO 4570, Hawkins). In the cases cited no investigation was

made of the charges on which trial was had. If complete lack of an investigation is without jurisdictional effect, a fortiori, procedural flaws in an investigation will not vitiate the results of trial. As in the Hawkins and Floyd cases, there was here no showing that substantial rights of either accused were injuriously effected by the failure to comply with Article of War 70.

6. The crime with which Reed was charged (Specification 3, Charge I), is assault with intent to commit rape, concerning which the Manual for Courts-Martial declares:

> "This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. Indecent advances, importunities however earnest; mere threats; and actual attempts to rape wherein the overt act is not an assault do not amount to this offense.
>
> * * *
>
> The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person" (MCM 1928, par.149, p.179).

Reed's guilt of every element of the offense charged is so abundantly proven that detailed comment here would be superfluous. It is conclusively established that he performed all of the disgraceful and degrading acts alleged in the Specification of which he was found guilty (CM ETO 10728, Keenan). While it was unnecessary to charge Reed both jointly (Specification 1, Charge I), and singly (Specification 3, Charge I), his rights were not prejudiced in view of his sentence.

7. a. Specification 1 of Charge I is a joint specification, and most of the acts therein alleged were actually performed by Reed. Boger's guilt, if any, of this Specification, must be based on his presence during the act by Reed plus other evidence showing his participation in the criminal intent since mere presence without more would not suffice to establish guilt (CM 221019 (1942), I Bull. JAG 23; CM 218876 (1942), 1 Bull. JAG.24; CM ETO 804, Ogletree et al). The distinctions between principals and aiders and abettors have been removed by Federal statute (18 USC 550; 35 Stat. 1152), and are not recognised in the administration of military justice (Winthrop's Military Law and Precedents (Reprint, 1920) p.108; CM ETO 72, Farley and Jacobs; CM ETO 1453, Fowler). To have been an aider and abettor Boger must have, by his presence, aided, encouraged or incited Reed to commit the crime, and have shared the criminal intent or purpose (Morei v. United States (CCA 6th 1942), 127(2d) 827). The victim testified that she did not see Boger from the time Reed stopped her at the exit from the quarry until she recovered consciousness at Boger's side. This does not necessarily indicate that Boger was not present

during this time as it is improbable that during this hectic period her powers of observation were of the best, and the court was justified in finding that he was in fact continuously present. Adequate undisputed evidence existed to support the finding that he shared the intent to commit rape with his co-accused. His original grappling with the girl on arrival in the quarry was a definitive overt act towards the accomplishment of the purpose which manifestly was intended by both men when they brought the girl to the quarry. It was Boger who commenced the attack on the girl. This fact when considered with the existing circumstances fully justifies the conclusion that Boger was an aider and abettor and was thus properly found guilty as a principal.

b. The finding that Boger was guilty of Specification 2 of Charge I, with the exceptions indicated above, rests on narrower ground. It finds him guilty of assault with intent to commit rape based on overt acts committed by himself, independent of Reed's actions. The commission of an assault is clearly alleged and proved. The remaining element of the offense is that accused had the intent to commit rape (MCM, 1928, par.149, p.179). The girl upon recovering consciousness discovered Boger at her side. He kissed her and placed her hand on his penis. No fair and rational hypothesis except that he performed the acts constituting the assault with the intent to commit rape can be inferred from this evidence and the finding is sustained (CM ETO 10728, Keenan). The evidence clearly justified the conclusion that Boger was not only guilty of the assault in which Reed was the active participant, but also that Boger committed several and separate assault upon the girl, which was charged in Specification 2, Charge I. The sentence is well within legal limits.

8. Boger was further charged with a violation of Article of War 95 in two particulars. The first was that Reed committed an assault with intent to commit rape in his presence and that he did nothing to prevent it. The validity of the finding that Reed's acts were in Boger's presence has been hereinabove sustained. The second alleged violation of this Article of War was that Boger, without her consent, grappled with the victim, twisted her arms, kissed her and placed her hand on his penis, under such circumstances as to bring great discredit upon the military service. The commission of these acts is established by undisputed evidence. All were performed in the presence of Reed, his military inferior. Winthrop (Military Law and Precedents (Reprint 1920), p.716), cites as an example of conduct unbecoming an officer and a gentleman the "demeaning of himself by an officer with soldiers or military inferiors" as by indecent conduct in their presence. Winthrop defines the conduct justifying a conviction under this article as,

> "action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms" (Ibid, p.713).

Boger's proven conduct transcended the minimum limits of the criterion established by Winthrop, the Manual (MCM, 1928, par.151, p.186), and the decided cases (see Dig.Op.JAG, 1912-1940, sec.453,p.341). Both specifications alleged violations of Article of War 95 and being sustained by substantial evidence the findings of guilt are proper.

9. The only remaining question is whether the record indicates such a degree of drunkenness on the part of Boger as to render him incapable of forming the intent required under Charge I and Specifications 1 and 2 thereof. Virtually the only testimony on this point was that of accused, who claimed extreme drunkenness to such an extent that his memory of the evening was confined to certain intermittent lucid intervals. Of the remainder he says he remembers nothing. The girl testified that she smelled liquor on Reed but not on Boger (R46). After stating that drunkenness may be a defense to a crime where specific intent is an element, the Manual cautions that such evidence should be carefully scrutinized (MCM, 1928, par.126a, p.136). Having carefully scrutinized this evidence the court determined it to be untrue, as it was within its province to find. We have not the power to disturb this finding (CM ETO 895, Davis et al).

10. The charge sheet shows that accused Boger is 26 years old and was commissioned 4 September 1942. He had prior service as an enlisted man in the National Guard from 14 September 1940 to 3 September 1942. Reed is 22 years four months of age and enlisted 11 April 1941 at Dallas, Texas. He had no prior service.

11. 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.

12. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of an officer of a crime denounced by Article of War 93. Confinement in a penitentiary is authorized upon conviction of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Boger is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b). As accused Reed is but 22 years of age and his period of confinement is but 10 years, the proper place of confinement is the Federal Reformatory, Chillicothe, Ohio (Cir.229, WD, 8 June 1944, sec.II, par.3a, as amended by Cir.25, WD, 22 Jan.1945).

Edward L. Stevens Jr. Judge Advocate

(DETACHED SERVICE) Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 3 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of First Lieutenant HAROLD C. BOGER (O-1292462), Headquarters Company, First Battalion, 9th 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 17056. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17056).

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

(Sentence ordered executed. GCMO 610, USFET, 1 Dec 1945).

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

BOARD OF REVIEW NO. 4

11 OCT 1945

CM ETO 17057

U N I T E D S T A T E S v. Private First Class NORBERT (NMI) TAYLOR (34292284) and Private KELLOGG (NMI) BAILEY (38195814), both of 3894th Quartermaster Gas Supply Company	42nd INFANTRY DIVISION Trial by GCM convened at Salzburg, Austria, 13 August 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. The accused were tried in common trial on the following charges and specifications:

TAYLOR

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

Specification: In that Private First Class Norbert (NMI) Taylor, 3894th QM Gas Supply Company, did, at Raubling, Germany, on or about 0215 hours 8 May 1945 forcibly and feloniously, against her will, have carnal knowledge of Elsa Drexler, 31-1/3 Raubling, Germany.

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

Specification 1: In that * * *, did at Redenfelden, Germany, on or about 0130 hours, 8 May 1945 in the night time feloniously and bulgariously break and enter the dwelling house of Maria Schweikl, 8 1/2 Redenfelden, Germany, with intent to commit a felony, viz Rape, therein.

Specification 2: In that * * * did at Redenfelden, Germany, on or about 0130 hours, 8 May 1945, with intent to commit a felony, viz, rape, commit an assault upon Maria Schweikl, 8 1/2 Redenfelden, Germany, by willfully and feloniously striking the said Maria Schweikl in the face with his hand.

BAILEY

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

Specification: In that Private Kellogg Bailey (NMI), 3894th QM Gas Supply Company, did at Raubling, Germany, on or about 0215 hours, 8 May 1945 forcibly and feloniously, against her will, have carnal knowledge of Ruth Drexler, 31 1/3 Raubling, Germany.

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

Specification: In that * * * did at Redenfelden, Germany, on or about 0130 8 May 1945 in the nighttime feloniously and burglariously break and enter the dwelling house of Maria Schweikl, 8 1/2 Redenfelden, Germany, with intent to commit a felony viz. Rape, therein.

Each accused pleaded not guilty to all charges and specifications preferred against him. Accused Taylor was found guilty of all charges and specifications preferred against him, and accused Bailey was found guilty of Charge I and its specification and guilty of the specification to Charge II excepting the words "in the nighttime feloniously and burglariously break and", substituting therefor the words "wrongfully and unlawfully" and excepting the words "with intent to commit a felony, namely, rape therein", and not guilty of Charge II, but guilty of a violation of the 96th Article of War. Evidence was introduced of one previous conviction by summary court against accused Bailey for willful disobedience of orders in violation of Article of War 96. No evidence of previous convictions was introduced against accused Taylor. Three-fourths of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the remainder of his natural life. The reviewing authority approved only so much of the findings of guilty of Specification I and of Charge II, as to accused Taylor, as finds that such accused did at the place and on the date alleged wrongfully and unlawfully break and enter the dwelling house of Maria Schweickl, 8 1/2 Raubling, Germany, in violation of the 96th Article of War, approved the sentence and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to each accused, and forwarded

the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution briefly summarized is as follows:-

At about 0130 hours, 8 May 1945, the two accused came to the temporary home of Maria Schweickl at No. 8 1/2 Raubling, Germany (R6,14). They broke a veranda window on the ground floor and were apparently admitted to the kitchen by Frau Saller, one of the occupants of the house (R6, 7,9). Maria Schweickl and her sister, hearing Frau Saller cry for help, got out of bed and went to the kitchen (R6,7). As Miss Schweickl reached the doorway between the bedroom and the kitchen, accused Taylor held her so that she was unable to move (R11,14). He then pushed her into the bedroom, and with his trousers and private parts exposed, tried to tear off her panties and "pushed himself" close to her (R15). Because of her resistance, he failed in his attempts to remove her clothing (R15). He tried however to touch her with his private parts and when she attempted to escape, struck her on the head with his open hand (R15,18). Meanwhile Miss Schweickl's sister had evaded accused Bailey, who was attempting to prevent her from going to Miss Schweickl's assistance, by telling him there were more attractive women upstairs (R8,14,52). Taking advantage of his departure in that direction, she left the house in search of aid and returned ten minutes later with two military guards who caused both accused to leave the house (R8,9,14,16). Accused were strangers to the house and had not been invited there by its occupants (R9,10).

At approximately 0200 hours, 8 May 1945, accused appeared at the residence of Frau Elsa Drexler, 31 1/3 Raubling, Germany (R20,29,37). They were intoxicated and armed with rifles (R20,26,40,43). Frau Drexler, hearing them hammering on the door, admitted them and all three proceeded to the kitchen (R19,20,30). Taylor embraced her and Bailey said something like "Gut" or "good" (R20). She cried out, one of the accused, probably Bailey, picked up his gun and all proceeded upstairs (R21,30,37, 39,41). On reaching the second floor, Frau Drexler, who was still being held by Taylor, called out to another occupant of the house for aid, but the latter upon opening her door was threatened by Bailey with his rifle (R21,37). Taylor forced Frau Drexler into a bedroom, embracing her with both hands (R22). She cried out in a loud voice, but he threw her on the bed and struck her in the face with his fist (R22). Despite her physical efforts to escape and to prevent him from accomplishing his purpose, he twice had intercourse with her, penetration being effected on both occasions (R23,24,27,28). Throughout the proceeding, Taylor's rifle was on the bed (R24). After the second intercourse, Taylor proceeded to remove his clothes and Frau Drexler took advantage of the situation to return downstairs to the kitchen (R24). By this time it was about 0400 hours (R24).

Meanwhile, Frau Drexler's fourteen year-old daughter, Ruth, who

had followed the party upstairs after hearing her mother scream, was threatened by one of accused with his rifle and forced by Bailey to go to the third floor (R31). One of the occupants of that floor attempted to aid her but Bailey pointed his gun at her forcing her to desist (R31, 39,42,40). He then ordered Ruth to return to the ground floor following her with his rifle (R31). On reaching a bedroom, he pushed her into the bed, removed her panties and, overcoming her attempts to get out of the bed, had intercourse with her. A partial penetration was effected (R31, 32, 35, 36). When he finished, he went to sleep, and Ruth escaped to the kitchen (R32). She waited there until her mother returned from upstairs and then went out for help (R32,33). Her mother followed shortly afterwards (R25). They summoned two military guards who caused accused to leave the premises at approximately 0530 or 0600 hours (R25,26,33,44,45,47).

4. Accused after being warned of their rights by the law member, elected to remain silent (R50).

Evidence for the defense consisted of the testimony of a German physician who examined Ruth Drexler shortly after the alleged rape. He found that the hymen had not been ruptured, but testified that this did not foreclose the possibility that sexual intercourse, including penetration had occurred (R48-50).

5. Every element of the crime of rape has been proved against each accused by substantial, competent and uncontradicted evidence and the record of trial is therefore legally sufficient to sustain the findings of guilty of these offenses (CM ETO 11004, Evans). While the lapse of time between the completion of the rapes and the summoning of the guards is not adequately explained, this circumstance was not considered by the court to impeach the testimony of the prosecuting witnesses and in no way serves to invalidate the court's findings.

With respect to the unlawful entry of Maria Schweikl's premises by each accused and the assault with intent to rape, committed upon Miss Schweikl by accused Taylor, a reading of the record leaves no possible doubt that findings of guilty reached by the court, as modified by the reviewing authority, were justified, all elements of these offenses having been fully proved.

6. The charge sheets show that accused Taylor is 35 years and six months of age and accused Bailey is 32 years and five months of age. They were inducted 21 April 1942 at Camp Livingston, Louisiana and 23 July 1942 at New Orleans, Louisiana, respectively. 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 accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Leslie A Hamilton Judge Advocate

Charles A Meyer Judge Advocate

John R Anderson Judge Advocate

17057

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

BOARD OF REVIEW NO. 4

8 NOV 1945

CM ETO 17058

U N I T E D S T A T E S	42nd INFANTRY DIVISION
v.	Trial by GCM, convened at Salzburg, Austria, 27 August 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.
Private LEON F. ORTIZ (33584485), Headquarters and Headquarters Company, 92nd Signal Battalion	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Leon F. Ortiz, then Technician Fourth Grade, Headquarters and Headquarters Company, 92nd Signal Battalion, did, through carelessness at Salzburg, Austria, on or about 28 June 1945, wrongfully and unlawfully kill Private First Class Thomas Bousamra, Headquarters and Headquarters Company, 92nd Signal Battalion, by shooting him in the stomach with a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave upon two occasions in violation of Article of War 61 (the absence in each instance being for a period of about one hour, according to information supplied through the Staff Judge

Advocate's review), and for failure to obey a lawful order in violation of Article of War 96. In the instant case, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence but reduced the period of confinement to one year, and ordered the sentence, as so modified, executed, except that he suspended execution of that portion thereof adjudging dishonorable discharge until accused's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles Bouches du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 32, Headquarters 42nd Infantry Division, 13 September 1945.

3. Evidence for the prosecution.

Private First Class Thomas Bousamra was mortally wounded about 8:00 am on 28 June 1945 by a bullet from a .45 caliber, United States Army automatic pistol (R7,9,12). He, accused, and Private First Class Joe S. Cavestri were together at the time in the kitchen of their organization's mess, a room approximately 10 by 15 feet in size (R7). Cavestri, although standing within seven or eight feet of accused and deceased, did not see in what manner or under what circumstances the pistol was discharged, as he was engaged at the time in making coffee and was facing away from them. Upon looking in their direction when he heard the report of the pistol, he saw deceased lying on the floor and accused standing nearby or "over Bousamra" (R7,8). Accused had no gun in his hand at the time (R8). Just preceding the shot, however, Cavestri saw accused pick up a holster from a shelf in the kitchen and remove a pistol from it (R7), and heard deceased say to accused, "Don't fool around with that gun, you might shoot someone" (R8). He did not hear accused say anything before, at the time, or after the shot was fired (R8-9).

Staff Sergeant Casimir A. Smyk, who was standing just outside the mess hall, rushed inside upon hearing the shot, saw deceased lying upon the floor, asked him what had happened, and was informed by deceased that accused had shot him (R9). Accused, who was standing about ten feet away from deceased, had nothing in his hands (R9). He said nothing at the time, but ran upstairs and returned with his first aid pouch (R9). Thereafter Smyk saw him kneeling beside deceased, cradling him in his arms, and heard him say "Take it easy, that everything would be all right" (R10). The relationship between accused and deceased theretofore had been "very friendly" (R10); they had been "fellow buddies" (R8).

Deceased died on 30 June 1945 from the effects of a bullet (.45 caliber) which had perforated his stomach, liver, spleen, and kidney (R10).

The pistol involved belonged to another member of the company and had merely been left in the kitchen (R8). The record does not clearly establish where it was first found after deceased had been shot, but it may be inferred from the evidence that it was found lying upon a cabinet in the kitchen (R9).

4. For the defense.

The accused, after his rights as a witness were fully explained to him, elected to remain silent (R12). He called only one witness, his company commander, First Lieutenant Benjamin Nathan, who stated that accused's previous conduct had been excellent (R11).

Lieutenant Nathan was examined further by the court. He arrived at the scene of the shooting within four or five minutes after the occurrence and heard accused say that he was "sorry" and that the shooting had been accidental (R12). Accused was "very much upset and very nervous as a result of the accident" (R12). An investigation conducted after the incident by the company mess officer developed that the pistol involved had been obtained in a trade and left in the kitchen by one of the cooks on the day preceding the accident, and that accused was engaged in demonstrating it to Bousamra at the time the latter was injured (R11). The carbine was accused's assigned weapon, and Lieutenant Nathan did not know what if any training he had had in the handling of a pistol (R12).

5. The specification alleges only the offense of involuntary manslaughter, which is "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law" (MCM, 1928, par. 149a, pp. 165-166). Of the possible ways in which the offense may be committed, the theory that the homicide here involved was proximately caused by accused's culpable negligence is the only one fairly embraced within the pleadings, and it is therefore upon this theory alone that we shall test the legal sufficiency of the record to support the findings of guilty. It may be added, however, that no contention is made and the record does not suggest that at the time of the homicide accused was engaged in the commission of an unlawful act.

The Boards of Review have consistently held that "culpable negligence", as that term is used in the foregoing definition, contemplates a higher degree of negligence than mere simple negligence.

> Criminality under these circumstances is not predicated upon mere negligence or carelessness "* * * but upon that degree of negligence or carelessness which is denominated 'gross' and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which in some offenses takes the place of criminal intent. * * * The highest degree of care is not the standard of care to be required in measuring responsibility under a statute providing that the killing of a human being by the 'culpable negligence' of another shall be manslaughter. * * * A proper understanding of the meaning of 'culpable negligence' of necessity rests upon the assumption

> that accused knew the probable consequences, but was intentionally, recklessly or wantonly indifferent to the results" (CM ETO 1414, Elia).
>
> "Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not constitute 'culpable negligence', but for culpable negligence there must exist in the mind of accused, at the time of act or omission, a consciousness of probable consequences of the act and a wanton disregard for them" (People v. Carlson, 26 N.Y.S. (2nd) 1003, 1004; CM ETO 15346, Fondren) (Underscoring supplied).

To the same effect also are the cases of CM ETO 1317, Bentley; CM ETO 1554, Pritchard; and CM ETO 6235, Leonard.

The burden rested upon the prosecution to establish by legal and competent evidence beyond a reasonable doubt the existence of this culpable, gross or criminal negligence, a burden which, in our opinion, it failed to discharge. The only facts which the evidence, when construed most favorably to the prosecution, may reasonably be said to establish are that deceased was killed by a bullet which was fired from a gun that accused at the time held in his hands; and it is from these bare facts (it being conceded that the shooting was not intentional) that the requisite degree of negligence on the part of accused must be deduced or inferred if the conviction is to be sustained. In other words, in this instance, accused's conviction rests upon circumstantial evidence. The mere handling of a pistol by a soldier in the presence of others does not of itself constitute culpable negligence. While it is a self-evident fact that at the moment of discharge, the pistol was pointed at deceased, there is no evidence to establish that accused either deliberately or carelessly pointed it at him. The hypothesis that deceased unbeknown to accused and while the latter was exercising due care in this respect, carelessly and heedlessly stepped in front of the gun is not an unreasonable one in the state of the record. Furthermore, there is no evidence shedding light upon how the pistol was actually caused to fire. Whether accused pulled the trigger or whether the pistol discharged because of mechanical defect or as a result of some inadvertence on the part of accused amounting to no more than simple negligence, we can only speculate; and mere surmise or speculation will not support a conviction (CM ETO 14845, Gerringer). Since the conviction rests upon circumstantial evidence and the evidence does not exclude every reasonable hypothesis consistent with accused's innocence, the record of trial is legally insufficient to support the conviction (CM ETO 9306, Tennant; CM ETO 7867, Westfield; CM ETO 14845, Gerringer).

Insofar as the facts revealed by the evidence are concerned, this case is of the same pattern as CM ETO 15217, Nolan and CM ETO 15346, Fondren, wherein the Board of Review concluded that the homicides there involved were in the realm of "pure accident" and that no culpability attached to the respective accused. CM ETO 15419, Green is clearly distinguishable. There, in the process of "horse-play" and wrestling between deceased and accused, the latter without warning or reason pulled a loaded pistol from his belt and in the process of further scuffling it was discharged with resultant death of deceased. By such act accused deliberately created a situation "loaded with danger".

6. The charge sheet shows that accused is 22 years of age and that he was inducted at Philadelphia, Pennsylvania on 13 February 1943. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Lester A Samelson Judge Advocate

(DETACHED SERVICE) Judge Advocate

John R Anderson Judge Advocate

(362)

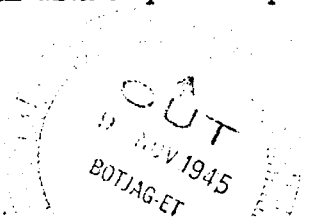
1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 742: 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 LEON F. ORTIZ (33584485), Headquarters and Headquarters Company, 92nd Signal Battalion.

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 herein before made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.



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

(Findings and sentence vacated, GCMO 616, 7 Dec 1945).
GCMO 648, 7 Dec 1945. (Corrected)

RESTRICTED

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

BOARD OF REVIEW NO 4

6 OCT 1945

CM ETO 17074

U N I T E D S T A T E S	) SEVENTH UNITED STATES ARMY
v	) Trial by GCM convened at
Private VERGE MAYE (34032904), 3253rd Quartermaster Service Company	) Augsburg, Germany, 4 July 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private VERGE MAYE, 3253rd Quartermaster Service Company, Dittingheim, Germany, did at Grunsfeldhausen, Germany, on or about 2130 hours, 20 April, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Wilhelm Engert, a human being by shooting him with a U.S. Army Carbine.

He pleaded not guilty to and was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by summary court for entering the town of Luneville, France, without a duly authorized pass 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 becomedue and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to

Article of War 50½.

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

Accused, uninvited, entered the house of Wilhelm Engert in Grunsfeldhausen, Germany at about 1930 hours, 20 April 1945 (R4,5,24,32,38). He was armed with a rifle, and went into the kitchen where Engert, his wife, son and two daughters and an Alsatian guest were gathered (R5,6, 24). Accused demanded wine and was given some cider. Complaining that the cider was like water, he then asked for schnapps and since the family had none, produced a bottle of his own (R5,15,24,25,33). He drank none of it at this time, however, and shortly afterwards left the house taking his bottle with him (R6,15,22,25). He returned at about 2115 hours, still armed with his rifle, and again entered the kitchen without invitation (R6,7,12,25,33,38). This time he was drunk and staggered and spoke incoherently (R7,21,26). In response to his request, he was given a small glass of schnapps which he drank. A squabble developed between him and the Alsation, accused demanding that the latter produce his passport and photograph and preventing his departure by pointing his rifle at him (R7,8,20,26-28,39,40). Frau Engert, being frightened, took her two daughters and went into the living room (R8,40). Then, Engert told accused that the Alsatian was his friend and suggested that accused leave and go to bed (R29). Accused apparently acquiesced and was led to the frontdoor by Engert and his son (R29,34,36). The son returned to the kitchen and heard his father close the frontdoor (R29,30). Frau Engert also heard the door being closed and locked, and immediately therafter she heard the bolt of a rifle move back and forth (R9,10,16,18). A shot was fired from the direction of the steps leading down from the front door on the outside of the house (R9,10, 18,29,30,41,31), and accused was seen to dash from the house and down the street, carrying his rifle on his shoulder (R41). Engert was found lying on the hallway floor immediately inside the frontdoor (R10). Blood was flowing from a bullet wound in the vicinity of his heart(R11,31). He was dead, having apparently been killed almost instantaneously(R10,30,41). There was a bullet hole in the fron door about five or ten centimeters above the handle of the door (R11,31,49-50). An empty cartridge, 30 caliber carbine, was found on the ground outside the house about six feet from the door (R14,49).

Sometime between 2130 and 2200 hours, accused entered his company kitchen. He was intoxicated and said to the cook "If anyone wants to know whether I was here between nine and ten o'clock, you know I was here". He said he was in trouble and had shot somebody (R44-46). Atabout 2230 hours, the company commander, inresponse to a report made to him, visited accused's tent and found him "passed out" (R48,50). His rifle, a caliber 30, M-1, was lying beside him and the company commader concluded, after smelling the bore and removing a clip from the gun, that it had recently been fired (R48,50,51).

4. Accused, after being warned of his rights by the law member, elected to testify under oath (R52,53). He stated that he was invited to the Engert house and given cider in exchange for chocolate, and he was told that they would give him some schnapps in return for some additional chocolate. He agreed, stating that he would return at nine o'clock and make the exchange. Upon his return, he had a small glass of schnapps and in the course of a conversation with the Alsatian, remarked that the latter should be investigated (R54,57,64). The Alsatian then struck him on the head with his fist and accused was seized by both he and Engert. (R54,55,59). A scuffle resulted, in the course of which the Alsatian attempted to take accused's rifle (R55,59,60). The struggle continued and moved from the kitchen to the hall (R55,60). When it reached the front door which was open at the time, Engert gave accused a "hard shove", the Alsatian sidestepped and, as he attempted to avoid falling, accused's rifle which was in his right hand discharged (R55,60,61,64,66). He was scared and excited at the time and didn't know whether he had his finger on the trigger (R55,61). He heard screams and thought he must have hit someone but did not stop to investigate, being "glad to get away" (R61). He ran, and on reaching his company, told the cook that he had had some trouble with two men and that a shot had been fired which did not hit anyone. He added that if anyone wanted to see him, he would be in his tent (R55, 62).

He further testified that he did not threaten or point his carbine at anyone (R55) and that he was not intoxicated (R55,59). He started to drink after reaching his tent and became drunk there (59). Despite a policy in his company to the contrary, he was in the habit of keeping a round in the chamber of his gun at all times (R55, 57). However, the safety was on the last time he had noticed prior to the shooting (R58).

5. The evidence adduced by the prosecution gives rise to the legitimate and inescapable inference that accused, having been shown out of Engert's house, deliberately fired his carbine through the door immediately after it had been closed and while he had every reason to suppose that Engert was still behind it. A death resulting from such an act constitutes murder within the meaning of Article of War 92 as construed by paragraph 148a of the Manual for Court Martial 1928. The necessary malice aforthought is supplied by accused's knowledge that his act will probably cause the death of, or grievous bodily harm to the person having the misfortune to be his victim (See CM ETO 559, Monsalve). As for the matter of intoxication and its effect on accused's capacity to entertain malice aforethought, the evidence is in conflict, accused testifying that he was "normal", several of the eye-witnesses that he was intoxicated, and the company commander that he had "passed out". The latter, however, did not see him until after a considerable lapse of time during which accused could have done and, according to his own testimony, did do considerable drinking. A factual issue was thus presented which was within the province of the court to decide.

Having resolved it in favor of the prosecution, its findings will not be disturbed in view of the substantial competent evidence supporting them (See CM ETO 1901, Miranda). A similar rule applies to the court's determination of other factual conflicts between the prosecution's evidence and the testimony of accused. Since the latter is contradicted in virtually every particular by the prosecution's array of witnesses, the court's refusal to give it credence is scarcely surprising.

6. The charge sheet shows that accused is 26 years and two months of age. He was inducted 19 March 1941 at Fort McClellan, Alabama. He had no prior service.

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

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

Lester A Danielson Judge Advocate

(TEMPORARY DUTY) Judge Advocate

John R. Anderson Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 3

2 OCT 1945

CM ETO 17106

U N I T E D S T A T E S	) CHANOR BASE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER
v.	)
Private First Class DOUGLAS G. CONLEY (34469863), 435th Engineer Dump Truck Company	) Trial by GCM, convened at Le Havre, France, 28 August 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Douglas G. Conley, 435th Engineer Dump Truck Company, did, at or near Harfleur, France, on or about 4 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class William L. Campbell, a human being, by shooting him with a gun.

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

3. The evidence for the prosecution shows that at about 1745 hours on 4 August 1945, accused, who was with his unit at Camp Phillip Morris, near Harfleur, France, entered tent No. 6, where some soldiers were engaged in a card game called "tung". After playing "a couple hands", he left to make an accident report, and Staff Sergeant Clifford B. Cole entered the game (R7,9,12). Soon thereafter accused returned and wanted to get back in the game, but since the maximum number of five were already playing, he was told that he could not play. Picking up the cards, he said "he'd get a hand or keep the cards" (R7,12). He "might have had a few drinks" at this time, but did not appear to be drunk (R9,14). Sergeant Cole told him to return the cards, and when he refused, Private First Class William L. Campbell, the deceased, who was broader and more stockily built than accused, said, "Let the man have the cards cause I'm loosing (sic) my money and don't want to fool around" (R7,10,14). After accused refused a second request from Campbell to return the cards, deceased got up and walked over to accused and demanded them. Accused said nothing. Campbell then started to struggle with him and hit him, but Sergeant Cole and Private Charley Booth separated them. Accused then started toward Campbell, who struck him a hard blow with his fist, causing him to fall on a barracks bag between two beds (R7,12-13). Accused's mouth was bleeding profusely and his bottom front teeth were "knocked back" (R11,15,21). He got up and sat on a bed, whereupon deceased, who had resumed playing cards, remarked that he should know better than to take cards out of a game in which men were losing money. Accused said, "I know you're mad Campbell, but that is all right". He then got up and left the tent (R7,13).

Shortly afterwards he walked up to a guard about 65 or 70 yards from tent No. 6, and said that the next relief had paid him to walk "a couple hours of guard". The guard told him to see the corporal of the guard, whereupon accused grabbed the guard's carbine, which contained a magazine of ammunition, and cocked it, causing the guard to run to the orderly room (R22-23).

Between 5 and 15 minutes after accused left the tent, a shot was heard at the rear of the tent by Sergeant Cole, Private Booth and deceased, who were still playing cards (R8,15). Booth looked out and said somebody was coming with a rifle. As they ran for the front door of the tent, Campbell was last seen getting up from the bed (R8,13). Private Booth ran into the adjoining tent and accused ran past him and out the back of the tent with a carbine in his hand. Immediately thereafter, Booth heard a shot and looked out and saw Campbell on his hands and knees. Then he heard "quite a few more shots" (R8). The company commander and "CQ", who were at the orderly room less than 100 yards away, each saw accused standing about 3 yards from tent No. 6, aiming a carbine at an angle toward the ground, and saw him fire it into the tent until it was empty and then throw it to the ground (R16-17,19-20).

Campbell was found lying on his back on the floor of the tent in a dying condition (R8-9,20). A post-mortem examination revealed 11 gun shot wounds in his body (R30).

On 6 August, accused signed a written confession in which he stated that deceased stuck him with his fist when accused threw a particular hand of cards into the deck, and that in searching for something with which to hit Campbell he found the carbine leaning against a gasoline rack. Campbell ran from one tent to another to escape him, but accused followed him and emptied the magazine of the carbine at him (R23-29,Pros. Ex.1).

4. After his rights as a witness were explained to him, accused elected to testify (R32-33). He started drinking about 1400 hours on 4 August and continued to drink during the afternoon. When he reported to his commanding officer that evening that he had a hit a gate and tree with his truck, he admitted he had been drinking. Upon returning to the card game, he was dealt another hand, on which he won, but when he saw he could not win again, he picked up the cards and said, "I can't win". Campbell told him to put down the cards, and hit him under the eye and in the mouth, causing him to fall, and hit him again after he sat down on the bed. He went out looking for something with which to defend himself and found a carbine on a "gas ramp", which he took without telling the guard anything, and which he did not know was loaded. He met Campbell at the door of tent No. 5. Campbell "looked like he was still mad", and as he came toward accused, the latter fired without intending to kill him, but to scare him. Accused was "scared" of Campbell. Deceased ran toward tent No. 6 and accused "ran behind". He did not believe he fired any more shots and did not remember anything else that happened until his commanding officer came down (R33-34,37).

For the defense, a medical officer testified that at about 2000 hours on 4 August he treated accused for a laceration of the lower lip and contusion of the lower gum, applying three sutures. He advised accused to see the dentist the following morning (R31-32).

Accused's commanding officer testified that accused's service with the organization was very satisfactory, that his efficiency rating was excellent, and that his reputation for truth and veracity was "of the average" (R38).

5. The evidence shows without doubt that accused shot and killed Private First Class William L. Campbell at the time and place alleged in the Specification. While the testimony of accused may be sufficient to raise fact issues as to self defense and intoxication, the weight of the evidence and the admitted circumstances surrounding the killing strongly contradict such testimony. The actions of accused in leaving the card game shortly after he had been beaten by accused with his fists, in in-

geniously securing a loaded rifle, in seeking out and pursuing the deceased, who was unarmed, and in accurately aiming and firing 11 shots into deceased's body are neither typical acts of a drunken man nor of a man acting in defense of his person. The circumstances clearly warrant a finding that accused acted with malice aforethought unless it can be said that he acted in the heat of sudden or uncontrollable passion aroused by adequate provocation, whereby his offense would be reduced to manslaughter (MCM, 1928, par. 149a, pp. 165-166). The evidence is undisputed that following a severe blow inflicted upon him by deceased with his fist, accused sat on a bed for a short time, then walked out of the tent a distance of 65 to 70 yards, where he secured a rifle, and walked back to the tent. The testimony shows that from 5 to 15 minutes elapsed from the time he left the tent until he returned with the lethal weapon. There was thus a brief cooling period during which his passion might abate and he could deliberate and plan a method of reprisal or revenge. Whether he was activated by uncontrollable passion or by mere anger was a question of fact for the court's determination, and the record fully supports the findings of guilty of murder (CM ETO 3042, Guy, Jr.; CM ETO 292, Mickles; CM ETO 1941, Battles; CM ETO 4497, DeKeyser).

6. Objection was made by the defense to the introduction of the signed written confession of accused because there was no certification that it was a true copy of the original and was signed at the same time as the original (R26,27). Since the testimony of the "CID" agent who took the statement shows that the carbon copy was a true copy of the original and was signed by accused and corrections initialed by him (R25-27), the carbon copy was primary evidence and admissible (State v. Lee, 173 La. 770, 138 So. 662). Whether the statement was voluntarily made was a question of fact for the court (CM ETO 5747, Harrison, Jr.). Moreover, even if the confession was erroneously admitted in evidence, the other evidence is compelling as to accused's guilt (CM 254423, Gonzalez, 35 BR 243 (1944)).

7. The charge sheet shows that accused is 26 years eleven months of age and was inducted 2 January 1943 at Fort Bragg, North Carolina. No prior service is shown.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for murder by Article of War 42 and sections 275 and 330,

Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

BRSCcofpcw Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Levy Jr Judge Advocate

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

24 NOV 1945

CM ETO 17134

U N I T E D S T A T E S	) HEADQUARTERS SPECIAL TROOPS, 12TH ARMY GROUP.
v	)
Private First Class ALEXANDER SCOTT (33467381), Company B, 43rd Signal Heavy Construction Battalion	) Trial by GCM convened at Wiesbaden, Germany, 23 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania

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

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

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

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

Specification: In that Private First Class Alexander Scott, Company B, 43rd Signal Heavy Construction Battalion, did, without proper leave, absent himself from his quarters at Dodenburg, Germany, from about 0900 hours 24 March 1945 to about 1730 hours 24 March 1945.

CHARGE II: Violation of the 92nd Article of War

Specification: In that * * * did, at house number six (6) Greverath, Germany, on or about 24 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Magdalene Thiel.

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

Specification: In that * * * did, at Greverath Hill, Greverath, Germany, on or about 24 March 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Wilhelm Weissmuller three (3) men's bicycles, value of over $50.00, the property of Wilhelm Weissmuller.

Specification 2: In that * * * did, on the road between Greverath and Heideweiler, Germany, on or about 24 March 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Peter Clemens, a pocket watch of a value of over $20.00, the property of Peter Clemens.

Specification 3: (Nolle prosequi).

Specification 4: In that * * * did, at house number forty seven (47), Heideweiler, Germany, on or about 24 March 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Joseph Dienhard a radio of a value of over $50.00, the property of Joseph Dienhard.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of Charges I and II and the specifications thereunder; guilty of Specification I of Charge III, except the words "over $50.00", substituting therefor the words, "about $12.00", not guilty of Specification 2, Charge III, but guilty of the following Specification: In that Private First Class Alexander Scott, Company B, 43rd Signal Heavy Construction Battalion, did, on the road between Greverath and Heideweiler, Germany, on or about 24 March 1945, feloniously take, steal and carry away a pocket watch, value about $1.50, the property of Peter Clemens; guilty of Specification 4 of Charge III, except the words "over $50.00, substituting therefor respectively the words "about $10.00", and guilty of Charge III. Evidence was introduced of one previous conviction by special court-martial for committing an assault with intent to do bodily harm by shooting at an American soldier in violation of Article of War 93. 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 places as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. Evidence for the Prosecution:

a. Specification, Charge I: On 24 March 1945 Company B, 43rd Signal Heavy Construction Battalion, the organization to which accused belonged

was located at Dodenburg, Germany. A battalion order in force at that time prohibited any member from leaving the battalion area without a pass. Accused was seen in the town of Heidweiler, Germany, about three miles from Dodenburg on the afternoon of 24 March. Although he was not on a duty status that day he did not have a pass nor permission to be absent from the battalion area (R8-12).

b. Specification, Charge II: At about 1200 hours on 24 March 1945 the accused, accompanied by two other colored soldiers, entered the home of Berhard Thiel at Greverath, Germany (R13,31,42). One of the soldiers went into the living room and embraced Magdalene Thiel, 19 years of age, the daughter of Bernhard Thiel. She started crying and entered the kitchen to be with her parents (R16-17,31-32,42). The soldiers asked for and received a glass of schnapps and Mrs. Thiel gave each a boiled egg (R15,33). At the first opportunity Magdalene left the house and went next door to the home of the local mayor (R18,33,43). When accused discovered her missing he made a search through the rooms, in the yard and in the barn (R18,35). While the search was being conducted one of the soldiers attempted to pull Mrs. Thiel into the barn. She broke away and ran to the mayor's home followed by two of the soldiers (R18,20-21,35-36). Magdalene was seated at dinner with the mayor's family when her mother and the soldiers entered (R43). On seeing her they started to "yell out" and were immediately joined by accused (R21,36). Magdalene was excited, she was suffering from heart trouble and began "shaking all over" when she saw accused. She had very bad cramps of the heart (R23, 36, 43-44). Accused went to her stating that he was a doctor, rubbed her face with a wet cloth, felt her pulse, opened her dress and started wiping her breasts (R23,37,44). The soldiers threatened the occupants of the room with rifles and demanded more schnapps. Magdalene told them not to shoot (R24,44). All of the soldiers then kissed her (R22, 37,44) and motioned that she should go into the kitchen. She left the room but on seeing that they were attempting to shut her off from the others, she broke through the door and fell to the floor in a faint (R37, 44-45). Two of the soldiers left the house when they saw that Magdalene was ill (R25,37). When she regained consciousness accused was again "wiping" her with the wet cloth. She was "shaking all over" and was taken to the yard of her own home where she sat in the sun. Accused fired some shots in the air and kept saying "Bett", insisting that she go inside the house to bed (R37-39, 45). He "got mad" and indicated that Magdalene had to be taken inside the house. She was placed on a sofa in the living room and accused again wiped her with the cloth. He kept asking her parents to leave and Mrs. Thiel finally left to secure help. Magdalene asked her father to stay and defend her but accused loaded his gun, pulled her away from her father and forced him from the room (R25-27, 39-40,46). Every few minutes Mr. Thiel pushed the door open to reenter the room but each time accused jumped to the door and threatened him with a rifle. Thiel opened the door about fifteen or twenty times and then went outside the house to get a stick to use as a weapon (R27-28,46).

Alone in the room with Magdalene, accused threw her back on the sofa, unbuttoned his pants and "pulled out" his penis, disregarding her pleas to release her. Steps were heard in the hallway, and accused buttoned his trousers as Katharina Beicher, a neighbor, entered the room. Magdalene was moaning "Please help me" accused "jumped up", pushed the door shut and when Miss Beicher opened the door two or three times, he threatened her with his carbine. She told accused (in German) he should release the girl, that she was going for his commander, and then advised Mr. Thiel to keep opening the door (R46-47,58). Magdalene twice regained her feet and each time accused threw her down on the sofa. He threatened to beat her with his rifle butt, pointed the weapon at her and said he would shoot if she did not "stay down there." She was dizzy, everything was "going around" but she could feel him place her legs on the sofa and then she lost consciousness. When she regained her senses, accused was lying on top of her. His penis was inserted and she could feel the penetration "very strongly" in her private parts (R47-48, 55,57). She had "bad pains" and was no longer able to resist or defend herself. Hearing steps accused "jumped up", wiped his penis, indicated that she should put the cloth he had used in the stove, and then left the room (R48). When Mr. Thiel returned to the house after an absence of about four or five minutes he saw accused "fleeing" out of the house. He found Magdalene crying, and she said immediately "Father, he raped me" (R28). During the intercourse accused had placed his rifle near the sofa where he could reach it (R56). Her pants were torn but her clothing was otherwise undamaged (R48,53). On cross-examination, Magdalene admitted to having previous sexual experiences (R53-54).

Captain Samuel Kampf, battalion surgeon, examined Magdalene at about 1830 hours on 24 March and found a slight flow of fresh blood from the lower edge of the labia which appeared to come from a laceration about one-eighth inch in length. The laceration could have been caused by the insertion of a foreign object in the vagina. Captain Kampf observed that the girl had a slight goiter and it was his opinion that people with goiters have a tendency to become excitable (R60-64).

c. Specification 1,2 and 4, Charge III: The evidence introduced by the prosecution in support of these specifications may be summarized as follows: At about 1400 hours on 24 March three colored soldiers entered the house of Wilhelm Weissmuller in Greverath, Germany and demanded schnapps. One of the soldiers started molesting Mrs. Weissmuller who ran into the barn where her husband was working (R64-65) and on his advice she escaped from the premises. Two of the soldiers went looking for her while the accused, holding his rifle at readiness motioned Mr. Weissmuller to remain. When they could not find Mrs. Weissmuller, her husband was forced to join in the search. In looking through the barn, the soldiers found three bicycles and each taking one of them, they rode away. Weismuller protested but as all three men were armed he could do nothing. One bicycle (Pros. Ex.1) was the property of his brother-in-law and

the others (Pros. Exs. 2 and 3) belonged to him (R66-71).

At about 1500 hours on the same afternoon (R78). Peter Clemens and Wilhelm Schmitt were stopped on the road between Greverath and Heideweiler, Germany by three colored soldiers on bicycles. One of the soldiers took a watch from Schmitt's pocket and pointed his rifle at Clemens. Another advised Clemens that it would also be better for him to surrender his watch (R73-74,77). Clements handed his watch over to accused (R78) and they were told to leave "tout de suite". As they walked away accused fired a shot from his rifle into the air (R75,79). Clemens' watch was returned to him the next day by the pastor of Herdweiler (R74). It was stipulated that the watch (Pros. Ex. 4) was of a value of $1.50 (R75).

During the late afternoon of 24 March three colored soldiers accosted Joseph Dienhard at his home in Heidweiler, Germany, and pointing rifles at him demanded schnapps. When informed he had no schnapps they entered his living room and ordered him to stay in the hallway with his hands up. The soldiers then disconnected his radio and tied it to the back of one of the bicycles. Dienhard could not identify the soldiers due to his excitement caused by the soldiers pointing the weapons at his chest (R81-83). On learning that the soldier had been apprehended he went to the "commanding officer" who removed the radio from the bicycle and returned it to him (R83). It was stipulated that the value of the radio (Pros. Ex. 5) was $10.00 (R85).

Between 1700 hours and 1800 hours on 24 March accused and his two companions were apprehended outside the village of Heideweiler by Major Lester H. Clark. They were in possession of three bicycles, a radio, and a watch which was found on "Private Sherman". Major Clark delivered the watch to the Catholic priest of the town. A "miller" from the town of Greverath claimed one of the bicycles and it was later discovered that two additional bicycles belonging to him had been "swapped" by the soldiers for the other two found in their possession. He delivered the radio to a man from Heidweiler after the Burgomeister of the town substantiated that claim of ownership. All three weapons belonging to the soldiers had recently been fired (R86-87).

4. No evidence was offered by the defense.

The accused after being fully advised of his rights to testify as a witness elected to remain silent (R89).

5. a. Specification Charge I: It is clearly established by the evidence that on 24 March 1945 the accused, without proper leave, absented himself from his orgnaization as alleged.

b. Specification, Charge II: Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b, p.165). The testimony of the prosecutrix corroborated by other witnesses shows that accused intended to use any force necessary to indulge in sexual intercourse with her. When she became frightened and ran away, accused found her again, brought her to her home, and at rifle point forced her

parents and a neighbor to leave the room. Accused threatened to beat her with the rifle butt and to shoot her if she did not submit to his advances. The terror inspired by accused coupled with the weakened condition of Magdalene caused her to faint and on awakening she found accused having sexual intercourse with her. Proof of penetration was substantiated by the lacerated condition of her labia and her immediate complaint that she had been raped. The evidence leaves no doubt that the force used by accused and the accomplishment of the act constituted rape (CM ETO 3691, Houston; CM ETO 10841, Utsey; CM 14066, Heishman; CM 14382, Janes). From the fact that the victim was unconscious at the time of actual penetration the act of intercourse, is presumed to be without her consent. 249224, III Bull. JAG 147. 44 AM Jur., Sec. 9,p. 906).

c. With reference to Specifications 1, and 4, Charge III, the evidence shows two robberies committed by the three soldiers on the same afternoon after they left the Thiel home. At the Weissmuller home accused held his rifle at readiness and directed Weissmuller to remain outside while the others searched for his wife. Although Weissmuller protested the soldiers took three bicycles from his presence and possession. The fact that the three soldiers were armed and the conduct exhibited by them prior to taking the bicycles present sufficient evidence from which the court could infer that Weissmuller was placed in fear for his safety and constituted robbery (MCM 1928, par. 149b,p. 170; CM ETO 78, Watts).

With reference to taking the radio the evidence is uncontradicted that Diehard was placed in fear by the three soldiers when the radio was taken from his presence at gun point and the offence of robbery completed (CM ETO 10715, Goynes). Although he could not identify accused as one of the three soldiers the circumstances under which he recovered the radio leave no doubt that accused was one of the perpetrators of the offense.

There is some conflict in the testimony of witnesses as to the actual part accused played in the commission of these robberies. There is no doubt, however, that he acted as particeps criminis with the other two soldiers. His active participation establishes the guilt of accused in each instance as a principal in the offenses committed (CM 2951, Pedigo; CM ETO 1594, Copprue and Ernest; CM ETO 1764, Jones and Munday).

d. As to Specification 2, the court found accused not guilty of robbery but guilty of larceny as a lesser included offense. Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specifically to another (MCM, 1928, par. 149g, p. 171). The evidence herein shows that the soldiers were armed, that one of them "nudged" Clemens and gave him to understand that it would be better for him to give up his watch, that one of the soldiers, identified as accused came up to him, and that Clemens, after first detaching the watch, handed it over to accused.

Although the elements of robbery, that the property was taken against the victim's will, by violence or intimidation were eliminated by the court, it clearly appears that the circumstances under which Clemens lost his watch constituted a trespass against him. The events that transpired at the time were known to accused and he knew when he accepted the watch it was not given with the voluntary consent of the owner, and his taking constituted a trespass and larceny.

6. The charge sheet shows that accused is 36 years eleven months of age and that he was inducted 17 November 1942 at Fort George G. Meade, Maryland. He has no prior service.

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

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

John Tannehill Judge Advocate

(DETACHED SERVICE) Judge Advocate

John A. Burns Judge Advocate

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

BOARD OF REVIEW NO. 4

22 OCT 1945

CM ETO 17140

U N I T E D S T A T E S	AIR TECHNICAL SERVICE COMMAND IN EUROPE
v.	
Second Lieutenant STANLEY LOUPUS (O-569149), Headquarters Squadron, 9th Base Air Depot Area, Army Air Force Station	Trial by GCM, convened at Army Air Force Station 389, APO 744, U. S. Army, 26 May, 1 June 1945. Sentence: Dismissal

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

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

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

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

Specification 1: In that 2nd Lt. STANLEY LOUPUS, HEADQUARTERS Squadron 9th Base Air Depot Area, was at Soissons, France, on or about 23 April 1945, drunk and disorderly in uniform in a public place, to wit: In front of the Hotel Croix d'Or Compeigne Street, Soissons, France.

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Specification 2: In that * * * having received a lawful order from Captain Albert Sherron, his superior officer, to take a walk, to remain silent, to stop disturbing the peace, the said officer being in the execution of his office, did, at Soissons, France on or about 23 April 1945 fail to obey same.

Specification 3: In that 2nd Lt. STANLEY LOUPUS, HEADQUARTERS Squadron 9th Base Air Depot Area, having received a lawful order from 1st Lt. Robert M. Iron, his superior officer, to return to his Station, the said officer being in the execution of his office, did, at Paris, France, on or about 25 April 1945 fail to obey same.

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

Specification 1: In that * * * did, at Soissons, France, on or about 23 April 1945 behave himself with disrespect toward Captain Albert E. Sharron, his superior officer, and Captain Anthony Watkins, his superior officer, by saying to both of them, "You Son of a Bitch", or words to that effect.

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 Specifications 1 and 3, Charge I, of Specification 2, Chage I, except the words "to take a walk", of Charge I, of the Specification, Charge II, except the words "and Captain Watkins, his superior officer", and "both of them", substituting for the words "both of them" the word "him", and of Charge II. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Air Technical Service Command in Europe, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Evidence for the Prosecution: On 23 April 1945 accused entered the nurses' quarters located at the Hotel Croix d'Or, Compiegne Street, Soissons, France, and engaged in conversation with a nurse (R20,32). He left the hotel shortly thereafter and went to a nearby jeep where he vomited or attempted to vomit (R20-24). He was "staggering all over" and was talking "louder than usual" (R21-23). He was in uniform (R14). The nurse told a guard not to permit him to enter the hotel again (R20), and when accused returned and sought

entrance, the guard informed him that he could not enter and said, "I'm sorry,Sir" (R20,21). Accused replied, "Is that all you know- 'I'm sorry, Sir'?" and continued"like he was falling on me", so the guard took hold of his arms (R21). The guard was of the opinion that he was intoxicated and called two military policemen to take him away (R21-23). Captain Albert E. Sherron, a military police officer, observed accused at this time and noted that he was "hollering and causing a lot of excitement" and saying,"Damn it, that is my wife - nobody is going to keep me out" (R12). Captain Sherron then took accused for a walk during which time accused swore at him. He then told him he was disturbing the peace and gave him a direct order to quiet down (R12-14). Accused did not comply with the order, however, and said, "I don't give a Goddamn who you are" (R12,15); "You are only making trouble for me. I don't want to go any place, I want to go into the dance"; "Goddamn you son-of-a-bitch-you are just making trouble for me - I don't care who you are - I want to go back in there" (R13). Accused's conduct caused a crowd to gather, and Captain Sherron ordered two military policemen to take him for a walk while he went for his hat (R13,18). Accused talked irrationally, staggered and acted like "an ordinary drunk will do - kind of quibbling and crying like", and when Captain Sherron returned he was taken to the military police office. Accused lisped when he spoke, cried and staggered, and in the opinion of observing officers was "crying drunk" (R19,27), or "doped up instead of being drunk; although there was no odor of alcohol on his breath" (R13).

The evidence further shows that on or about 25 April 1945 accused was in Paris, France, on pass from 0800 hours, 24 April 1945 to 2000 hours, 26 April 1945, and that First Lieutenant Robert M. Iron, Assistant Provost Marshal at Soissons, was directed to go to Paris, find accused and give him a direct order to report back to his organization(R8). In compliance with his instructions, Lieutenant Iron went to Paris, located accused and gave him a direct order to report back to his organization (R8-10). He also offered to furnish accused with necessary transportation (R9). Accused replied that he had tickets for the Follies and was not going to return at that time (R8,9), and he did not report back until the next day at 1500 hours (R29,31).

4. Evidence for the Defense. Accused testified that he drank five glasses of wine after 1930 hours on 23 April 1945 at different cafes (R37), and did not know what happened from that time until he awoke in a military police station in Soissons, except that he had spoken to two military policemen (R37,38). He had not been affected in a similar manner theretofore by a few drinks, but on 23 April 1945 he was under an emotional strain because of an argument with his girl friend (R39-40). He also stated that Lieutenant Irons did not give him a direct order to return immediately to his organization, but only advised him to contact his Commanding Officer.

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Two officers testified they saw accused at about 0200 hours on 24 April 1945 at the Military Police Detachment in Soissons, and the accused appeared to be very sick and stated that he didn't realize what had happened the night before (R48,50,51).

A medical officer testified that an emotionally upset person is more readily affected by intoxicants, and that he is less likely to recognize the signs of intoxication (51,52).

5. a. Specification 1, Charge I. Accused was charged with being drunk and disorderly in a unifrm in a public place, in violation of Article of War 96. The record of trial discloses that accused, while drunk and in uniform, upon being denied entrance to a nurses' billet, tried to force his way therein. His language was loud and unseemly, he vomited in front of the billet, refused to be quiet when ordered to do so, addressed an officer in profane language, and caused a crowd to gather by reason of his disorderly conduct. He admitted having consumed five glasses of wine theretofore, but claimed he did not recall what happened thereafter. The evidence abundantly shows that he was in a drunken condition. There is some evidence which indicates that he acted as if he were under the influence of drugs rather than intoxicants, but whether "drunkeness was caused by liquor or drugs is immaterial" (MCM,1928,par.145,p.160).

The record of trial clearly discloses that accused was drunk and disorderly in uniform while in a public place, as alleged, and it is, therefore, legally sufficient to support the finding of guilty of Specification 1, Charge I (CM ETO 1388, Madden; CM ETO 9304, Smitt).

b. Specification 2, Charge I. Accused was charged with failing to obey a lawful command of Captain Sherron to remain silent. The evidence shows that such an order was given by Captain Sherron while in the execution of his office, that accused recognized him as his superior officer, and that he failed to obey the order. Although there is some evidence from which the inference might be drawn that accused, because of his drunken condition, did not fully understand the order, the degree of his drunkeness and its effect upon his comprehension were matters within the province of the court for determination and not subject to review here under the facts disclosed by the record of trial. Moreover, a neglect or failure to obey does not involve any specific mental processes or intent, and drunkeness voluntarily induced is not a defense (CM 225336 (1942), Bull JAG, sec.422(5),p.159 et seq.).

For the reasons stated, the record of trial is legally sufficient to support a finding of guilty of Specification 2, Charge I (CM ETO 8189, Ritts; CM ETO 4619, Traub).

c. Specification 3, Charge I. Accused was also charged with

failing to obey the order of First Lieutenant Iron to report back to his organization. The evidence shows that Lieutenant Iron, while in the execution of his office, gave him such an order, that accused received it and understood it, and that he failed to comply with it. The order was a proper one, and accused was required to obey it. His failure to do so constituted a violation of Article of War 96, and the record of trial is legally sufficient to support the finding of guilty (see authorities cited supra).

d. Specification 1, Charge II. Accused being charged with disrespectful behavior toward his superior officer in violation of Article of War 63, the prosecution was required to prove that accused committed the acts alleged, that they were disrespectful, and that the officer toward whom they were directed was the accused's superior officer (MCM,1928,par.135,p.147).

The evidence shows that accused, while in the custody of Captain Sherron, a Military Police Officer, whom he recognized as his superior officer, used abusive and disrespectful language toward him, and this proof, being responsive to the allegations, is ample to sustain the finding of guilty (CM ETO 2866, Woodson). Although the evidence shows that accused was intoxicated at the time, it is not required that disrespect be intentional, and drunkeness does not excuse or minimize the offense (CM ETO 106, Orbon).

6. The charge sheet shows that accused is 22 years 10 months of age and was appointed a second lieutenant 9 December 1942. He had prior service as an enlisted man from 1 October 1939 until his discharge 8 December 1942 to accept a commission.

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

(ON LEAVE) Judge Advocate

Judge Advocate

Judge Advocate

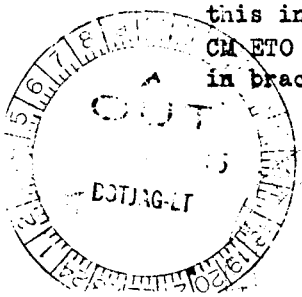
(386)

1st Ind.

War Department, Branch Office of The Judge Advocate General with The European Theater. 22 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U. S. Army.

1. In the case of Second Lieutenant STANLEY LOUPUS (O-569149), Headquarters Squadron, 9th Base Air Depot Area, Army Air Force Station 389, 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 17140. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17140).



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

(Sentence ordered executed. GCMO 554, USFET, 8 Nov 1945).

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

BOARD OF REVIEW No. 1

6 NOV 1945

CM ETO 17141

U N I T E D S T A T E S	)	75TH INFANTRY DIVISION
v.	)	
First Lieutenant JOHN T. HANEGAN (O-1059478), 289th Infantry.	)	Trial by GCM, convened at Werdohl, Germany, 31 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for three years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that First Lieutenant John T. Hanegan, Cannon Company, 289th Infantry, did, at or near Ludenscheid, Stadtkreis Ludenscheid, Germany, on or about 5 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hermann Schroeder, a human being by shooting him with a carbine.

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, excepting the words "with malice aforethought, willfully, deliberately," and "and with premeditation", and substituting the word "and" after

the word"felonious", and before the word "unlawful" and of the Charge not guilty but guilty of violation of the 93rd Article of War. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding General, 75th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, although stating that it was wholly inadequate punishment for an officer guilty of such grave offense and that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility, 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. Before passing to a discussion of the merits of the case an important procedural point deserves mention. Article of War 48 provides that:

> "In addition to the approval required by Article of War 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution,namely:
>
> * * *
>
> (b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the army in the field or by the commanding general of the territorial department or division."

Accused, a first lieutenant, was sentenced to be dismissed the service and this sentence was confirmed on 19 September 1945 by the Commanding General, United States Forces, European Theater. We take judicial notice that on that date active hostilities between the German Government and the Imperial Japanese Government, on the one hand,

and the Government of the United States, on the other, had ceased (MCM, 1928, par.125, p.135). The question, therefore, is whether the Commanding General, United States Forces, European Theater, had the power to confirm a sentence dismissing an officer and whether, pursuant to such confirmation, the sentence may be executed.

In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of a treaty of peace or the proclamation of peace, (Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U.S. 146,64 L.Ed.194 (1919); Macleod v. United States,229 U.S.416,57 L.Ed. 1260 (1913)). A similar construction has been applied to the Articles of War. Kahn v. Anderson,255 U.S.1, 65 L.Ed. 469 (1921), involved a petition for writ of habeas corpus by prisoners in the United States Disciplinary Barracks, Leavenworth, Kansas, who had been placed on trial on 4 November 1918 for murder of a fellow prisoner in violation of Article of War 92 and found guilty on 25 November 1918. Then as now the 92nd Article of War provided:

> "No person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Colombia in time of peace".

In answer to the contention that because of the quoted provision a court-martial was without power to try and sentence accused the court said:

> "That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. (citing Hamilton v. Kentucky Distilleries & Warehouse Company., supra). It is therefore difficult to appreciate the reasoning upon which it is insisted that although the Government of the United States was officially at war, nevertheless, so far as the regulation and control by it of its Army is concerned, it was at peace.
>
> * * *
>
> See McElrath v. United States, 102 U.S. 426,438, 26 L.Ed.189,191, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed."

We conclude that so far as the construction of subparagraph (b) of Article of War 48 is concerned, a state of war still exists and that a sentence of dismissal of an officer may be carried into execution on the confirmation of the commanding general of the Army in the field. The Commanding General, United States Forces, European Theater, clearly occupies such a status.

4. The prosecution proved the following facts:

On 4 May 1945, accused and First Sergeant Bernard J. Kelly were present in the Company Command Post at Ludenscheid, Stadtkreis Ludenscheid, Germany, (R13,54). They were having a cup of coffee when they were interupted by a disturbance on the street. It was then about 0030 hours 5 May (R13,26). Sergeant Kelly borrowed accused's pistol and went downstairs where he discovered two civilians, deceased, a German, and another man. Accused joined Kelly but neither of them was able to understand what the civilians wanted so they took them to an adjoining building. They went to the bedroom occupied by Private First Class Harold S. Keiser, who could speak German, and another soldier. Questioning developed that the civilians wanted to complain to the American authorities about the alleged theft of a cow by the Russians. Sergeant Kelly's suspicions were aroused by the fact that the men were out after curfew and he searched them. From deceased he took a jackknife and a rubber hose which was described as 18-3/4 inches in length with an inner diameter of one-half inch and an outer diameter of 13/16 inches (R13,23; Pros.Ex.4). A jackknife was also found on deceased's companion (R14). Accused was present when the men were searched (R32).

Deceased claimed that he carried the hose as a protection against the Russians (R13). In the meantime, Staff Sergeant Arthur W. Sweet, who was awakened by the noise incident to questioning the men, joined the group (R33). It developed that the man who accompanied deceased was a Hollander who worked for him. Thinking that the Hollander might answer questions more freely if he were questioned alone, it was decided to take deceased into the kitchen which was just across the hall. The distance from the door of the bedroom to the door of the kitchen was about six feet. Adjoining the kitchen was another bedroom with three American soldiers in it. Sergeant Kelly and accused walked across the hall to the kitchen with deceased and told him to stand about a foot in front of a couch which would place him about nine feet from, and in a direct line with, the kitchen door (R12,15,25,33, Pros. Ex.3). There was a security guard posted around the house (R34). Sergeant Kelly testified he returned to the bedroom to continue his interrogation of the Hollander. He looked back into the kitchen once and saw deceased standing as directed. There was no one else in the kitchen with him and accused was standing in the hall (R16). Witness did not remember the position of deceased's hands

(R21). He then closed the door to the bedroom, at least part of the way (R27,32).

Sergeant Sweet stood in the door of the kitchen watching deceased who had his hands clasped over his head. Accused and Sergeant Kelly had ordered him to do this (R33,35). Accused left the apartment after a short while and returned in three or four minutes with a carbine. He stood at the door of the kitchen - which was about two and a half feet wide (R12; Pros. Ex.3), and pointed the weapon in the "general direction" of deceased. Sergeant Sweet returned to the bedroom to inquire of Sergeant Kelly as to the possibility of questioning these men some place else so that they would not continue to disturb military personnel who were trying to sleep (R33,74). Sergeant Kelly heard "about two scuffs" but did not know where they came from. The noise resembled the scraping of a sole of a shoe on the floor (R19,24). Three or four minutes after Sergeant Sweet entered the bedroom three shots rang out. Both Sergeants Sweet and Kelly rushed out of the room and saw accused standing in the doorway with the butt of the carbine against his right hip. The look on his face "was sort of vague" (R17). Deceased was standing three or four feet in front of the couch and was facing toward the door (R21). Sergeant Kelly's impression was that deceased was bringing his hands down from his head to his chest, although it is possible that they were "coming down to his chest but not necessarily from his head" (R38,75). It was then 0145 hours (R34). When asked why he shot deceased, accused said, "The son of a bitch tried to come at me" (R18).

Deceased was wounded three times, once in the right shoulder and twice in the left side of the chest. He died sometime on 5 May 1945 as a result of these wounds (R9-10; Pros.Ex.1).

Description of deceased varied. The doctor who was present at the post-mortem stated that he was about 50 years of age, about five feet eight or nine inches in height, and that he weighed approximately 150 pounds (R9). In the opinion of Sergeant Kelly he was about 35 or 40 years of age and about the same height and weight (R19). Sergeant Sweet thought that he was about 45 to 50 years of age and smaller than himself. He stated that his own height was five feet ten inches and that he weighed 145 pounds (R35,36).

So far as deceased's attitude was concerned, Sergeant Kelly testified that he was a little upset, but not excited (R19). Sergeant Sweet stated that he was highly excited or hysterical when he was in the bedroom and that he became more excited when accused appeared with the carbine (R37). In the opinion of Private First Class Keiser, the interpreter, he was "sort of nervous" and "excited". He did not resist when they took

away the rubber hose but witness "didn't think he liked it" (R46).

As to accused's condition, Captain John F. Dempsey, his commanding officer, testified that he, accused and two other officers had something to drink between 2000 and 2230 hours. At the latter time accused was "high" but lucid in his speech (R67). Sergeant Kelly stated that accused was not drunk when he was with witness (R25) and that he seemed perfectly normal and in full control of his faculties (R70). Sergeant Sweet testified that accused was "a trifle unsteady" in his movements and that he attributed this to accused's drinking. Accused otherwise had control of himself (R41).

5. After an explanation of his rights, accused at his own request was sworn and testified (R57). His version of the evening's events coincided with Kelly's. He was present when deceased was searched and the rubber hose taken from him. Prior to that time he had seen such hoses in "slave camps" and understood that they were carried by guards (R60). When the two men were separated, he left Sweet to watch deceased while he went to get a weapon. When he returned with a carbine, Sweet departed (R61). Accused, by motioning with the carbine, directed deceased to sit down. He believed that he said "Sitz" at the same time. At any rate, deceased sat down but soon arose. Accused again motioned him to be seated and deceased complied. However, he again rose and this time he did not obey accused's commands. To emphasize his orders, accused loaded the weapon by pulling the bolt to the rear and releasing it. With that, deceased took two or three steps in accused's direction (R62). Accused "assumed" he was trying to leave the room and so released the safety and pulled the trigger three times. He made no effort to strike deceased with the stock of the carbine and could not explain why he did not (R63). Accused was not afraid of deceased, but he was a little "leery of him" because he did not have a pass permitting him to be on the streets after curfew, because he was carrying an instrument with which he could have inflicted harm, and because he was a German citizen (R64). Accused felt that he was justified in using the maximum force to prevent deceased's escape (R66). Accused had three or four drinks of gin between 2000 and 2230 hours but they had not affected his senses (R67).

6. Accused was charged with murder. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought may consist of 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, even though such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that

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it may not be caused (MCM, 1928, par.148a, p 162-164). Accused conceded, and the prosecution's evidence tended to establish, that the shooting was deliberate. The only disputed questions of fact were whether accused shot in an attempt to prevent deceased from escaping and whether, if he did, did he use more force than was necessary. The court in finding accused guilty excepted certain words from the traditional murder specification so that in substance it read that accused feloniously and unlawfully killed Hermann Schroeder by shooting him with a carbine, and found him not guilty of Article of War 92, but guilty of a violation of Article of War 93. The words which were excepted were "with malice aforethought, willfully, deliberately," and "with premeditation." Manifestly the court intended to find accused guilty of manslaughter.

The case, therefore, resolves itself simply into a question whether accused was justified in killing deceased to prevent his escape. The evidence that deceased attempted to escape is weak. Accused claimed that he did. It was conceded that he had moved three or four feet toward the door, and Sergeant Kelly heard a "scuff" shortly before the shooting, although he was unable to locate its source. On the other hand, deceased was unarmed and frightened. The only exit from the room was through a narrow door - a little over two and one half feet wide - which was guarded by accused who had a carbine levelled in deceased's direction. To deceased's knowledge, only five feet across the hall there were other soldiers, one of whom was armed, and deceased, even if he succeeded in getting by accused, could not hope to evade eventual capture. In these circumstances, the fact that after he was shot, deceased was found to have advanced three or four feet loses its significance as indicating an attempt to escape. Even assuming, however, that deceased did attempt to escape, it is abundantly clear that accused used more force than was necessary. Making every concession that can be made in favor of him who was required to exercise his powers of judgement at the time and fully realizing that hindsight is better than foresight, still we utterly fail to see the necessity for accused's using the force that he did. Admittedly accused made no attempt to summon help before shooting, although help was easily available. There were four American soldiers in the room a few feet from accused. There were three soldiers in an adjoining room and there was a security guard posted outside. Accused could offer no satisfactory evidence as to why he did not use the butt of his carbine to stop deceased. Even accepting accused's story at its full value, the matter stands that deceased arose three times after being ordered to sit down, that the third time accused drew back the bolt of his carbine and put a

round in the chamber to emphasize his orders; that deceased made three or four steps toward accused and the latter "assumed that he was trying or going to leave the room" and shot him three times. In the circumstances disclosed by this record the use of such force was unnecessary. There is a line of authorities which holds that when there is evidence justifying a conviction of a high degree of homicide and also evidence warranting an acquittal, and the court finds accused guilty of a lesser degree of homicide which is not supported by evidence, then the conviction cannot stand because of the danger that the triers of fact compromised these differences by finding accused guilty of the lesser offense. On the other hand, if the evidence would not warrant an acquittal the same authorities hold that accused has no just complaint if he is found guilty of a lesser offense than that of which he might properly have been convicted. (State v. Pruett, - N.M.-, 203 Pac.840, 21 A.L.R. 579; Bandy v. State 102 Ohio St.387, 131 N.E. 499, 21 A.L.R. 594, and annotation thereto; State v. Yargus, 112 Kan. 450, 211 Pac.121, 27 A.L.R.1093 and annotation thereto; State v. Reed 39 N.M.44, 39 P.(2nd) 1005, 102 A.L.R. 995 and annotation thereto). Assuming, without deciding, that these principles apply to this case, accused can derive no benifit from them. If, as has been suggested, the court by its action found him guilty of involuntary manslaughter, and that such a conviction was not sustained by the evidence (State v. Pruett, supra) still, for the reasons already developed above, the evidence did not warrant his acquittal. The finding of manslaughter was therefore valid (CM ETO 3362, Shackleford), the record is legally sufficient to sustain the findings and the sentence (cf. CM ETO 4581, Ross).

6. The charge sheet shows that accused is 24 years four months of age. He enlisted in the Regular Army on 16 October 1939 and on 2 September 1943 was commissioned a second lieutenant.

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

8. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 93. Confinement in a penitentiary is authorized upon conviction of involuntary manslaughter by Article of War 42 and section 275,

Federal Criminal Code (18 USCA 454). In view of accused's age and the period of confinement, the designation of the Federal Reformatory, Chillicothe, Ohio is proper (Cir.229, WD, 8 June 1944, sec.II, par.3a, as amended by Cir.25, WD, 22 January 1945).

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

[illegible] Judge Advocate

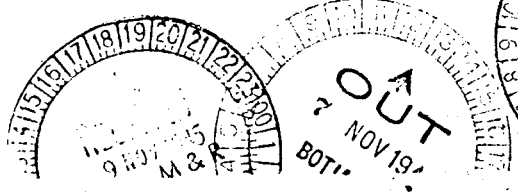
RESTRICTED

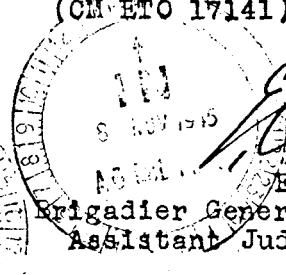
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 6 NOV 1945 TO: Commanding General, United States Forces, European Theater (Main) APO 757, U.S. Army.

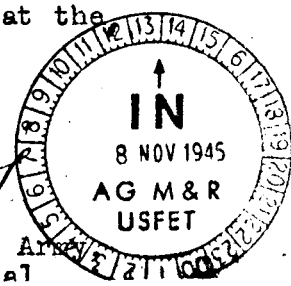
1. In the case of First Lieutenant JOHN T. HANEGAN (O-1059478), 289th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions 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 17141. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17141).





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



(Sentence ordered executed. GCMO 581, USFET, 23,Nov 1945).

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

BOARD OF REVIEW NO. 4

16 OCT 1945

CM ETO 17167

U N I T E D S T A T E S	99TH INFANTRY DIVISION
v.	Trial by GCM, convened at Kitzengen, Germany, 1 June 1945. Sentence: Dismissal and total forfeitures.
Second Lieutenant JAMES F. DYAL (O-2005360), Company K, 394th Infantry	

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

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

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

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

Specification: In that Second Lieutenant James F. Dyal, Company "K", 394th Infantry Regiment, did, at Sommerhausen, Germany, on or about 11 May 1945, with intent to do him bodily harm, commit an assault upon Sergeant Frederick H. Grim, Company "K", 394th Infantry, by cutting him on the arm and neck with a dangerous weapon, to wit, a knife.

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

Specification: In that * * * did, at Sommerhausen, Germany, on or about 11 May 1945, wrongfully and unlawfully cut his military inferior, Sergeant Frederick H. Grim, Company "K", 394th Infantry, on the arm and neck with a knife.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that * * * was, at Velden, Germany, on or about 2 May 1945, found drunk, while on duty as Platoon Leader, Company "K", 394th Infantry Regiment.

He pleaded not guilty to all charges and specifications and was found not guilty of Specification I, Charge III, guilty of the Specification to Charge I except the words "with intent to do him bodily harm", not guilty of Charge I, but guilty of a violation of the 96th Article of War, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority, the Commanding General, 99th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence, but owing to special circumstances in the case, remitted so much thereof as provides for confinement at hard labor for five years and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution insofar as it relates to the charges and specifications of which accused was convicted, is substantially as follows:-

On the morning of 2 May 1945, accused was observed by his battalion commander coming up a road near Velden, Germany (R7). Accused was on duty at the time, his duties being those of a platoon leader (R8). He was being supported by an enlisted man, and the battalion commander "could see he was in no condition to travel without the support of somebody". He therefore placed him under arrest (R7). At this time, he was definitely under the influence of liquor and was drunk and incapable of performing his duties (R8). With respect to the tactical situation of the company, there was no immediate contact with enemy troops, but the company proceeded down the road not knowing when it would meet them. Resistance had been scattered (R8).

On 11 May 1945, accused's platoon command post was located in Sommerhausen, Germany (R9). Late that afternoon, Sergeant Frederick H. Grim of the same company met accused in the command post and the two proceeded to drink some wine. They were joined by several other enlisted men of the company (R9, 16, 22). Accused was under the influence of liquor or drunk at this time (R10,17,19). He started "cutting up" with Trulac, one of the enlisted men present, and when the latter indicated that he did not feel like playing, accused drew a knife and threw it with moderate force on the couch between Trulac and another of the enlisted men (R9,10, 16,22,23). The latter hid the knife behind the couch, whereupon accused pulled out another, threatening to cut Trulac's throat (R10,13,22). Sergeant

Davis; another of the enlisted men, remonstrated with him, but accused grabbed him by the hair and said he would cut his throat (R10,16,20). Sergeant Grim asked accused to be sensible and put the knife down (R22). Accused then slashed at Grim, cutting him under the arm (R10,16,22). As accused advanced to cut him again, Grim asked him to refrain, but accused again slashed at him and in the ensuing struggle, cut Grim on the back of the neck (R10,16,21-23). The knife was finally taken from accused by the enlisted men and medical assistance was summoned (R10,16,17,23). After Grim left, accused recovered the knife and ran upstairs saying "Where did Sergeant Grim go?" (R23). Grim's injuries consisted of a superficial cut on his arm and a gash on his neck which required three stitches (R10). He had been drinking, and was under the influence of liquor, but "still had his right frame of mind" (R17,19,24).

4. Accused having been warned of his rights by the law member, elected to testify under oath (R29). With respect to Specification 2, Charge III, he stated that he was not drunk on 2 May 1945, but had been drinking the night before and was ill just prior to the time the battalion commander saw him. This was the reason why he was at that moment being supported by an enlisted man (R29,30). As to the specifications to Charges I and II, accused testified that he had been drinking wine with the enlisted men and had no recollection of the incidents complained of (R30). He had been with his platoon since November 1943 and was commissioned on 24 January 1945 (R29,30).

Other evidence for the defense was to the effect that Sergeant Grim, sometime after the scuffle, had told Private First Class Baker that he "didn't know whether he was cut accidentally or on purpose or whether he hit the table" (R25). 1st Lieutenant Malvey E. Jameson testified that he saw accused both before and after his arrest on 2 May 1945 and that he was not drunk on either occasion (R27).

5.The record of trial leaves no doubt of its sufficiency to sustain the findings of guilty reached by the court.

a. As to Charge I (Assault with a dangerous weapon), such difficulty as otherwise might have arisen in connection with the effect of accused's intoxication upon the specific intent alleged has been eliminated by the court's action in excepting from its findings of guilty the words"with intent to do him bodily harm".

b. As to Specification 2, Charge III (drunk on duty, 2 May 1945), all elements of the offense charged have been amply proved by the prosecution. The factual question raised by the testimony for the defense was one for determination by the court whose findings will not be disturbed by the Board of Review in view of the substantial competent evidence supporting them. (CM ETO 9423, Carr; CM ETO 10362, Hindmarsh; CM ETO 12924, Calvo).

c. With reference to Charge II and its specification, the conduct of accused in assaulting Sergeant Grim in the manner and under the circumstances shown by the uncontradicted evidence adduced by the prosecution so clearly constitutes a violation of Article of War 95 that no discussion of the matter is required (Dig. Op. JAG 1912-40, sec. 453 (2)

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and (3) p.341; cf: CM ETO 339, Gage, 1BR (ETO) 299). It is ofcourse immaterial that the same transaction constitutes the basis for both the charge under AW 95 and that under AW 93 (CM ETO 9542, Isenberg).

6. The charge sheet shows that accused is 24 years and six months of age, was inducted 14 November 1942 at Fort McPherson, Georgia, and was honorably discharged 23 January 1945 to accept a commission as second lieutenant, Army of the United States. 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 the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. Dismissal and total forfeitures are authorized punishments for an officer upon conviction of a violation of Article of War 96. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95 and in time of war, upon conviction of violation of Article of War 85.

(ON LEAVE) Judge Advocate

Martin A. Meyers Judge Advocate

John R. Anderson Judge Advocate

(401)

1st Ind

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

1. In the case of Second Lieutenant JAMES F. DYAL (O-2005360), Company K, 394th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 17167. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 17167).

IN 19 OCT 1945 AG M&R USFET

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

(Sentence ordered executed. GCMO 539, USFET, 3 Nov 1945).

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BY REGINALD C. MILLER, COL.,
JAGC, EXEC. ON 26 FEB 52