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HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

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

VOLUME 26 B. R. (ETO)

CM ETO 12813 - CM ETO 13476

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CLASSIFICATION CANCELLED
AUTH: TJAG 8 Aug 46 BY: J.J.N.

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

Judge Advocate General's Department

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JAGC, EXEC. ON 26 FEB 52

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 26 B.R. (ETO)

including

CM ETO 12813 - CM ETO 13476

(1945)

Office of The Judge Advocate General

Washington : 1946

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JAGC, EXEC ON 26 FEB 52

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BOARD OF REVIEW NO. 2

14 SEP 1945

CM ETO 12813

UNITED STATES	79TH INFANTRY DIVISION
v.	Trial by GCM, convened at Faulx, Meurthe-et-Moselle, France, 15 February 1945.
Private ELMER E. BLANKENSHIP (35658587), Company A, 315th Infantry	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

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

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

Specification 1: In that Private Elmer E. Blankenship, Company "A" 315th Infantry did, at the vicinity of Crion, France on or about 30 September 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at the vicinity of Weitbruch, France on or about 7 December 1944.

Specification 2: In that * * * did, at the vicinity of Weitbruch, France on or about 9 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in

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desertion until he was apprehended at Luneville, France on or about 13 December 1944.

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

Specification: In that * * * did, without proper leave, absent himself from his command at the vicinity of Niederroedern, France from about 22 December 1944, to about 29 December 1944.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of 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 only so much of the finding of guilty of Specification 1 of Charge I as involves a finding of guilty of absence without leave from 30 September 1944 to 7 December 1944 in violation of Article of War 61, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On 30 September 1944, accused was an ammunition bearer in Company A, 315th Infantry Regiment, which was then located just west of Crion, France (R8,10). He was given permission on that day to go to the aid station and pursuant to such permission he left the company. The records of accused's battalion aid station for 30 September 1944 do not contain any entry concerning him. His name would appear thereon had he reported for treatment inasmuch as the name of every soldier who reports is so recorded. The only permission to leave that was granted accused was for the purpose of going to the aid station (R9,11). He was returned to his company on 7 December 1944, which was then in a tactical assembly area at Weitbruch, France (R12). At the time the company had established road blocks around their billets (R12) and accused was assigned to the third platoon as a rifleman and placed in arrest in quarters (R13).

On 9 December 1944, the third platoon was ordered to leave Wietbruch, France and establish a road block on a road outside of Mommenheim. Accused was sent to this platoon under guard and left Weitbruch with it that morning. He left the platoon while they were in the woods enroute to their destination and although a search was made he could not be found. He did not have permission to be absent (R15).

On 21 December 1944 accused was brought to the Service Company, 315th Infantry regiment, for return to his organization. He was fed and billeted at that time and the next morning he was missing from his quarters. Although the entire Service Company area was searched he could not be found (R17). A non-commissioned officer of the Service Company, whose duty it was

to take charge of stragglers, men returning to duty from the aid station and men absent without leave, kept records of the soldiers brought to him under these circumstances. His record for 22 December 1944 was received in evidence, defense counsel expressly stating he had no objection thereto. It contained the following entry:

> "Date, 22 December 44; Service Company, 315th Infantry; Outgoing: Serial Number 3565857; Blankenship, Elmer E., Private, Company "A"; AWOL retained under arrest from 21 Dec 44; AWOL again as of 0900 22 December 1944" (R17,18;Pros.Ex.A).

It was stipulated by the prosecution defense counsel and the accused that if Staff Sergeant L. L. Landry of the 66th Military Police Company were present in court and testified as a witness in the case he would testify that accused was taken into military control in Luneville, France, on 29 December 1944 (R18).

4. Accused, after his rights as a witness were fully explained to him (R19,20), was sworn and testified as follows:

He was 16 years of age when he joined the army and is now 18 years of age. On 7 December 1944 he and some others walked into the company command post where "Captain Harvey's office" was located and waited until he walked in about 1600 hours. They were then under guard and the captain said "Where in the hell have you bastards been?" They remained silent and the captain said he would "beat" them "up with a pistol". He further added he would get them into combat with a rifle platoon and then he put "us under twenty-four hour guard and sent us to the 2d platoon. That morning we went into attack; the platoon sergeant gave me a rifle and then I went to the 3rd platoon as 2d scout" (R20,21).

It was stipulated by defense counsel, prosecution and accused that if Major Anthony V. Stabile, Division Neuropsychiatrist, were present in court and sworn as witness that he would testify as follows:

> "Soldier shows no evidence of being mentally ill. Although the soldier gives evidence of having been upset by a blast concussion at the time of his first alleged offense, he was mentally responsible for his actions at the time of the second and third alleged offense" (R19).

5. As a result of the action of the reviewing authority, the Board of Review is concerned herein only with the legal sufficiency of the offense alleged in Specification 1 of Charge I as a violation of Article of War 61 and the finding of guilty of absence without leave is amply supported by substantial evidence of all the elements of this offense (MCM,1928,par.132, p.146).

Concerning the offense charged in Specification 2 of Charge I, accused's unauthorized absence at the time and place alleged is proved by the uncontradicted testimony of his squad leader. From all the uncontradicted facts established by the evidence, together with accused's admission in his sworn testimony that the morning in question they went into the attack, the court was warranted in inferring that he left his organization with the intent to avoid hazardous duty (CM ETO 9469, Alvarez). Accordingly, all the essential elements of this offense are established by substantial evidence (MCM, 1928, par.130a,p.143).

With respect to the finding of guilty of absence without leave as alleged in the Specification of Charge II, the record contains substantial evidence of all the elements of this offense to support the findings of guilty (MCM, 1928, par.132,p.146).

6. The charge sheet shows that accused is 20 years of age and was inducted 21 April 1943 at Huntington, West Virginia. He had no prior service.

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

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

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
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BOARD OF REVIEW NO. 1

26 JUN 1945

CM ETO 12850

UNITED STATES	)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private HENRY C. PHILPOT (39080069), Attached-Unassigned, 234th Replacement Company, 90th Replacement Battalion	)	Trial by GCM, convened at Marburg, Germany, 23 April 1945. Sentence: To be hanged by the neck until dead.

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Henry C. Philpot, attached-unassigned 234th Replacement Company, 90th Replacement Battalion, did, at or near Bad Neuenahr, Germany, on or about 30 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Second Lieutenant John B. Platt, a human being by shooting him with a rifle.

(6)

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, one by summary court for disrespect to an officer in violation of Article of War 63, and one by special court-martial for absence without leave for three days in violation of Article of War 61 and for being drunk and disorderly in a public place 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, Advance Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

At about 1740 hours on 30 March 1945 the commanding officer of accused's company, which was stationed at Bad Neuenahr, Germany, having been notified that accused was drunk and he had run into the mess hall, directed that Lieutenant Platt and a four-man guard detail place accused under arrest and take him to the stockade (R7,8). The lieutenant walked over to the mess area where accused was eating out of a mess kit, spoke to him, and then they walked toward the front of the mess hall, the members of the detail falling in behind them (R11,23,25). Accused was carrying his mess kit and had an M-1 rifle over his shoulder (R23). When they reached the corner of the building, a sergeant appeared and delivered the lieutenant the confinement papers (R7,10,15,29). Accused was heard to say that he did not want to be confined but wanted to eat, and the lieutenant replied that it was all right for him to go ahead and eat (R15,19,26). Accused then dropped his mess gear, took his rifle from his shoulder, pulled the safety off, worked the bolt back, looked into the chamber, let the bolt go forward, put his finger on the trigger, waved the rifle around at all of the members of the detail, and then pointed it directly at Lieutenant Platt (R11-15,17,19,23,29). After pointing the rifle at the officer (for a period estimated by two witnesses to be about five minutes (R11,29)), accused ordered him to back up or he would shoot (R11,15,21). The officer stepped back three paces and accused fired. Lieutenant Platt fell over on his back (R11,15, 21,23). The sergeant, who had brought the confinement papers, grasped by the barrel a carbine he was carrying and hit accused over the head, while a corporal struck accused with a .45 pistol (R10,11,19,21,24,27). Accused, knocked to the ground, tried to reach for his M-1, but the sergeant prevented him by jerking him over to

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a wall (R19,20).

Immediately after the firing, the body of Lieutenant Platt lay on the street, without any movement, with blood all around him (R7,9). He was taken to a hospital (R7), where an examination at about 1750 or 1755 hours showed that the officer had died practically instantaneously from a bullet wound that had severed his spinal cord (R30).

4. No witnesses appeared on behalf of accused. After his rights as a witness were explained to him, he elected to testify, substantially as follows:

He was unable to give a clear account of exactly what happened because he was under the influence of intoxicating liquor. He could remember, however, that the lieutenant demanded that he go with him. Accused resented the fact that he was being put under confinement, and said that he was not going and would shoot if he did go. The persons who were near him began to crowd in on him, and he waved his gun around demanding that they back up or he would shoot, but did not say who or what he would shoot. His gun went off, though he did not know whether or not he pulled the trigger. Someone hit him on the head and he fell to the ground (R31). He remembered that he had left a clip in his gun after shooting on the range earlier that morning, and that he told the lieutenant to back up because he, accused, was much depressed and wanted to warn him to stay away. He did not remember, however, whether or not the lieutenant or the guards had guns (R34,35). Accused was able to walk. He "just flared up" (R36).

Accused had been drinking practically all that day, drinking wine "incessantly" from mid-morning. Due to his drunkenness he was, to his regret, the cause of the death of the lieutenant. He had "no excuses" (R33,34).

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).

Clear, undisputed evidence establishes, and accused in his testimony admits, that at the time and place alleged he caused the

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death of Lieutenant Platt by shooting him with a rifle. The court's finding that the shooting was with malice aforethought is supported not only by the inferences of malice arising out of accused's acts, but also by abundant evidence of express malice and intent to kill, including the evidence of his pulling back the bolt of the rifle, checking the chamber, pulling off the safety, aiming the rifle at Lieutenant Platt, and stating that he would shoot.

In support of the defense that accused was under the influence of intoxicating liquor at the time of the offense, he testified that he had been drinking incessantly since mid-morning. On the other hand, he admitted that he was able to walk. At the trial he recalled the lieutenant's demand that he go with him. He also recalled the waving of his rifle, his threats to shoot, and the firing of the rifle. These admissions, in addition to the compelling evidence produced by the prosecution, form a body of substantial evidence that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite element of malice aforethought, and support the court's finding that accused was guilty of murder under Article of War 92 (CM ETO 1901, Miranda; CM ETO 6229, Creech; CM ETO 11269, Gordon).

6. The allied papers attached to the record of trial reveal that accused's battalion commander, who by first indorsement concurred in the company commander's recommendation that accused be tried by general court-martial, was later appointed the investigating officer to investigate the charges under Article of War 70. In view of the strong nature of the evidence supporting the court's findings, and the rule that an investigation under this article is not jurisdictional (CM 229477, Floyd, 17 B.R. 149 (1943); CM ETO 4570, Hawkins), accused's substantial rights were not injuriously affected by such appointment.

7. The charge sheet shows that accused is 27 years, nine months of age and was inducted 7 May 1941 at Sacramento, California, to serve for the duration of the war and six months. He had no prior service.

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

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the court-martial may direct. (AW 92).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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(10)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private HENRY C. PHILPOT (39080069), Attached-Unassigned, 234th Replacement Company, 90th Replacement 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. The evidence clearly sustains the charge of murder. Assuming that accused was and is of normal mentality, there is not a shadow of excuse to be offered in palliation of his crime. However, his testimony is a strange conglomeration of statements of fact and explanations of his emotional life. It is clearly indicative that he possesses some degree of education, but inherently bespeaks him as "a man of very strange sensitivities". In fairness to accused and in vindication of the processes of military justice, I recommend that he be subjected to a careful psychiatric examination.

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 12850. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12850).

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.

(Sentence ordered executed. GCMO 365, USFET, 30 Aug 1945).

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

BOARD OF REVIEW NO. 2 20 AUG 1945

CM ETO 12855

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Luneville, France, 28 March 1945. Sentence: To be hanged by the neck until dead.
Private EDWIN R. MINNICK (33646866), Battery D, 559th Antiaircraft Artillery (Automatic Weapons) Battalion	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 Edwin R. Minnick, Battery D, 559th Antiaircraft Artillery (Automatic Weapons) Battalion, did, at Bouxurulles, Vosges, France, on or about 5 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Emile Charles Morlot, 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 Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seventh United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Accused and Private Fred Chaffee were both members of Section 7, Battery D, 559th Antiaircraft Artillery (Automatic Weapons) Battalion, stationed about three miles from the village of Bouxurulles, France, guarding a gasoline dump (R19,20). Between 2:30 and 3:00 pm, 5 October 1944, accused and Chaffee left the company area and went to Bouxurulles. Both were armed with rifles. Upon reaching the village they drank a small glass of cognac and each bought a quart of the same liquor. They then walked to the edge of the village, sat on a log and each drank about one-half of his bottle. They began drinking about 3:45 pm. They then went back into the village and each bought another quart of cognac. Going down the street they met some colored soldiers, gave them a drink and took a drink themselves. All of them drank from the bottle. Accused and Chaffee continued walking about the village and took another drink. By this time each soldier still had one full bottle of cognac and the two bottles from which they had been drinking were a little more than a quarter full. They carried the bottles inside their shirts. They stopped in front of a cafe and finding the door closed, one of them stepped back three or four paces and pointed his rifle at the door. A woman who was standing nearby called out to them that the door was closed and that there was nobody in the cafe. They thereupon walked up to her, tapped her on the shoulder and asked her for cognac. She said she had none. Accused took her by the waist and asked her for cognac. She released herself from his hold, but he repeated the act three more times. According to Chaffee accused put his arm around the woman's neck and tried to talk to her. When accused understood that she wanted him to leave her alone he let her go and both soldiers walked away. The woman testified that they did not "walk well", that "they were rolling", that accused had "dead eyes", "the eyes of a drunkard", and he seemed to be "completely" drunk. Chaffee testified that the liquor seemed to affect accused to such an extent that witness could not reason

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with him; that he spoke "a lot faster than normal but he couldn't seem to make sense", but that he appeared to walk straight; "he was drunk but it seemed to affect his mind more than anything;" "you couldn't argue or reason with him. He was just one-minded - one way" (R8,9,11,27-29).

After leaving the woman the two soldiers walked to the house adjoining the cafe they had previously found closed. Emile Charles Morlot, the deceased, who was 68 years of age, and his 70-year-old sister lived in this house. It was between 5:30 and 6:00 pm. Morlot was in the barn or enclosure which formed part of the house. Both soldiers entered the enclosure and accused asked Morlot for cognac. The latter stated he had none and waving his hands told the soldiers to go away. Accused took Morlot by the shoulders and shook him a little. The elderly man told him to release him and go away. This angered accused and he began to argue with Morlot. His actions while talking to Morlot did not seem "natural" and he did not seem to make any sense in what he was saying. Chaffee tried to reason with him saying they had enough cognac. Morlot was unarmed and attempted no violence. Accused then unslung his rifle and holding it at port arms pushed the old man back. He resumed the argument Morlot was scared and "didn't know what to do". After a few seconds accused raised his rifle and fired into the ceiling. The sister who was standing a few meters away from her brother said, "Oh my God, what are you going to do to him", and withdrew to the doorway leading into the kitchen because she was afraid of firearms. Morlot was greatly frightened, stood still a moment, then turned and made for the kitchen door which was a few steps away. His sister, standing on the doorway urged him to go in before they shot him. As he reached the doorway and stood beside his sister accused raised the rifle to his shoulder, aimed it at Morlot and fired (R8-10,12-14,20-31). The bullet passed through Morlot's heart and lungs, and he dropped in the doorway. Death was almost instantaneous (R6,7,9,10,14,18,19,23,25; Pros.Ex.A).

Immediately before the fatal bullet was fired Chaffee turned around and stepped outside the enclosure. He heard the shot. When accused came out of the enclosure and rejoined Chaffee, he said to the latter, "I shot the old man", "I shot him in cold blood", and made another statement to the effect that he had shot him "just like his brother told him to", namely "never to argue with anybody but to shoot him". As the two soldiers walked up the street, Morlot's sister hurried by them crying, "Oh my God they killed him". She had just passed them when she met her cousin who had heard the shots and turning toward the soldiers told him that they had killed her brother. When the cousin asked them what they had done, accused unslung his rifle, pointed it at his chest, and told him to go away. Chaffee tried to quiet accused and persuaded him to leave (R17-18,32).

12855

The only evidence of what happened from the time the soldiers left the cousin of deceased to the time they reached camp is found in Chaffee's testimony.

The two soldiers proceeded up the road and out of the village in a fast walk in the direction of their camp which was about two and a half to three miles away. On their course they crossed a field and entered some woods where they stopped for approximately three-quarters of an hour. Up to the time they reached the woods accused continued his "violent actions" and then seemed to subside a "little bit". He sounded a "little wild", acted very nervously and seemed to "talk a lot". He told Chaffee not to mention that he had killed the "old man". When he said this he appeared to be "abnormal".

The firing of the gun and the shooting of the man seemed to bring accused back to normal to a small extent but "not hardly so you could notice it". He appeared to be the same after that. By the time they reached camp, about two hours later, he seemed no different insofar as the more serious effects of the alcohol were concerned. He was just as "violent" when he returned to camp as he was in the village when the shooting was taking place.

While in the woods Chaffee stopped to relieve himself while his companion continued on about 200 feet. Chaffee then fired his rifle several times to let accused know where he was. The shots were answered by accused and after Chaffee rejoined him they resumed their way to the camp. At the edge of the woods they each took another drink finishing what remained in Chaffee's bottle. Just before reaching camp they stopped to talk with some engineers located nearby and gave them a drink. Accused did not join in the conversation (R25-35).

Private Irving Chaser, a member of the same section as accused, testified that the soldiers arrived at their gun position in camp at about 8:00 pm when it was getting dark. He saw accused approaching the camp and from a distance he seemed to be "happy and singing". Accused and Chaffee went up to the camp fire where witness was standing guard. Accused greeted witness and a Corporal Armstrong who was also there. About 20 minutes after his arrival and while they were talking at the camp fire accused said that he had just come back from town and that he had killed a man. "He kept repeating that over and over". He told witness and the others to go to sleep and that he would stand guard for them; that he had just killed a man and was unable to sleep; that he wanted to get some cognac and so just shot the man; that he shot him in the chest. Accused was supposed to stand guard that night, but it was not yet time for him to go on duty.

He told witness he would like to have some extra ammunition, if he had any. Witness replied he had four extra rounds, but accused said he needed at least 14 rounds. Witness suggested that he see Private Phelps who was about 100 yards away and had ammunition. Accused started towards Phelp's location. When he stated that he had killed a man, accused appeared to be troubled. He spoke coherently and as normally as he usually spoke but he was not sober. He was not "violent in any way". He seemed to know what he was talking about. Witness saw accused walking when he first approached the gun position and when he started toward Phelps' position and did not notice him "stagger, fall down or do anything of that kind". Witness had known him for four months (R36-40).

Private First Class Allen A. Phelps testified that on the evening in question at about 8:00 pm accused called him out of his tent and asked him if he had any extra ammunition. Witness said yes, and asked him what he wanted it for and what he had done with his. Accused replied that he had done some shooting and wanted to replace the ammunition he had used, so that he would have the same amount that had been issued to him. When asked what he had used the ammunition for, accused stated that he had been doing a "little shooting" and that he had been in a town nearby and had shot a man. Asked if it was an accident or whether he did it on purpose accused stated that it was not an accident; that he tried to buy some cognac from the man; that the latter shoved him and he, accused, pulled the rifle from his shoulder and shot him. Witness inquired if he was sure the man was dead and where he had hit him. Accused said that he hit him in the chest, that the man fell in the doorway and was bleeding from the nose and mouth. He further stated that the victim was an old man and he, accused, did not know why he had done it; that it was "pitiful", and that right after that the "old woman" ran by him crying very hard; that it was a "pitiful scene". Accused recognized Phelps when he asked for the ammunition, and called him by name. There was liquor on his breath and he had a bottle on him partly filled. He did not seem tipsy but was more "scared than anything". Normally he was not nervous or "shaky". His speech appeared to be coherent. Witness had known him for a year and six months but had not observed him intoxicated prior to this occasion (R36-44).

After reaching camp, Chaffee sat by the fire for about a half hour. He then became sick, vomited, retired to his tent and "passed out" (R35).

4. Major Bernard L. Greene, Medical Corps, was called as a witness for the defense and testified in substance as follows:

He practiced medicine since 1933, specializing in neuropsychiatry. He has been in that field since 1931. Since his entrance

into the Army in August 1941, he has specialized in the same field and has been Chief of the Neuropsychiatry Section of the 21st General Hospital for 26 months. He examined accused continuously from 4 to 21 February 1945. During that period accused was given the routine examination consisting of a physical and neurological examination, laboratory tests of the blood, a spinal fluid examination, an x-ray study of the skull, and a pneumoencephalogram of the brain. All thest tests revealed minor evidence of brain disease. The following was his diagnosis: Constitutional psychopathic state, emotional instability, severe, manifested by chronic alcoholism and combative behavior, all existing before his entrance into the service and not incurred in line of duty; accused is not psychotic meaning that he is not insane. His findings were that accused was able to understand the nature of court-martial proceedings and assist in his defense, but that "at the time of the alleged offense he was suffering from some mental derahgement which prevented him from distinguishing between right and wrong". The nature of this "impairment" was due to alcoholic intoxication. The reason for this conclusion was that repeated medical study revealed a fixed habit pattern antedating his induction into the Army with numerous incidents characterized by alcoholic intoxication and assaultive behavior of which accused was not aware. If accused were under the influence of liquor, intoxicated, then in the opinion of witness, based upon accused's past behavior, he would be non-responsible (R44-46).

When under the personal observation of the witness accused was at no time psychotic, was cooperative and knew exactly what he was doing.

A constitutional psychopathic state is generally recognized as a type of sanity rather than insanity.

His opinion about accused's assaultive behavior was based on the history given by accused himself that since the age of 16 he had frequently been involved in brawls of which he would have no recollection except that he would wake up bloody in the morning. Witness observed accused's pneumoencephalogram of the brain. In this test all spinal fluid was drained from the brain and air injected. The test was performed while accused was anesthetized. During the test he practically came to and more anesthetic had to be administered. While he was semi-conscious he displayed assaultive behavior of which he had no recollection when he regained full consciousness. Most likely this was similar to the type of behavior he would have shown if a concentration of alcohol had been injected into his blood stream. No alcohol, however, was administered in any test. Assaultive behavior is not a type of insanity and is displayed by anyone who commits an assault or a murder. The fact that an individual is a combative type has no bearing on his sanity or insanity.

The slight amount of brain injury revealed by the tests, was the result of trauma to the head which accused stated he had sustained on numerous occasions, and of a skull fracture disclosed by x-rays. This brain injury rendered him more susceptible to the influence of alcohol than the average person. He is perfectly capable of recognizing right and wrong when not under the influence of liquor.

In the course of repeated interviews accused stated he did not recall the killing. Some persons in a chronic psycopathic state manifested by chronic alcoholism ordinarily recognize and remember all the details of an incident three or four hours after the incident when he is no longer under the influence of liquor, while some have a temporary blackout and do not know what they do. Accused belongs to the latter class. During the blackout he is temporarily insane, commits an act, and later remembers nothing about it. If an individual becomes temporarily insane for a matter of seconds it would affect his memory only during the interval in which he is not in complete control of his faculties. When he becomes sane again he cannot tell a coherent story of what happened during that interval. A blackout caused by acloholism should last more than a few seconds, and usually lasts an hour or a half hour before he regains complete control of his faculties. The temporary blackout of accused does not differ from that of an ordinary drunk who "blacks out".

In answer to hypothetical questions which summarized the evidence of what accused did and said from the time of the shooting up to and including the time he talked with Private First Class Phelps at the camp, witness testified that "from all the facts it would appear that heknew right from wrong but at the time of the alleged incident he might not have"; that

> "applying all the facts you outlined after the alleged offense this individual should have known right from wrong but what was his mental state at the time the alleged incident occurred? You haven't outlined any facts about that"; * * *

that

> "after the incident I would say he did know the difference between right and wrong. At the time of the incident I wouldn't know unless you outlined his condition at the time of the alleged incident" (R48).

He did not know the condition of accused at the time of the incident and that it was "the prerogative of the court to

decide what his condition was at that time", and that he did not know

> "how he was after the alleged offense because his behavior would indicate that he was able to distinguish between right and wrong. The man may have become perfectly normal after the incident and the opinion I gave is one of my own judgment and the court has to decide from the facts they have at hand as to his legal status" (R48).

His findings in this case were based partly upon the history of accused of which he had no proof other than accused's own statements and partly upon an analysis of his past behavior and psychological tests. He thought accused was truthful.

No abnormality was indicated by accused's family history.

5. The defense introduced no other evidence. Accused after his rights as a witness were explained to him, elected to remain silent (R53).

6. a. Murder is the killing of a human being without legal justification or excuse and with malice aforethought (MCM, 1928, par.148a, p.163). The evidence is ample that accused intentionally killed the deceased by shooting him with a rifle at the time and place alleged without legal justification or excuse. Malice is presumed from the use of a deadly weapon (MCM, 1928, par.112a, p.110). Malice aforethought may also be inferred from an intention to cause the death of or grievous bodily harm to a person and may exist when the act is unpremeditated. The intent necessary to constitute malice aforethought may spring up at the time of the killing (MCM, 1928, par.148a, p.163; Allen v. United States, 164 U.S. 494, 41 L.Ed. 528; Hotema v. United States, 186 U.S. 413, 46 L.Ed.1225, 1226-1227).

The court was fully warranted by the evidence in finding accused guilty of murder unless there was reasonable doubt about his sanity at the time of the offense, or his criminal liability was affected by his condition of drunkenness.

b. Sanity of Accused. Accused is not mentally responsible for the killing of Morlot unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. Where a reasonable doubt exists in the minds of the court as to the mental responsibility of accused he cannot legally be convicted (MCM, 1928, par.78a, pp. 62-63). The mental responsibility of accused is a question of fact, and the burden is upon the prosecution to prove beyond a reasonable doubt that he is mentally responsible for the offense.

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He is presumed, however, to have been in fact sane at the time of the offense until a reasonable doubt of his sanity at that time appears from all the evidence. This presumption merely supplies in the first instance the required proof of the capacity of accused to commit the crime charged and authorizes the court to assume at the outset that he is mentally responsible for his act. When evidence tending to prove that accused was not mentally responsible for the alleged offense is introduced either by the prosecution or by the defense, or, in appropriate cases, on the court's own initiative, and such evidence creates a reasonable doubt as to the sanity of accused, he is entitled to an acquittal. The burden, however, of producing evidence of insanity is not upon the prosecution but upon the defense (MCM, 1928, par.112a, p.110; Davis v. United States, 160 U.S. 469, 40 L.Ed.499; Davis v. United States, 165 U.S. 375, 41 L.Ed. 750; Hotema v. United States, 186 U.S. 413, 46 L.Ed. 1225; Lee v. United States, 91 F (2d) 326). It is immaterial whether the insanity is permanent or temporary, or whether it is produced by excessive drinking, or by any other cause. The distinction between the defense of insanity, caused by excessive drinking, and the defense of drunkenness has been maintained throughout the cases. An insane person cannot be convicted of an offense committed while he is in that condition, while voluntary drunkenness is generally no excuse for crime (Perkins v. United States, 228 Fed. 408; Director of Public Prosecutions v. Beard (1920) A.C. 479, 12 ALR 846).

The finding of the court in the present case that accused was guilty of murder imports a finding that he was mentally responsible at the time of the killing. This finding will not be disturbed upon appellate review if there is substantial evidence in the record to sustain it. An examination of the evidence discloses that while intoxicated accused engaged in an unprovoked altercation with deceased in the course of which he became angry and fired a shot into the ceiling. As deceased was attempting to get away, accused aimed and fired his rifle at him and killed him. Immediately thereafter he informed his companion who was waiting for him outside that he had killed the deceased. On the way back to camp he enjoined his companion not to mention that he had done the killing. After returning to camp two or three hours later he was troubled, made statements indicating remorse and related to other members of his unit that he had shot and killed the deceased. He stated his reason for killing the man, namely that the latter had shoved him, and gave details of what happened. He admitted that the shooting was not an accident. Chaffee testified that at the time of the shooting and on the way back to camp accused did not seem natural, was violent in his actions, seemed abnormal and a little wild, did not seem to make sense in what he said, could not be reasoned with, and that the liquor seemed to affect his mind. He further testified that although the shooting brought accused slightly back to normal his condition

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seemed no different after he reached camp. There was evidence that Chaffee had himself drunk heavily and was intoxicated. It was for the court to determine what weight should be given to his appraisal of accused's mental condition. The two other witnesses who saw accused and talked with him upon his arrival at camp and to whom he revealed what he had done, testified that he spoke coherently and as normally as he usually did, that he did not stagger, was not violent in any way and appeared to know what he was talking about. The psychiatrist found that he was not suffering from psychosis, meaning that he was not insane. The slight amount of brain injury he had sustained prior to his entry into the service merely made him more susceptible to the influence of alcohol than the average person. He was perfectly capable of distinguishing right from wrong when not intoxicated. The witness based his opinion that accused was suffering from some mental derangement or impairment which rendered him temporarily insane, upon the assumption that due to alcoholic intoxication he was suffering from a temporary blackout at the time of the killing. The only indication that he suffered a blackout came from the accused's own statement to the witness while he was under observation and when he was not under oath or subject to cross-examination. There is no evidence in the record to corroborate the truth of that statement. On the contrary the evidence warranted the court in finding that he did not suffer a blackout. Admittedly the witness did not know the condition of accused at the time of the killing. He testified that accused's behavior immediately following the slaying indicated that he was able to distinguish right from wrong, and that it was for the court to determine what his condition was at the time of the shooting. There was substantial evidence, therefore, to sustain the court's finding that accused at the time of the offense was so far free from mental defect, disease or derangement as to be able concerning the act charged to distinguish right from wrong. There is nothing in the record to suggest that although accused was aware of the moral quality of his act, he was unable to adhere to the right. A specific finding of mental responsibility is not required, it being included in the general finding of guilty (CM ETO 5747, Harrison, Jr.; I Bull JAG p.360).

c. Drunkenness of Accused. The evidence shows that accused drank about one-half to three-fourths of a quart of cognac over a period of approximately two hours before the slaying and that he was intoxicated at the time he fired the fatal shot. It is a general rule of law that voluntary intoxication 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 crime (MCM, 1928, par.126a, p.136; Hopt v. Utah, 104 U.S. 631, 26 L.Ed. 873; Director of Public Prosecutions v. Beard, supra). Evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime charged and merely establishing that his

mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. It was for the court in the present case to determine the degree of accused's intoxication on all the evidence before it. There was substantial evidence to support a finding that accused at the time of the offense was capable of forming the purpose and intent to kill, and that he intentionally shot and killed the deceased. That finding will not be disturbed on appellate review (CM ETO 6229, Creech). The evidence does not disclose the existence of facts which would justify the Board of Review in reducing the homicide to manslaughter (CM ETO 82, McKenzie; CM ETO 3957, Barneclo; CM ETO 6074, Howard; CM ETO 9365, Mendoza; CM ETO 9972, Christon; CM ETO 10338, Lamb).

7. The charge sheet shows that accused is 21 years of age and was inducted 30 March 1943, at Abingdon, Virginia. He had no prior service.

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

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

Judge Advocate

(DISSENT) Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 12855

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Luneville, France, 28 March 1945. Sentence: To be hanged by the neck until dead.
Private EDWIN R. MINNICK (33646866), Battery D, 559th Antiaircraft Artillery (Automatic Weapons) Battalion	

DISSENTING OPINION by HILL, Judge Advocate

The evidence is overwhelming that when accused fired the fatal shot he was very drunk. It is admitted that accused had a brain injury, evidenced by x-ray examination, which made him sensitive to the toxication of alcohol, and that during a short period before the shooting he had actually drunk three-fourths of a bottle of cognac. The absence of any motive for the shooting points to drunkenness as the explanation. The testimony of the French woman that at the time accused had "dead eyes", "the eyes of a drunkard", and that he seemed to be "completely" drunk, and the testimony of Chaffee to the same effect, cannot be ignored in this connection.

The only evidence which could possibly have supported an inference that accused was not drunk at the time of the killing, so as to have justified the court in disregarding the mass of evidence to the contrary, is found in the testimony of Chaffee that when accused returned to camp he spoke coherently and in normal manner, but he was not sober then, and in the testimony of Phelps who said that at that time accused "was more scared than anything" and "he seemed to have been drinking". Shortly after, however, accused's companion of the afternoon vomited and "passed out".

But this evidence as to sobriety is negatived by the positive evidence that accused walked two and one-half to three miles back to camp, resting three-quarters of an hour on the way. Added to the sobering effects of both time and exercise is that produced by the psychological shock of a killing. This latter effect is powerful and well known.

There is strong proof of the absence of malice aforethought in this killing in the very fact that the act itself had a sobering effect.

The psychiatrist took all these facts into consideration and in the light of his professional knowledge and experience testified that in his opinion accused when he committed the act was in a mental blackout and did not know the difference between right and wrong. Under cross-examination, while this witness said that he did not know personally if accused was intoxicated, one of the symptoms which led to his opinion, he did not depart from his opinion based on that and other symptoms, but left it to the court to decide the condition of accused at the time. His findings were based on the brain injury, an assumption that accused had drunk a given quantity of liquor, accused's past behavior and psychological tests.

That was the court's sole province and its determination may not be disturbed on appellate review, unless there was no substantial evidence on which the court could overlook or disregard the competent, strong evidence that accused was mentally ill and was too drunk to know the difference between right and wrong, to form the required specific intent.

In my opinion, the case in favor of such drunkenness was clearly made out and was not rebutted.

What is the result? Accused's inability to know right from wrong is not a complete defense because he was psychotic. But his drunken condition which carried at least a moral blackout, according to the professional witness, reduced the offense from murder to voluntary manslaughter by eliminating the element of malice aforethought. The only evidence of malice aforethought is found in the presumption which flows from the use of a deadly weapon. But all the implications of premeditation found in the presecuring, the possession and use of a deadly weapon during peace times are certainly not present during war when everyone is armed at all times. The presumption of malice is not so great when a man does not have to prepare by prearming himself, the weapon having been properly by his side at all times. In any event this presumption was rebutted by proof which the court had no right to disregard.

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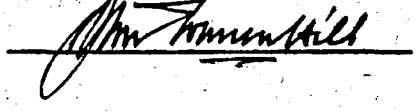
In CM ETO 9365, Mendoza, accused was found guilty of murder. The evidence before the court was that prior to the shooting, accused was in a card game with a number of members of his squad, that three bottles of wine were consumed and that accused "had a good bit of each one of them" (in the present case accused drank three-quarters of a bottle of cognac). After the game, accused came down the stairs, with a rifle, staggering so that he had to hold on to the bannister. Two men stopped him from going out of his billet by grappling him, during which accused swung at them and fell on the concrete pavement hurting his head. He was carried to bed, but immediately came out of his room with a rifle which he fired from a "hip-firing position". This shot grazed one soldier and killed another. Accused's condition of intoxication was variously described: "too drunk to go out", "drunk", "drinking pretty heavily" and "pretty drunk". "Shortly after" the shooting, accused appeared to be "quite sober". The Board of Review said that there was evidence, if nothing else had been shown, from which the court would have been justified in finding that accused acted with malice aforethought. The Board continued, however, to say that the use of a deadly weapon creates a presumption of fact—not law —as to the presence of malice aforethought but that it is only one piece of evidence bearing on the question of malice and that it may be rebutted by the other facts and circumstances surrounding the homicide (authorities cited). The Board said that "all the evidence * * * points to the fact that accused's drunkenness was well advanced" and that "while intoxication is no defense to homicide, it may be operative to reduce murder to manslaughter if sufficiently extreme to render the accused incapable of entertaining malice aforethought". The Board of Review decided that the record of trial in that case did not contain substantial evidence that accused acted with malice aforethought and was legally sufficient to support a conviction of voluntary manslaughter only.

In the Mendoza case, the proof showed that accused's intoxication was "well advanced". There can be no doubt that in this case the proof showed that this accused was in a "well advanced" state of intoxication. His brain injury made him unusually susceptible to the intoxication of the large quantity of liquor he consumed just before the shooting. Of that there is not the slightest question.

There is no substantial difference between the Mendoza case and that under consideration.

In my opinion the record of trial is legally sufficient to support only a finding of voluntary manslaughter.



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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 29 AUG 1945 TO: Commanding General, United States Forces, European Theater, (Main) APO 757, U. S. Army.

1. In the case of Private EDWIN R. MINNICK (33646866), Battery D, 559th Antiaircraft Artillery (Automatic Weapons) 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. It is recommended that the death sentence be commuted to life imprisonment. Accused's abnormal susceptibility to alcohol due to pre-existing brain injury, his drunken condition, the absence of deliberation, his sudden anger, and his youth, make out a strong basis for the recommendation. On all the evidence in the case as carefully analyzed in the holding, the imposition of the lesser mandatory penalties appears to be warranted.

3, When copies of the published order are forwarded to this office, they should be accompanied to 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 12855. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 12855).

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

(Sentence confirmed but after reconsideration commuted to dishonorable discharge, total forfeitures and confinement for life. Pursuant to par. 87 b, M.C.M 1928 so much of previous action dated 7 June 1945, as inconsistent with this action recalled. Sentence as commuted ordered executed. GCMO 438, USFET, 19 Sept 1945).

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 3 6 JUL 1945

CM ETO 12859

U N I T E D S T A T E S	NINTH UNITED STATES ARMY
v.	Trial by GCM, convened at Munster, Germany, 12 May 1945.
Private CHARLES BAKER (6855560), 472nd Military Police Escort Guard Company	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 Charles Baker then Technician Fifth Grade, 472d Military Police Escort Guard Company, did, at Nemours, France, on or about 9 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 1 March 1945.

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

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3. Summary of evidence for prosecution:

It is shown by the testimony of his company commander and first sergeant and by an extract copy of the company's morning report, that accused absented himself without leave from his company at or near Nemours, France, 9 September 1944 (R7-9; Pros.Ex.1). He was apprehended by a military policeman on 1 March 1945 in Paris, France (R10; Pros.Ex.2).

4. Summary of evidence for defense:

A corporal of accused's organization testified he was regarded as a good soldier (R11). While accused was awaiting return to his company, a military police officer found him to be a capable and efficient soldier who performed his duties as a drill sergeant with cheerful obedience and in an exemplary manner (R12; Def.Ex.A).

After his rights as a witness were explained to him, accused elected to make an unsworn statement: On or about 9 September 1944 at Nemours, France, he used his Class B pass for the first time. Becoming under the influence of liquor he was unable to return to his company. When he did return, his company had moved - supposedly to Metz. His company was not at Metz so he returned to Avon near Fountainbleau. Members of an ordnance evacuation company there tried to locate his company for him. He always intended to return. He had no intention to desert. The army was his first love. He had nine years service and hopes to stay in after the war (R13).

5. Accused's unauthorized absence of 173 days in an active Theater of Operations, terminated as shown by apprehension, support the court's inference and finding that at some time he intended not to return (CM ETO 1629, O'Donnell, and cases therein cited).

6. The charge sheet shows that accused is 28 years ten months of age, that he enlisted 2 July 1940, and that his prior service consisted of one enlistment from 13 July 1934 to 13 July 1937.

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

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

B R Sleeper Judge Advocate

Marsden C. Adelman Judge Advocate

B H Levy Jr Judge Advocate

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

CM ETO 12869

U N I T E D S T A T E S	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Menden, Germany, 22 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class EARNEST DeWAR (15043139), 5th. Signal Company	

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

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

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

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

Specification: In that Private First Class Earnest DeWar, 5th Signal Company, did, at Wendelsheim, Germany, on or about 21 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Elisabeth Mathes.

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

Specification 1: In that * * * did, at Wendelsheim, Germany, on or about 21 March 1945, with intent to do her bodily harm, commit an assault upon Mrs. Elisabeth Mathes, by willfully and feloniously striking the said Mrs. Mathes in the face with a carbine.

Specification 2: In that * * * did, at Wendelsheim, Germany, on or about 21 March 1945, with intent to do her bodily harm, commit an assault upon Mrs. Elisabeth Mathes, by willfully and feloniously striking the said Mrs. Mathes in the abdomen with a carbine.

Specification 3: In that * * * did, at Wendelsheim, Germany, on or about 21 March 1945, with intent to do her bodily harm, commit an assault upon Mrs. Elisabeth Mathes, by willfully and feloniously tearing the said Mrs. Mathes in the private parts of her body with his hand.

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

Specification: In that * * * did, at Wendelsheim, Germany, on or about 21 March 1945, wrongfully, willfully, and in violation of standing orders fraternize with German civilians by entering the home of Mr. and Mrs. Herrmann Mathes.

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, 5th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to special circumstances in the case, 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. The evidence for the prosecution is, briefly summarized, as follows:

On the night of 21 March 1945 (date of alleged offenses), accused's organization, the 5th Signal Company, was billeted in Wendelsheim, Germany (R32-33), in which city Herrmann Mathes and his wife, Elisabeth, the person alleged to have been assaulted and raped, together with their 11 children, the youngest of whom was about five weeks of age, resided. Mathes and his wife had already gone to bed

on the night in question when, between 11:00 and 11:30 O'clock (Mathes fixed the time as between 11:20 and 11:30), they heard someone knock and call at their door (R6,17). Mathes went to the door while his wife lighted a carbide lamp. When the door was opened, an American soldier, who was armed with a carbine, entered. Asked if he wanted something to eat or drink, he replied in the negative. He then said something which Mathes understood as a request for wine. A glass of wine was procured and the soldier drank it (R13). He then asked about the young baby, played with it briefly, passed on to where Frau Mathes was lying in bed and made evident that he desired to have sexual intercourse with her. When Mathes protested and explained the recent birth of the youngest child, he was seized and thrown aside. The soldier then pushed Frau Mathes down on the bed and began to undress her. When Mathes again sought to intervene, he was threatened with the carbine and made to get into bed. The soldier then placed his helmet and carbine at the head of the bed, got on top of Frau Mathes and began trying to engage in sexual intercourse with her. She was not completely undressed. She also resisted. Presently the soldier arose, removed additional of her clothing and his own jacket, got back upon her and resumed his efforts. After a short period, he arose again, removed his leggings and trousers, as well as the remainder of Frau Mathes' clothes, and then once more got upon her. At this stage of the proceedings, when urged by his wife to secure help, Mathes jumped from bed and went out the door. The soldier seized his carbine and followed but returned shortly and struck Frau Mathes twice with the butt of the carbine, once on the forehead and once on the chin(R8-9). He then dressed and went into an adjoining pantry. Failing to find an exit, he returned to the room, dragged Frau Mathes from bed, forced her legs apart and with his hand penetrated her vagina, thereby inflicting internal injuries and causing her to bleed profusely (R7). He again struck her with the carbine, this time in the abdomen, after which he again sought an exit. He finally asked Frau Mathes to point out the correct door and when she had done so, he left. The time of his leaving was approximately five minutes before midnight (R12).

Frau Mathes at no time consented to the act of sexual intercourse with accused and she resisted his efforts throughout to the extent that her impaired strength permitted (R7,8). Despite her resistance, he from time to time succeeded in penetrating her genitals with his own but at no time had an emission (R8).

Mathes, not being permitted on the streets at night, obtained no help on the night of the occurrence, but reported the matter to American military authorities the following morning. Frau Mathes was promptly examined by an American Army medical officer. The examination disclosed a contusion and ecchymotic swelling of the left upper eyelid, a mild contusion of the left lower eyelid, and a bruise and marked swelling of the left lower jaw (R19). A vaginal examination disclosed profuse bleeding from the vagina.

The perineum was intact; the anus normal. There was swelling and marked tenderness of the left labia majora and minora. A piece of loose tissue one-half inch long was hanging from the left labia minora. There were oozing ecchymotic spots around the urethra with a very small superficial tear in the mucous membrane on the right side. There were also several small superficial tears in the anterior commissure. The urethra was intact. There was a small tear in the left lateral vaginal wall. The cervix (mouth of the womb) was not inspected but, except for an old laceration on the right side, felt normal. The uterus was in normal position, slightly larger than normal and not tender. The bleeding was from the uterus and from the oozing, superficial tears mentioned above (R20). The examining officer (presumably testifying, in part at least, from medical history supplied by the patient at the time of the examination) stated also that Frau Mathes had had a normal delivery some five weeks previously, following which she bled more or less for ten days. The bleeding had then ceased completely, after which she had been well until the assaults in question (R19). Frau Mathes was placed in a hospital after the examination.

Both Herr and Frau Mathes identified accused at the trial as the person who entered their home and attacked Frau Mathes on the night in question (R10-11,15). Each testified, that he and she separately had seen, recognized and identified accused in an identification parade two days after the attack (R10,15). The day following the attack, upon different occasions, available members of accused's organization, some 80 or 90 in number, were paraded before Herr and Frau Mathes, respectively. Neither he nor she identified any of them as the guilty party. Accused was not in either parade (R22). The following day a group of eight or nine men, including accused, was taken by First Lieutenant Sam Buonafede to the hospital in which Frau Mathes was being treated. The men were sent into the room in single file, there to form a line. Lieutenant Buonafede stated that immediately upon accused's stepping through the door, Frau Mathes said, "He is the man" (R26). The same group of soldiers was then carried to where Mathes was, and he also identified accused (R26). Accused had never visited the Mathes home prior to the night in question (R12).

The morning after she was attacked, Frau Mathes found a short, leather legging at the end of the bed on which she had been lying at the time of the attack (R9). It was turned over to Lieutenant Buonafede, who, later that day, was informed that accused had borrowed a pair of leggings that morning (22 March). This led to accused's being questioned that night. He denied that he had either lost a legging or borrowed a pair, claiming that the leggings which

he was then wearing were his own (R25). These latter leggings were taken from him by Lieutenant Buonafede. They, as well as the legging that was found in the Mathes home, were identified and introduced in evidence (R36; Pros. Exs. 1, 3).

After having been identified by Herr and Frau Mathes on 23 March, and after having been duly warned of his rights, accused admitted that the legging found in the Mathes home belonged to him and that he borrowed the pair taken from him by Lieutenant Buonafede from one Wampler on the morning of 22 March (R26). Two statements in writing, both made and signed by accused on 23 March after due warning, were introduced in evidence without objection (R32; Pros.Exs.2,4). In one (Pros.Ex.2), he said that he was drunk on the night of 21 March. He recalled walking up or down a street in Wandelheim, Germany, in the vicinity of 5th Signal Company. It was possible that he entered a civilian home but he did not believe that he could have raped or assaulted Frau Mathes. When he woke up at 0600 hours on 22 March, one of his leggings was missing and he borrowed a pair from Eugene Wampler, they being the leggings taken over by Lieutenant Buonafede. In the other statement (Pros.Ex.4), he merely admitted ownership of the legging shown him by Lieutenant Buonafede (the legging found in the Mathes home).

Eugene Wampler was not present at the trial, but his brother testified that he heard accused ask Eugene for the loan of a pair of leggings on the morning of 22 March (R40).

Captain Joseph W. Kohnstamm, commanding officer of 5th Signal Company, saw accused at company headquarters in Wendelsheim, Germany, between 9:00 and 9:30 pm on 21 March. Accused had just completed a trip from the division near echelon, a distance of approximately 150 miles. There was nothing unusual about his appearance and he expressed himself in a normal manner. He did appear to be tired (R33).

Technical Sergeant John F. Kurgan stated that he was with accused continously from 4:00 to 11:00 pm on 21 March. He last saw accused when the lights went out just after 11:00 pm. The 11:00 o'clock news broadcast had just ended. Accused was then sitting on the side of his bunk, partially undressed. He had removed his field jacket and was removing his shirt (R37). Sergeant Kurgan did not know whether accused went to bed. He did not hear him leave the quarters. He himself went to sleep within a short time after going to bed (R37-38). Neither the prosecution nor the defense questioned the witness with regard to accused's state of sobriety.

At the suggestion of the president of the court, there was read into the record the following, from paragraph 6c of a letter from Headquarters Twelfth Army Group, to-wit:

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"American soldiers must not associate with Germans. Specifically, it is not permissible to shake hands with them, to visit their homes" (R52).

4. Defense evidence:

Captain Kohnstamm, Sergeant Kurgan and First Sergeant Raymond L. Liedke, all of whom had known accused for periods ranging from 16 months to four years, each expressed the opinion that accused was of good character and reliable (R35,39,41).

Upon having his rights as a witness fully explained to him, accused elected to testify under oath as a witness in his own behalf. He related his experiences on his trip from Luxembourg to Wendelsheim and his activities immediately after arriving at the latter place in the evening of 21 March 1945. He had pulled his leggings off while driving and when he parked his jeep for the night and left it about 6:00 pm., he left his leggings in it. He did not see either of them again until Lieutenant Buonafede confronted him with one of them (R48). Both were missing when he went to look for them about 6:30 am on 22 March (R46). After supper on 21 March, he drank wine with a number of different people at four different places about the company area. Finally, about 10:00 pm, he procured two bottles of wine from a wine cellar, returned to his room and drank some more. He listened to the 11:00 o'clock news broadcast and retired shortly thereafter (R47,48). On cross-examination, when asked about his written statement wherein he said, "one of my leggings was gone", he stated that he was nervous when he signed the statement and did not pay a great deal of attention to it (R50).

5. The record of trial clearly is legally sufficient to support the finding of guilty of rape (Charge I and Specification). All elements of the offense were established by the undisputed testimony of the prosecuting witness and her husband (CM ETO 4194, Scott and authorities therein cited). It was not essential to commission of the offense that accused have an emission (MCM, 1928, par. 148b, p. 165). There was substantial competent evidence to support the court's finding that accused was the guilty party. Both Frau Mathes and her husband definitely identified accused at the trial and both separately identified him without hesitation from among other soldiers in an identification parade two days after the offense was committed. Proof of the previous extrajudicial identification was properly admitted in evidence (CM ETO 3837, Bernard W. Smith; CM ETO 7209, Williams; CM ETO 8270, Cook). In addition, accused's legging was found in the Mathes home after the offense was committed. Accused's contention that he was at his billet in bed at the time the rape was committed and that his leggings were stolen, which contention was not in harmony with his voluntary pretrial statements, merely presented an issue of fact on the question of identification, the determination of which on the state of the record was for the court. (CM ETO 3200 Price).

6. The evidence of record is likewise legally sufficient to support the findings of guilty of Charge II and each of its specifications. Each specification charged an assault with intent to do bodily harm.

> "This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended" (MCM, 1928, par. 149n, p. 180).

The undisputed testimony of Frau Mathes, corroborated by subsequent medical examination, established the assaults and such serious injuries as to remove the case from the realm of speculation or inference regarding accused's intent to do bodily harm (CM ETO 804, Ogletree et al; CM ETO 4606, Geckler.

7. The Specification of Charge III alleged that accused did

> "wrongfully, willfully, and in violation of standing orders fraternize with German civilians by entering the home of Mr. and Mrs. Herrmann Mathes" (Underscoring supplied).

The specific act alleged to constitute fraternization is that of entering the Mathes home. The evidence shows that accused gained admission by knocking and calling at the door, whereupon Mathes opened it. Accused asked for and was given wine which he drank, and played with the baby. Thereafter he directed his attention to Frau Mathes, whom he eventually succeeded in raping. The court was justified in inferring from accused's amicable acts immediately following his entry into the house that that entry, unlike those in CM ETO 10501, Liner and CM ETO 10967, Harris, was not motivated solely by the purpose of committing a criminal offense, and that it therefore constituted fraternization (CM ETO 11978, Bromley). There is thus no inconsistency between the findings of guilty of this Specification and those of the Specification of Charge I (rape). In the Liner and Harris cases, supra, the entry into the German home was immediately followed by unfriendly conduct, culminating in assaults upon the inmates, in clear contra-distinction to the instant case. The record supports the findings of guilty of the Specification.

8. The charge sheet shows that accused is 34 years of age and enlisted 8 August 1940 at Fort Benjamin Harrison, Indiana. His period of service is 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 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 as commuted.

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

/s/ B. Franklin Riter Judge Advocate

/s/ Wm. F. Burrow Judge Advocate

/s/ Edward L. Stevens, Jr. Judge Advocate

1st. Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 Jul 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U.S. Army.

1. In the case of Private First Class EARNEST DeWAR (15043139), 5th Signal 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 12869. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12869).

/s/ E. C. McNEIL

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

(Sentence as commuted ordered executed. GCMO 289, ETO, 26 July 1945).

CONFIDENTIAL

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

BOARD OF REVIEW NO. 5

24 AUG 1945

CM ETO 12873

UNITED STATES	89TH INFANTRY DIVISION
v.	Trial by GCM, convened at Immerath, Germany, 10 April 1945. Sentence as to each: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade ELMER L. SPOHN (18020239) and Private MARTON L. WHELCHEL (18038433), Company C, 602nd Tank Destroyer Battalion	

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

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

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

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

Specification: In that Private Marton L. Whelchel, Company C, 602nd Tank Destroyer Battalion, and Tec 5 Elmer L. Spohn, Company C, 602nd Tank Destroyer Battalion, acting jointly and in pursuance of a common intent, did, at Immerath, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Hildagard Thull.

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

Specification: In that Private Marton L. Whelchel, Company C, 602nd Tank Destroyer Battalion, did, at Immerath Germany, on or about 14 March 1945, with intent to commit a felony, viz, rape, commit an assault upon Helga Thull, by willfully and feloniously removing her step-ins from and throwing the said Helga Thull on a bed.

Each pleaded not guilty. Two-thirds of the members of the court present when the vote was taken concurring in the case of Spohn, and all concurring in the case of Whelchel, each was found guilty as charged. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, Spohn 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. All of the members of the court present when the vote was taken concurring, Whelchel was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 89th Infantry Division, approved the sentence of each, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of Spohn, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence of Whelchel, but owing to special circumstances in this case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution shows that both accused were members of Company C, 602nd Tank Destroyer Battalion (R24). On 14 March 1945, Matthias Thull was living in Immerath, Germany, with his wife, two daughters, Hildagard and Helga, 16 and 13 years of age, respectively, a nine year old son, and his brother-in-law, Joseph Schmitz. Between 11:00 and 12:00 pm, the two accused went to the home of this family, knocked on the door, and told Herr Thull who answered that they wanted to sleep there (R6,7,11,15,19,20). Thull protested that there was not room for them, but they went upstairs. When Thull started to follow, "The big soldier, or dark one" (whom Thull identified as Whelchel (R8) hit him on the chest with his gun, gave him a push, and told him to stay down (R6). Each soldier had a bottle. They had been drinking and Spohn was drunk (R7,8,15,19,20). Upstairs, they entered a bedroom where there were two beds. In one were Hildagard and Helga, in the other Frau Thull

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and the nine year old boy (R7,16,17). When Hildagard awoke she observed the soldiers standing there. Her testimony was corroborated in pertinent part by her sister, her father and her uncle, Herr Schmitz. As she related the story, after accused entered the room, they first sat on the bed occupied by the girls who thereupon got up, dressed and attempted to leave. But they were restrained by one accused (Whelchel) who frightened them by pointing a gun at them. Thereupon they called for their father to come up and he came up. Shortly after they called for their uncle, because he understood English, and when the uncle arrived, Whelchel told him that Hildagard had to sit on his lap. She did not want to do this and cried, whereupon accused pointed his gun at the family and threatened to shoot all unless she complied. Then the girl "went over", unwillingly, she was so afraid, and accused Whelchel hit her on the head with his gun, took off her pants, made all her "folks" get on one bed, and pulled and pushed her over to and into the other bed. At first she tried to get away, but he pulled her back and put his penis in her. She jerked so that it came out. He made her put it back in. She squirmed and pushed, and it came out again, and once more "he put it in". He remained with her about an hour and then he called Spohn who in the meantime had vomited and gone to sleep. The girl wanted to jump up and run but he pushed her back on the bed. Spohn got up and came over, and did the same thing to her. She could feel his penis in her. Hildagard cried all the time and called for help, tried to get away, but could not. While Spohn was with Hildagard, Whelchel went to the other bed, grabbed Helga, the 13 year old girl, brought her over to the bed with Hildagard and Spohn, took out his penis and laid on top of her while she cried out all the time, "Mother, Mother, I'll die". Helga said she could feel his penis against her body, "right here in front" (R8-10,12-14, 15-22). An Army medical officer examined the two girls the next day. "On the younger girl", Helga, he found nothing. An examination of Hildagard disclosed a tear in the hymen. Whether the tear was fresh, the officer was not certain. In addition, he found a small blood clot at the lower end of the tear, together with a swelling and purplish discoloration of the entrance (R23).

4. First Lieutenant Robert E. Graham of accused's company testified, on cross-examination, that Whelchel had never been court-martialled and had received company punishment only once, for drinking, during a period of two and one-half years; and that "he was one of the best tank destroyer drivers in the ETO * * * never had any trouble with his vehicle * * * also been in several tight places with us and has always stuck by all of us every time". The lieutenant said that during the same time, Spohn had not been court-martialled (R24, 25).

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A corporal in accused's company testified for the defense that Whelchel had been playing poker with him and others up until about 11 o'clock the night in question and that he was drunk (R25,26).

5. The rights of accused as witnesses in their own behalf were fully explained to them. Whelchel elected to remain silent and Spohn to take the stand and testify under oath (R27).

Spohn in substance said that on the night of 14 March, after a rather late supper, he and Whelchel drank wine, "a little bit", that he then went on guard between 9:30 and 10:30, after which he and his co-accused "continued to drink some more wine or whatever it was" (R27). Later on, they went to a nearby civilian home and upstairs where some Germans were talking. Spohn said:

> "I don't know what they were saying. I didn't feel very good so I went down and went to sleep. I don't have any idea how long I was asleep, but Private Whelchel woke me and asked me if I wanted to fuck with this girl and I said yes. So I got on the bed, but I couldn't get a 'hard on'. While I was trying to get a 'hard on', Whelchel and this other girl got on the bed. He wasn't there very long and he said let's go. So we got up and went back to the house" (R27).

Spohn denied that he had intercourse with the girl. If she struggled he did not recall it. He did not attempt to have intercourse with her. He said, also, he was lying between her legs and that his penis was between her legs.

On cross-examination, Spohn said he was on the bed "with the girl", also, that he took out his penis and did "touch her with it" (R26-29).

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

> "Assault with intent to commit rape--This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished" (MCM, 1928, par.149l, p.179).

The evidence before the court justified the findings of guilty with respect to each accused for the rape of Hildagard Thull (Charge I, Specification), and with respect to accused Whelchel for

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his assault with intent to commit rape on Helga Thull (Charge II, Specification).

One at least of the accused was armed. Uninvited, they entered a strange house and over protests proceeded upstairs to a bed room where they found the two girls. The girls called for their father and uncle when they realized that accused had evil designs. They attempted to leave the room and were stopped by a pointed weapon. A threat to kill all unless she complied resulted in Hildagard, 16 years of age, sitting on Whelchel's knees. Hildagard was then pulled and pushed on to a bed and there raped first by Whelchel and afterwards by Spohn. She struggled and resisted. She was penetrated by each accused. Whelchel then attempted to have intercourse with Helga, a 13 year old girl. She called for assistance but Whelchel grabbed her and brought her to bed with him.

The law is that the victim of a rape will resist to the extent that the circumstances require. The reason for this is that failure to resist may denote consent and, of course, where there is consent there is no rape. Circumstances such as are found here indicate that the victims were filled with fear that resistance would result in death or great bodily harm. Such fear excuses resistance. "Intercourse effected by terror, and without consent, is rape (44 Am.Jur. secs.5,6,7,8, p.903).

Spohn in his testimony injected the proposition that Hildagard did not struggle or resist, implying that there was consent. Even if there was not great resistance, the two accused had no right to believe that such failure constituted consent or approval to submission. Where consent is interposed as a defense the court has a right to judge all the circumstances to determine whether accused had a right to believe there was consent if in fact there was none. The circumstances here, which involve the terrorizing of an entire family, the brandishing of a gun and threats of death, immediately preceding the intercourse, would fully explain the lack of resistance on the part of these two young girls, and certainly justified the court in believing that accused could not have believed reasonably that there was consent to what followed.

In view of the fact that Whelchel had already committed rape on Hildagard, the court was justified in believing that when he, Whelchel, assaulted Helga he intended to commit rape.

7. The charge sheet shows that accused Spohn is 27 years of age and that he enlisted 23 August 1940 without prior service, and that accused Whelchel is 22 years of age and that he enlisted 15 January 1941 without prior service.

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

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

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

1st Ind.

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

1. In the case of Private MARTON L. WHELCHEL (18038433), Company C, 602nd Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as 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 12873. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12873).

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

(Sentence ordered ececuted. GCMO 388, ETO, 6 Sept 1945).

CONFIDENTIAL

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

BOARD OF REVIEW NO. 4 — 7 NOV 1945

CM ETO 12878

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM convened at Bickendorf (Cologne), Germany, 17,18,19 March 1945.
Private WILLIAM C WEBB (14012102), Division Artillery Command, 3rd Armored Division	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William C. Webb, Division Artillery Command, Third Armored Division, did at Bickendorf, Germany, on or about 10 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Heinrich Puszinski, 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 Specification and Charge. Evidence was introduced of one previous conviction by summary court for absence without leave for two 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 hanged by the neck until dead. The reviewing authority, the Commanding General, 3rd Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48 with recommendation that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in 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. The prosecution's evidence in substance was as follows:

Between 1800 and 1900 hours, 10 March 1945, Mr. and Mrs. Heinrich Puszinski were at their home in Bickendorf, Cologne, Germany (R23,40). Privates Charles Dethlefsen and Mathew J. Miska, both of accused's organization, and a German civilian, Joseph Stammel, were also present, apparently having spent most of the afternoon drinking wine with the Puszinskis (R23,29,40,72). Neither Dethlefsen nor the Germans were armed, although there is some evidence that Miska had a rifle and a pistol (R27,37,38,44,75). The group was in a bedroom when, at about 1900 hours, accused entered (R23,29,32,42,77,79). He sat down on the bed where Miska was also sitting, laid his helmet beside him and leaned the M-1 rifle with which he was armed against him, with the stock on the floor and his right hand on the barrel (R23,34,43,49). At this time, he did not appear to those present to be intoxicated (R24,42), although one of them, Stammel, admitted on cross examination that he himself had done so much drinking that he was unable to judge (R33,37). Accused's attitude was friendly, and although he talked to no one, he offered chocolate and cigarettes to Mrs. Puszinski (R24,42,47). Shortly afterwards, Dethlefsen wanted to box with Puszinski, but Mrs. Puszinski separated them. Puszinski who was standing on the side of the room opposite to where accused was sitting, then opened his collar, apparently to show some tattoo marks to accused and Miska (R26,33,35,42). At this point Miska and accused exchanged a few words and accused raised his gun, took the safety off and fired four shots

(R25,27,34,35,43,47,49,73). Puszinski dropped to the floor and the carbide lamp which was on the kitchen cabinet fell, thus extinguishing the light (R25,49). Immediately after the shooting, accused left the room (R27).

Accused's battery commander was immediately summoned by some soldiers who were in the vicinity of the Puszinski house and who heard the shots. None of these men saw accused leave the house. One of them, however, who was on guard had seen him going in the direction of the house about 20 minutes before, at which time he was armed with an M-1 rifle and appeared to be under the influence of liquor (57,60-61). Upon arrival, the battery commander found Miska, Dethlefsen, Stammel and Mrs. Puszinski still at the house (R7). Accused was no longer there, but his helmet was found, as well as three empty cartridge shells out of a .30 caliber rifle (R8,15). Dethlefsen and Miska were put under arrest (R10,11). A medical officer was summoned who pronounced Puszinski dead as the result of gunshot wounds in the chest(R17).

Accused, after leaving the house, apparently returned at once to his quarters. On arrival he went through the switchboard room and was observed there by Private Irwin Sacks (R63). He did not have his helmet, but was carrying an M-1 rifle and appeared to be in an intoxicated condition (R63,65,66,67). Accused had been on switchboard duty in the afternoon and had been relieved because of intoxication, at which time he had taken his gun and left (R64-65). The gun he had with him on his return was the same one he had taken with him at the time he was relieved (R65). According to Sacks, "He was drunk all day and he was drunk when he left and I would say he was in about the same condition when he came back" (R66). He was told to go to bed but refused to relinquish his gun, saying, "I don't want anybody to get my gun" (R66,67). He then went to the room of Private George Coppola which adjoined the switchboard room (R63). He seemed to those present to be excited and scared, although not drunk, and he was pale, with a kind of "glare" on his face (R158,159). He pulled back the bolt on his gun and a shell and clip fell out. All he said was, "Don't, don't, don't," (R157,158,159). One of the men asked his whether he had shot anyone and he replied, "No", and then left the room (R157,159). One of the men "threw out" the clip and bullets (R157,160). It does not appear that anyone saw accused reload his gun (R157).

The battery commander meanwhile took Miska and Dethlefsen to his quarters for questioning and as a result of his conversation with them sent for accused (R12). Upon his arrival, accused was so intoxicated that he could neither stand up nor sit in a chair and had to be supported to prevent him from falling. This occurred at about 2000 hours, or approximately an hour after the shooting (R12). Nothing but incoherent mumbling could be obtained from accused (R12), and the battery commander sent for

his rifle (R13). The first sergeant went to accused's quarters and obtained a rifle which he was informed belonged to accused and which he delivered to the battery commander (R68). There were three other "weapons" in accused's room at the time, although the gun taken by the first sergeant was apparently the only rifle (R68,69). Upon examination by the battery commander, the rifle was found to contain a clip and eight shells and did not appear to have been recently fired (R13,14,70,90).

None of the men in the company had been issued M-1 rifles, although accused and Miska each actually had one (R70). On examination shortly after the shooting, Miska's had six rounds in the clip and looked as if it had been fired "quite some time back and it was never cleaned" (R71,89). It apparently remained in his possession and was examined again during the course of the trial, at which time there were only three rounds in the clip (R89).

The prosecution's evidence also showed that accused was "Quiet and pretty easy to get along with" and that "his attitude toward the Germans is pretty much the same as most of the other men. He did not particularly like or dislike them in any way out of the ordinary" (R66,67).

4. Accused, having been warned of his rights by defense counsel, elected to remain silent (R162). Evidence introduced in behalf of the defense was substantially as follows:

Technician Fifth Grade Laurence K. Upp stated that he was obliged to relieve accused from switchboard duty in the afternoon of 10 March 1945 because of intoxication (R92). He saw him on and off throughout the afternoon and at about 1900 - 1930 hours, he told him to go to bed. Accused was then "seriously drunk" and in an argumentative mood (R92). He had an M-1 rifle with him which was the only one in the building (R93).

Both Dethlefsen and Miska testified for the defense (R94-132, 136-146). Each admitted his presence at the Puszinski house at the time of the shooting and earlier in the afternoon (R95,140), but disclaimed any knowledge or recollection of the details of the events that transpired (R95,143). Both were extremely vague as to virtually everything that occurred and neither admitted knowledge of the identity of the person who fired the shots (R106, 143). Miska stated that he and Dethlefsen were unarmed and, as far as he recalled, so was accused (R103-127). He admitted possessing an M-1 rifle but stated that he had never fired it (R109). Dethlefsen testified that accused did not seem to be drunk (R138).

Private George Coppola testified that he was at the Puszinski house at the time of the shooting although not in the room where the incident occurred (R149). On hearing the shots, he ran from the house toward his quarters (R150). Just as he reached the door of his billet, he heard accused call "Wait for me". Accused was running, had an M-1 rifle and seemed excited but not drunk (R151-154). He came into Coppola's quarters and "started fooling around with his gun", removing a clip and "a round or two of ammunition". He "went through the motions of reloading the rifle" and Coppola thought he saw him put another clip in. The original clip and the rounds he had unloaded were thrown out (R152,154-155).

The Division neuropsychiatrist testified that accused was sane and responsible and capable of differentiating between right and wrong. He had the intelligence of a nine year old and his intelligence quotient was 51 (R160-161).

5. The evidence in this case amply supports the court's conclusion that it was accused who fired the shots that resulted in Puszinski's death. Such conclusion flows not only from the direct testimony of Stammel and Mrs. Puszinski, but also from the inference legitimately to be drawn from the circumstantial evidence relative to accused's actions immediately following the shooting. It is true that the rifle supposedly belonging to accused contained a full clip at the time it was examined by the battery commander and did not appear to have been recently discharged. This, however, hardly offsets the direct testimony of the eye witnesses to the shooting, particularly in view of the evidence that accused reloaded his rifle following the incident and of the somewhat dubious proof that the gun examined by the battery commander was in fact the one accused had with him at the time of the shooting. In this connection, it is regrettable that the testimony of Miska and Dethlefsen, the two military witnesses to the crime, was so garbled and vague as to be a virtual nullity from a probative point of view. Whether this was attributable to a desire to shield themselves or accused or to bona fide, alcoholic oblivion to what was going on at the time of the incident, is problematical, the former being the more likely hypothesis. In any event, as previously stated, there is sufficient other evidence to support the conclusion that accused fired the fatal shots.

The important question, therefore, is whether the malice aforethought necessary to support the conviction of murder has been sufficiently proved. "Malice aforethought" according to its definition in the Manual for Courts-Martial, exists where there is "an intention to cause the death of, or grievous bodily harm to, any person" or where there is "knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person" (MCM 1928, par. 148a, pp.163-164). If one or the other or both these states of mind exist,

the killing is murder even though, as in the instant case, no premeditation or reasonable motive on the part of accused is proved (CM ETO 5745, Allen; CM ETO 6159, Lewis; CM ETO 438, Smith; CM ETO 422, Green). Since the evidence shows that accused, although sane and able to distinguish right from wrong, deliberately raised his gun and fired four shots at the deceased, it is obvious that the court was justified in finding that he possessed the intent or knowledge requisite to constitute malice aforethought, unless the complicating factor of intoxication was such as to render him incapable of malice as previously defined (see CM ETO 9365 Mendoza). The evidence on the issue of intoxication is highly conflicting, ranging from statements by Stammel and Mrs. Puszinski that accused was sober to testimony by his battery commander that about an hour later he was drunk beyond the capacity to control actions and speech. Hence, the question of the degree of intoxication was one of fact for the determination of the court whose findings on such matters, as the Board of Review has often held, will not be disturbed if supported by substantial competent evidence (see CM ETO 9396, Elgin, and cases cited). While a fair reading of the record leads to no other conclusion than that accused was intoxicated to a considerable degree, it is considered in light of the deliberate character of the physical acts comprising the shooting, that the court's finding that he was capable of entertaining malice is sufficiently supported by the evidence. Indeed, the only testimony indicating otherwise was that of the battery commander, and it is noted that his interview with accused occurred nearly an hour after the shooting and that during a considerable part of such interval, accused's movements were unaccounted for. It is quite possible therefore that he may have consumed additional intoxicants, thus producing a condition at the time he was seen by the battery commander not representative of his state of intoxication at the time of the shooting. The case, therefore, does not fall within the principles laid down in CM ETO 9365, Mendoza, and the record of trial is legally sufficient to support the findings of guilty of murder.

6. The charge sheet shows that accused is 23 years of age and enlisted 26 July 1940 at Fort Benning, Georgia. 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).

LESTER A. DANIELSON Judge Advocate

MARTIN A. MEYER Judge Advocate

JOHN R. ANDERSON Judge Advocate

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

BOARD OF REVIEW NO. 4

27 JUN 1945

CM ETO 12902

UNITED STATES	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Ansbach, Germany, 16 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class A. (I.O.) J. CROSS (6929237), Company E, 22nd Infantry	)	

HOLDING by BOARD OF REVIEW NO. 4
DANIELSON, MEYER 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 on the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class A. J. Cross, Company "E", 22nd Infantry, did, in the vicinity of Prum, Germany, on or about 28 February 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: an attack against the enemy, and did remain absent in desertion until he surrendered himself at Paris, France, on or about 2 March 1945.

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CONFIDENTIAL

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He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial for absence without leave for two and 19 days, respectively, in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

On the morning of 28 February 1945, accused's company was in an assembly area near Prum, Germany, preparatory to attacking the enemy. The company had been engaged with the enemy for about 12 days previously and the attack was to be made in the latter part of the morning over wooded and hilly terrain. Small arms, mines and artillery fire were anticipated (R5-6,8-9). Accused was specifically advised of the impending attack (R5,8, 9,11). At about 0800 hours, he told his squad leader that he was going to the battalion aid station. The squad leader neither gave nor refused permission and shortly afterwards accused met one of the company officers to whom he said that "the war was getting a little too rough for him" and that he was going to the aid station (R5,7,9-10). At this time, he appeared normal in speech and walk and was rational and sober (R9-10). He had complained of battle fatigue to his squad leader although his condition appeared no different from that of the other men (R5). The officer gave him permission to visit the aid station, but did not give him authority to be otherwise absent from the company (R9-10). Accused, however, did not return and remained absent without leave until he surrendered himself in Paris, France, on 2 March 1945 (R10; Pros.Ex.A). The contemplated attack occurred at about 1100-1200 hours and continued for about two weeks. Artillery and small arms fire was encountered as well as mines, although no casualties were sustained in accused's squad or platoon (R5-6,9).

In a statement made to the investigating officer, after being warned of his rights, accused stated that when he reached

the aid station, he was given some nose drops for a sinus condition which had been troubling him and was told by the sergeant in charge to return to his company. He did not do so because he was "tired of fighting and fed up on combat". Instead he went to Metz and then to Paris where he attempted to have his nose examined at a general hospital. He was not admitted, being without orders, and he then turned himself in to the military police. He had not been told of the contemplated attack by his company (R12; Pros.Ex.B).

4. After being warned of his rights by the law member, accused elected to remain silent (R13). No evidence was presented by the defense.

5. The record of trial contains ample proof that accused was aware of an immediately impending attack on the enemy at the time he absented himself without leave, and such evidence, coupled with his own admissions, is sufficient to support the inference that his absence was designed to avoid the hazardous duty incident to participation in the contemplated attack. Accordingly, the findings of guilty of desertion reached by the court are supported by the evidence adduced (See CM ETO 11404, Holmes).

6. The charge sheet shows that accused is 25 years and nine months of age and enlisted 26 November 1940 at Fort McClellan, Alabama. He had prior service commencing 20 November 1937 and ending 25 November 1940.

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

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

Walter A Danielson Judge Advocate

Martin A Meyer Judge Advocate

John A. Burns Judge Advocate

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

BOARD OF REVIEW NO. 1 27 JUL 1945

CM ETO 12924

UNITED STATES	)	9TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Borna, Germany, 27 April 1945, Sentence: Dismissal, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant JOHN F. CALVO (O-1016371), Company B, Second Tank Battalion	)	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that 2nd Lieutenant John F. Calvo, Company B, Second Tank Battalion, was, at Hohnbach, Germany, on or about 16 April 1945, found drunk while on duty as a platoon leader while leading his platoon in combat against the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, 9th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The

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confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. On 16 April 1945, accused was a platoon leader in Company B, 2nd Tank Battalion, which was making a road march in enemy territory. He instructed a tank commander to cover him as he made incursions into adjacent woods, but disappeared from sight so frequently that coverage was impossible and he failed to heed or answer radio advice to that effect (R14,16).

Later in the day, during an assault upon the town of Hohnbach, Germany, it was the mission of his platoon to remain in position on high ground, support the attack by fire, and guard the left flank. He quarreled over the radio and in person with the company commander, contending that a firing position further forward was preferable (R7,13). The company commander did not think him drunk at that time, but a tank commander thought so at the time of the radio conversation because of his difficulty in climbing on a tank and because of his use of stilted speech (R7,15). The men were apprehensive (R11).

While the action continued, accused entered a house and procured a bottle of liquor, estimated in size from a pint to a quart (R11,17-19). It was half full (R19). He gave two drinks to enlisted men, drank the remainder and went to sleep in a tank (R13,17,19). The company continued to fire (R17). An infantry officer, who arrived for conference, awakened him only after rough handling and shaking. Accused was then drunk and silly (R17-19). The company commander returned from the town, then captured, and saw accused sitting on top of a tank with his head in his hands, and in a drunken condition. In the presence of his men, accused said "The men who run the Army are pricks * * * they don't know what they are doing * * * they don't know how to fight * * * our tactics were absolutely wrong * * *" (R7,8). He smelled of liquor, could hardly hold up his head, spoke abnormally, blubbered, and staggered slightly when he walked (R7-9,20). Four witnesses testified he was drunk (R7,12,15,20).

4. The defense presented testimony that accused was not drunk, but the witness was apparently not there at the time accused went into the house for liquor, or when he was asleep or when the company commander returned. Further testimony was to the effect that his battle position before Hohnbach was good (R20-22). Accused joined the organization during the previous autumn and was a capable and trusted leader whose combat efficiency rating was excellent (R23).

The defense stated that accused's rights as a witness were fully explained to him and that he elected to be sworn as a witness (R24). He testified in substance as follows:

In his opinion, his choice of firing positions was better than that of the company commander, but he obeyed orders. He procured a pint bottle half full of liquor, and drank from it; one or two of the men also drank. The entire affair was caused by the quarrel over the move from the position. He admitted having a drink at a prior time that afternoon while on the road march, but did not testify as to whether or not he was drunk as alleged (R25,26).

5. There is full and complete evidence that accused was drunk on duty as alleged. The test is whether his intoxication was

> "sufficient to impair the rational and full exercise of the mental and physical faculties" (MCM, 1928, par.145, p.160).

His language, acts and demeanor were such as to leave no doubt that the evidence adduced was substantial proof of drunkenness under this definition. That his duty was that of a line commander in battle, upon whose decisions and acts the lives of his comrades depended, aggravated the offense. Whether his contentions with his company commander as to tactical dispositions were better or worse than those of his superior, was not the issue in the case. An officer of the American Army on duty in time of war is required to stay sober and in the best possible condition for the leadership of his men. The fast movement and use of mechanized equipment in modern war do not permit drunken stupors by officers on the field of battle. The evidence sustains the findings and sentence (CM ETO 9423, Carr; CM ETO 10362, Hindmarch).

6. The charge sheet shows that accused is 33 years, three months of age. He was inducted in August 1942 and commissioned a second lieutenant 27 February 1943. No prior service is shown.

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

8. A sentence of dismissal is mandatory, and total forfeitures and confinement at hard labor authorized punishments, upon conviction of a violation of Article of War 85. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir. 210, WD, 14 Sept. 1943, sec. VI as amended).

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations 27 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant JOHN F. CALVO (O-1016371), Company B, Second Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 12924. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 12924).

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

(Sentence ordered executed. GCMO 321, ETO, 11 Aug 1945).

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Branch Office of The Judge Advocate General
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BOARD OF REVIEW NO. 1 14 JUL 1945

CM ETO 12951

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, 11 May 1945. Sentence:
Private First Class FRANK P. QUINTUS (35049552), Company E, 121st Infantry	Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Frank P. Quintus, Company "E", One Hundred and Twenty First Infantry, did, in the vicinity of Hurtgen, Germany, on or about 23 November 1944, desert the service of the United States by absenting himself

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without proper leave from his organization, with intent to avoid hazardous duty, to wit: engage in combat with the enemy, and did remain absent in desertion until he was apprehended at Montigny Le Tilleul, Belgium on or about 21 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification, except the words "was apprehended", substituting therefor the words "returned to military control", of the excepted words not guilty, of the substituted words guilty and guilty of the Charge. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, ordered the sentence executed as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouches du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 82, Headquarters 8th Infantry Division, APO 8, 11 June 1945.

3. After a move from Luxembourg, accused's company arrived at an assembly area in the Hurtgen Forest on the night of 20 November 1944. A hot meal was served, and the platoon leaders and platoon sergeants were informed of a further move for that night with instructions to transmit this information to the men (R5,6). When the company moved forward at 2100 hours, the plans were common knowledge in the organization (R6). The unit made a road march of six or seven miles (R5). Accused appeared at the old assembly area at about 2400 hours, and questioned the company cook, whose kitchen was the only part of the company remaining there, as to the location of the company and the direction of its departure. The cook could not answer the queries, and had no knowledge of any plans, projected attack, or move towards the enemy. Accused also asked if he might sleep in that area (R8-11).

The company was attacking on 21, 22 and 23 November. On the 23rd, the first sergeant received a report that accused was missing from the line. He did not again see accused until 23 March 1945 (R6). He would have known of any authorization for accused's

absence from 23 November until 21 December, and none was granted.

The original morning report of 11 January 1945 was introduced in evidence and contained the following entry concerning accused:

"Dy to AWOL 23 Nov 1944 time unknown" (R8; Pros.Ex.A).

The report showed return to military control 21 December 1944. An extract copy thereof was without leave of court substituted in the record for the original.

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

5. The single issue in this case is whether the morning report entry of 11 January 1945 is proof of accused's presence, with an ensuing absence from the company on 23 November. If it is, the events of 20 November, recited in evidence, are of little significance. It has already been held that a like entry, contemporaneously made, is prima facie proof of presence at the time stated (CM ETO 7312, Andrew), but the entry in the instant case was made more than six weeks after the event, and nine days after the preference of charges. As to the delay, the following language is binding:

> "On the other hand, documents which may correctly be termed 'official writings' gain admissibility in evidence because of an official duty upon the entrant to record the true facts. It is not necessary that the entry be made contemporaneously with the happening of the event recorded. This principle permits the delayed entry in a morning report to be received in evidence as proof of the unauthorized absence of an accused which occurred prior to the date of actual entry" (SPJGN 1945/3492, 29 March 1945, IV Bull. JAG 86 (Underscoring supplied)).

Nor is the fact that charges were preferred at a prior time any cause to impugn the integrity and competence of the entry. Records concerning personnel must be made correct for many administrative reasons other than courts-martial; for example, if the entry was in lieu of "missing in action", notification and stoppage of benefits to next of kin were necessary, or if the record showed continuous duty, pay and length of service adjustments were required. It is but incidental that these records, which must be made correct, may be

introduced in evidence. It is therefore the opinion of the Board of Review that proof was made of accused's presence in the company on 23 November and of his absenting himself that day without authority. Departure from his place of duty in the line under circumstances where attacks were made by his company in the three days of 21 to 23 November, in a battle notoriously and commonly known to have been as bitter, terrible and bloody as that of Hurtgen Forest, was such an absence without leave that the court could properly infer that it was with the intent to avoid the further hazards of that combat. He therefore stands lawfully convicted of desertion by cowardly abandonment of his comrades and his country in critical hours (CM ETO 6637, Pittala; CM ETO 7312, Andrew; CM ETO 8172, St. Dennis; CM ETO 8519, Briguglio).

6. The charge sheet shows that accused is 20 years of age and was inducted 20 February 1943 to serve for the duration of the war plus six months. He had no prior service.

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

8. The place of confinement should be changed to the Loire Disciplinary Training Center, Le Mans, France (Ltr. Hq. European Theater of Operations, AG 252 Op. PM, 25 May 1945).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

22 AUG 1945

BOARD OF REVIEW NO. 3

CM ETO 12954

U N I T E D S T A T E S	106TH INFANTRY DIVISION
v.	Trial by GCM, convened at Gross-gartach, Kreis Heilbronn, Wurttem-berg, Germany, 29 May 1945.
Privates ELBERT H. BURGESS (18002091) and CLEM BAILEY (44012369), both of Battery A, 592nd Field Artillery Battalion	Sentence as to each: Dishonor-able 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 soldiers named above has been examined by the Board of Review.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Clem Bailey and Private Elbert H. Burgess, both of Battery A, 592d Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Neckargartach, Germany, on or about 15 May 1945, forcibly and feloniously against her will, have carnal knowledge of Lotte Schmueckle.

Each accused pleaded not guilty and, eight-ninths of the members of the court present at the time the vote was taken concurring, each accused was found guilty of the Charge and Specification. As to Burgess, evidence was introduced of one previous conviction by special court-martial for absence without leave for a period of seven and one-half hours in violation of Article of War 61 and being drunk in uniform in a public place in violation of Article of War 96. As to Bailey, no evidence of previous convictions was introduced. Eight-ninths 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 term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

At about 0100 hours on 15 May 1945, both accused entered 5 Hegle Street, Neckargartach, Germany, the residence of the Bauschert family, the Pfau family and Lotte Schmueckle, age 22, claiming that they were searching for German soldiers (R14,30,31). They went from room to room in the house. Burgess approached Lore Bauschert, Age 19, and "since he was sitting on my bed and didn't leave" she agreed, upon the advice of her father, to make a date with him for 2000 hours the following night (R14,30-31). Accused departed and returned at about 2100 hours. They knocked on the door (R5-6,19,27). At the kitchen window, Lotte Schmueckle told them "we did not open the door as we heard that American soldiers * * * are not permitted to come and visit us". Burgess pointed a gun at her (R6,20,27). The door was then opened by August Pfau, age 55 (R6,20,27), and Burgess entered while Bailey stood near the door (R6-7,20,27). While Burgess went through the house, the others present, August Pfau, his wife and their son Alfred, Mr. and Mrs. Bauschert and Lotte went outside into the garden (R7,16,23-24). The two accused followed and Burgess tried to force Lotte into the house, pointing his gun at her breast (R7,19,20,21,24). As she stepped aside, Burgess grabbed her arm and attempted to pull her into the building (R7). She called to Mr. Pfau and asked him to call the police (R11), as she slipped away and ran to a corner of the garden (R7,21,24). Burgess followed, firing a shot from his rifle. She saw that he "opened his pants" as he walked towards her. Again he pointed the rifle at her breast. She held the gun at the muzzle and pushed it away from her. The weapon fell from his hands. He threw her on the ground and placed himself on top of her. Since she resisted, he covered her mouth with one hand, struck her on the forehead, removed her "pants" and struck her again on the "nose bone".

She "couldn't defend myself any more. I was tired. I just couldn't go on any more". He succeeded in having sexual intercourse to which she did not consent (R8-9,38,39-40). As long as she defended herself he struck her. When she gave up he did not hit her any more (R39). While Burgess was thus attacking Lotte, Bailey stood guard with his rifle over the others whom he forced to sit on a bench (R7,21). After his act of intercourse was completed, Burgess walked over to Bailey, who then came to Lotte and "threw himself" upon her. He also had sexual intercourse with her. She did not resist him. She "didn't consent to do that, but I just didn't defend myself any more" because she "saw and I realized I couldn't get my will through" (R10,41). She was afraid if she resisted any more she "would get some damage and there was no help around for me anyway" (R41). Meanwhile, Burgess, who had returned to the people sitting on the bench, straightened out his clothes (R24), inserted a new magazine in his weapon and "shot the whole magazine off, approximately ten shots" (R18,22,24).

While the accused were thus engaged, Lore Pfau and Frieda Bauschert went to Frankenbach where they contacted Captain Harold R. Dann, Headquarters Battery, 106th Division Artillery (R28,32-34). He returned with the women to 5 Hegle Street accompanied by a ten-man patrol. Accused were no longer there, but after a short search in the vicinity by Captain Dann with Frieda accompanying him in a jeep, she saw Burgess and identified him as one of the men sought (R33-34). He was returned to 5 Hegle Street where he was identified by Lotte and by other persons at that address as one of the soldiers who had been there earlier in the evening (R12,25,29,35).

Major Joseph F. Dreier, MC, 106th Division Artillery, examined both Lotte Schmueckle and Burgess after the latter's apprehension (R42,43,46). His examination was negative and failed to reveal any evidence that either of them had had sexual intercourse earlier that evening (R42,47). He was unable to express any opinion in this regard (R43,45-46). Lotte had

> "slight cuts here on the right frontal region, a definite scratch mark below her left shoulder, one half way down the arm and elbow joint, and abrasions at the tip of the elbow. The abrasions were about the size of a five-cent piece. The definite scratch marks could not be measured. There was a blow on the head in the right front region about the size of a quarter and probably as high as two quarters. It was a slight bump. When I arrived at the house, one of the enlisted men was putting compresses on the contusion, which no doubt kept it from swelling" (R44).

4. No evidence was offered by the defense. After their rights were explained, both accused elected to remain silent (R37).

5. As to accused Burgess, the court's findings of guilty are supported by substantial evidence, which contains all the elements of the crime of rape, and are final and binding upon appellate review (CM ETO 4661, Ducote, and authorities therein cited). A conviction of rape may be sustained on the uncorroborated testimony of the prosecutrix, even though the defendant denies the crime, where her testimony is clear and convincing (CM ETO 2625, Pridgen). Notwithstanding the fact that prosecution's evidence rested entirely on the testimony of German civilians, whose homeland was occupied by American military forces, it was within the province of the court to believe their testimony including that of the victim which sufficiently proved that carnal knowledge of her was accomplished with force and by the threatening use of a rifle and without her consent (CM ETO 11621, Trujillo, et al; CM ETO 3933, Ferguson, et al).

As to accused Bailey, Lotte's testimony showed that when he "threw himself" upon her, following the act of rape committed by Burgess, she did not resist him because she "couldn't get my will through" and feared she "would get some damage and there was no help around for me anyway" (R41). Regardless of her admitted lack of resistance to Bailey, it was clearly shown that he aided and assisted Burgess' act of rape by standing guard with a rifle over the only persons in the vicinity who could come to her assistance and consequently was equally guilty of Burgess' offense. The court was warranted, therefore, in finding him guilty of the offense of rape (CM ETO 4444, Hudson, et al, and authorities therein cited; Winthrop's Military Law and Precedents (Reprint, 1920), p.108).

Since the evidence showed clearly that Bailey aided and abetted Burgess in his rape of their victim, it was not improper in the Specification of the Charge to join them severally as principals "acting jointly and in pursuance of a common intent" (CM NATO 643 (1943), CM NATO 1242 (1944), CM NATO 1121 (1944), III Bull. JAG 61).

6. The charge sheet shows the following concerning the service of accused:

Burgess is 23 years three months of age and enlisted 6 July 1940 to serve for three years. His period of service is governed by the Service Extension Act of 1941.

Bailey is 18 years eleven months of age and was inducted 14 September 1944 at Fort Bragg, North Carolina.

No prior service is shown as to either accused.

7. The court was legally constituted and had jurisdiction of each accused and of 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.

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

Nicholas C. Sharman Judge Advocate

B K Levey Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 2

11 AUG 1945

CM ETO 12994

UNITED STATES	)	FIFTEENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at APO 408, U. S. Army, 18, 19 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade SAMUEL A. KEYS (33527681), Company A, 42nd Signal Heavy Construction Battalion.	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Samuel A. Keys, Technician Fifth Grade, Company A, 42nd Signal Heavy Construction Battalion did, at or near Odendorf, Kreis Bonn-land Germany, on or about 26 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Frau Maria Pahlke.

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

sentence, designated the 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 at the time mentioned in the Specification accused was in the military service, Technician Fifth Grade, Company A, 42nd Signal Heavy Construction Battalion, stationed in Odendorf, Germany (R33,35,38,40,41,43;Pros.Ex.A).

On 26 April 1945, Maria Pahlke, the prosecutrix, 24 years old, married, the mother of one child, was returning from Rheinbach to her home in Odendorf. She was on a bicycle, riding along a field path, a little over two yards wide, with a hedge on one side, between it and a railroad. The time was a little after 1500 hours and she was a little less than two miles from Odendorf when she first saw accused. She testified that he was sitting in the hedge and jumped out as she "came there," offering her cigarettes and chocolate. She refused and he grabbed at the seat of her bicycle so that she had to jump off. Accused thereupon threw the prosecutrix down and kept her down by kneeling on her and by pushing her head back with his hand while she wrestled and tried to get away, turning "around several times." Her tongue was paralyzed by fright and she could not yell. Then he unbuttoned his pants and exposed his person. At this point she wanted to cry out but he held his hand over her mouth. He also raised her skirts, pulled down her pants and uncovered her private parts. She could not fight him. She pressed her legs together, but he pushed them apart with his knees. After that he penetrated her private parts with his. It caused pain. "He pushed once very deep and twice very lightly and then he jumped up." Frau Pahlke explained that by "pushed," she meant that accused "penetrated with his penis deeply into my vagina" (R7-13,18, 56-60).

After getting up accused took off in the direction of Rheinbach, walking fast. Prosecutrix got on her bicycle and and left the scene. The first person she met was Johann Wolbern, who also testified. He was coming toward her driving an ox cart. She was yelling and crying as she approached him and indicated a soldier then walking away whom she described as colored as having attacked her. At that time there were a few drops of blood on her mouth. (R12-14,21-25,62-64). Frau Pahlke continued toward Odendorf. On the way she met two others, a boy and a girl. She sent the boy to get her mother who came to meet her and took her home. The prosecutrix found that her skirt was torn a little, her blouse stained green, and there was some blood in the "panties" "which she discovered when she returned that night" (R14,15, 17,60). Her clothing, generally, "was dirty on her back" (R24).

The prosecutrix was examined by Captain Carl Ruby, Medical Corps, at about 1700 hours that day (R15,30). At that time she was crying and somewhat hysterical. He found, on examination, no abrasions

or contusions, but a small, recent perineum tear at the lower end of the vaginal opening, clean and not infected. The tear could have been caused by the penetration of an object into the vagina overstretching the opening or by hypertension of the legs resulting, for instance, from falling off a bicycle (R31,32). He found no evidence of bleeding or stains on her clothing, "particularly" on her panties, the same ones she wore (R33,59). The prosecutrix identified accused the following Sunday, three days later (R15,42).

On 1 May 1945, accused voluntarily gave a signed statement (Pros.Ex.A) to Agent Charles B. Newton, Criminal Investigation Division. In this, accused told of having met at the time and place of the assault described by the prosecutrix, a young woman who offered and volunteered sexual intercourse in exchange for cigarettes and candy. He described his preparations for the invited act and said that although he did not remember whether or not he had inserted his penis, they had been on the ground only a minute when a man with an ox and cart approached them, that the woman said "Comrade comin', comin'"; that thereupon he stood up, and that she got up, arranged her clothes and took her gifts. He left her unexcited and undisturbed, but on looking back noticed that when she approached the man with the ox and cart she cried out several times. Accused in his statement did not directly identify the prosecutrix as the woman of his story but collateral incidents which he related leave no doubt that it was the prosecutrix with whom he had this admitted encounter (R40,42,43,Prox.Ex.A).

Additional facts regarding the prosecutrix related by herself are that her child was 14½ months old, her husband was in the German Army and had been home a total of only four months since their marriage. She was living at this time in the home of her parents. She had at one time labored on a farm. Asked if she considered herself a strong person, she replied: "One suffered a lot through the air raids. I was stronger before the war started" (R7,8,56-57).

4. Fully advised of his rights as a witness, accused took the stand and testified under oath in his own behalf. The story he told was substantially the same as that which he gave the investigating officer except that on the witness stand he claimed that the interruption by the man with the ox cart occurred "just before I touched her private parts, which I did with my left hand. On cross examination, he said that he did not get his penis in but could not say for sure that it "didn't touch" (R45-54).

The company commander of accused testified that accused had been in his company for eleven months, that he was reliable, truthful, law abiding and deserving of placement in top half of the company (R64).

5. On this evidence the court found accused guilty of rape as charged.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however 12994

slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not." (MCM, 1928, par.148b,p.165.)

The questions of fact for determination by the court were those of penetration, lack of consent and force. The prosecutrix was definite that there was penetration and the medical testimony strongly indicates such fact. Accused in his written statement said that he did not remember whether he had inserted his penis. On the stand he said that he did not get his penis in but that he might have touched the woman with it. Thus there was no substantial testimony to rebut the claim of the prosecutrix that she was penetrated. If the court believed the story of the woman there was sufficient therein to support the necessary elements of lack of consent and force. She indicated to accused her refusal to consent by wrestling with him, trying to get away. Fear and accused's hand on her mouth accounted for her failure to scream and to resist more than she did. The element of force is found in accused's throwing her to the ground, in his holding her down by kneeling on her and pushing her head back, in his forcibly "kneeing" her legs apart, and the injury to her vagina. The importance of proving resistance is to establish two elements in this crime, that of force and of non-consent. The record does not show the relative size of accused and that of his alleged victim. They were both before the court. The court was able to determine from the appearance of the two whether there was, by reason of disparity of size and strength, grounds for overwhelming fear so as to excuse a more sturdy resistance. The law excuses the absence of resistance where there is a real apprehension of death or great bodily harm (44 Am.Jur.,sec.5-7;pp.903-906). In this case there is no evidence that accused carried or employed a deadly weapon. The court doubtless took notice of that fact but doubtless found in the circumstances, such as the loneliness of the spot and the nature of the initial attack, a real basis for the paralysis which gripped the throat of the prosecutrix and made it impossible for her to scream. These were all matters for determination by the court and inasmuch as there was evidence in support of each essential element of the offense charged, the findings of guilty will not be disturbed by the Board of Review (CM ETO 1953, Lewis).

6. The charge sheet shows that accused is 24 years of age. He was inducted 14 December 1942 at Roanoke, Virginia, without 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 United States Penitentiary is authorized upon conviction by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

12994

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

15 SEP 1945

BOARD OF REVIEW NO. 5

CM ETO 13000

U N I T E D S T A T E S	XXI CORPS
v.	Trial by GCM, convened at Tauberbischofsheim, Germany, 14 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade CAREY M. PUGH (35451781), 496th Signal Heavy Construction Company, and Privates First Class LUSTER WRIGHT (34472112) and HAROLD A. WILLIAMS (38378295) both of the 4th Platoon, 4223rd Quartermaster Car Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Carey M. Pugh, 496th Signal Heavy Construction Company, Private First Class Harold A. Williams, 4223rd Quartermaster Car Company, and Private First Class Luster Wright, 4223rd Quartermaster Car Company, acting jointly and in pursuance of a common intent did, at Dittigheim, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Hilda Weinmann.

Specification 2: In that * * * did, at Dittigheim, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal

13000

knowledge of Elli Weiss.

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 specifications thereunder. No evidence of previous convictions was introduced as to accused Pugh and Williams. Evidence was introduced as to accused Wright of one previous conviction by summary court for absence without leave of one day in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, accused Pugh 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. All of the members of the court present at the time the votes were taken concurring, accused Wright and Williams were sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, XXI Corps, approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Pugh and forwarded the record of trial for action, as to Pugh pursuant to Article of War 50½, and as to Wright and Williams under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to accused Wright and Williams, but owing to special circumstances in the case and the recommendation of the convening authority, commuted it as to each accused 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 sentences pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 4 April 1945 at about 8:30 o'clock three colored soldiers appeared at a house located at number 67 in Dittigheim, Germany (R8,23). They knocked on the door and were admitted into the house. Living there at this time were Frau Hilda Weinmann, aged 27, her son, aged two, and her sister, Frau Elli Weiss, aged 45, and the latter's son, nine years of age. Frau Weiss who opened the door testified that she distinctly remembered seeing "two revolvers" being pointed at her and she identified in court accused Wright and Williams as the soldiers who pointed the pistols at her (R23,24). Accused Wright, "with revolver in hand" followed her into the kitchen where he stood in front of her and "all of a sudden" turned off the lights (R24). She asked him to turn the lights on, but he "refused to do it". She switched the lights back on as "she knew what he was up to" (R24). He turned the lights off again and "in the darkness" lifted up her dress and took her pants off. She begged him to let her alone and offered him jewelry. She also begged him to let her live, because she had heard "so much of atrocities at the least bit of resistance" (R24). He did not reply immediately but later answered her plea for mercy by saying "No" (R24). He then "threw" her on the kitchen table and engaged in sexual intercourse with her (R24). She denied consenting to the act of intercourse but stated that she "did it only under force" (R24).

In the meantime accused Williams stayed in the bedroom with Frau Weinmann while accused Pugh remained in the hallway (R8,9). Frau Weinmann identified in court both of these accused, as well as accused Wright, as the soldiers present in her home on the evening in question (R9). She testified that "they" threatened her "with pistols" and that she was "afraid and terrified" because she had heard on the radio that assaults were being committed on German women (R9). Accused Williams took her by the hand, turned out the lights, pushed her onto the bed, took off her dress and engaged in sexual intercourse with her. He had previously pointed a pistol at her chest and she was afraid he would kill her. She did not scream but "begged" him "not to do anything" and "not to kill" her (R10). After completing the act, Williams left and the "slim fellow", identified as accused Pugh, entered the room and engaged in sexual intercourse with her (R10). Shortly thereafter an elderly German woman, and neighbor of Frau Weinmann, entered the house and the soldiers again drew their pistols (R10). Following this they "gave" the women some chocolate candy and departed (R10,16,20,21,24).

At about 10:30 PM that night, accused Wright and Williams returned and told the women that they would remain until six o'clock the next morning (R10,11,25). Although not drunk accused Williams appeared to have been drinking at this time and both accused were armed with pistols (R11). Frau Weinmann told accused that her child was sick and begged them to let her alone and to leave (R11). The soldiers' attention was not diverted by the women's efforts to talk with them as accused Wright took Frau Weiss into the kitchen and again engaged in sexual intercourse with her (R25), while accused Williams remained in the bedroom with Frau Weinmann. Later Williams drove Frau Weinmann into the kitchen and again had sexual intercourse with her (R11). After this episode in the kitchen, they returned to the bedroom where Williams forced her to completely undress and again had intercourse with her on the bed. Williams also undressed (R12). At the same time accused Wright "forced" Elli upstairs and engaged in sexual intercourse with her. While upstairs in the bedroom Wright kept his pistol lying on the floor and within his reach (R27). Later Wright and Williams exchanged women and each had intercourse with the other woman (R13,28). Altogether during the course of the evening, according to the testimony of the women, Williams had intercourse with Frau Weinmann three times and with Frau Weiss once, while Wright had intercourse with Hilda Weinmann twice and with Elli Weiss three times (R13,14,27). Both women maintained that none of the acts of sexual intercourse was consented to by them but that they had intercourse after begging the accused to let them live. They were alone and were afraid they would be killed as the soldiers were armed (R9,14,24,28). Accused left the house at about 1:30 that night. The following morning Frau Weinmann reported the attacks to someone at the Town Hall and shortly thereafter an investigation was made by the American military authorities (R13,14).

There was received in evidence, over objection of the defense, a statement made by accused Pugh during the investigation wherein he stated that Wright and Williams had been drinking heavily on the evening in question and that accused Wright "forced" the older lady into the kitchen with his pistol (R59,Pros.Ex.A).

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4. The accused, after their rights as witnesses were explained to them, each elected to testify in his own behalf (R35,36).

Williams testified that on the evening in question, he accompanied Wright and Pugh to the village where the women lived and that he knocked on the door, which was opened by Elli Weiss, who smiled and welcomed their entrance into the house (R36). He shook the hand of the younger lady, Hilda Weinmann, and observed a ring on her finger. He made a sign indicating his desire to have sexual intercourse with her and offered her chocolate if she would engage in the act with him. At first she seemed not to understand but after asking her a second time "she smiled and nodded her head and sat on the side of the bed" (R37). He then turned out the lights and after the girl "pulled down her pants herself", he engaged in sexual intercourse with her. He had his pistol under his field jacket and "never taken it out" (R37). Later the three soldiers left the house together after Pugh shook hands with the older lady who made signs to them "as for us to come back" (R38). He indicated the sign made as a forward movement of the hand (R38). They went to their barracks and had a few drinks following which he and Wright returned to the house. They sat around talking and making signs for a few minutes. Later, the old lady sat on Wright's knee. The younger one was sitting on the bed, looking at Williams and laughing. He asked her about the baby and the child's father, and was informed that the child's father was a German soldier. He then noticed Wright and the older woman go into the kitchen and after they returned to the room a few minutes later, he went into the kitchen with the youngest girl but could not have intercourse with her and they returned to the room, following which Wright and the older woman left them alone and went upstairs. Frau Weinmann then ate some chocolate and gave the baby a piece of candy. She laid her baby "far enough back" on the bed to permit them to lie down (R39). She then made signs for Williams to lie down on the bed and go to sleep. He removed his jacket, pants and shoes, turned out the lights and got into bed with her. She "put her face to mine and rubbed her face aside mine two or three times" and tried to assist him in having intercourse with her (R40). He was unable to do anything (R40). Williams then went upstairs and told Wright that he was unable to have intercourse with the girl and Wright asked him if he would like to try the older woman, which he did but was still unable to have intercourse. During the time that he had or was trying to have intercourse with the girl or the older woman, neither of them resisted in anyway. In fact both of them assisted him in trying to have intercourse (R40).

Accused Wright's testimony is similar to Williams'. He added that when he entered the house the first time he gave Elli Weiss some chocolate candy and indicated that he desired to have intercourse with her and that she led him to the kitchen, spread a robe on the floor, removed her pants, and permitted him to engaged in sexual intercourse with her (R46). When they returned the second time the older lady welcomed them "with a bow and a smile" (R46). He admitted having sexual intercourse with both women (R52). Neither of them offered any resistance to his advances but both helped him in having sexual intercourse (R48,49). His pistol was fastened on his pants. He took off his pants during the evening but never removed the pistol from the holster (R51,52).

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Accused Pugh's testimony is substantially in accord with Wright and Williams' story concerning what occurred on the evening in question. He admitted having sexual intercourse with Frau Weinmann, after giving her chocolate and asking her permission. Her only response or request was, "Don't turn off the lights" (R55,56). After completing the act of sexual intercourse with her, he left the house with Wright and Williams and did not return there with them (R55). On cross-examination by the prosecution, he admitted seeing Wright and Williams with pistols in their hands when they entered the house, as he remembered telling them to put their pistols away as they "might scare the ladies" (R56). He denied that Wright forced the older woman into the kitchen with the pistol as recited in his pre-trial statement (Pros.Ex.A), and stated that he did not know why he made that statement during the investigation (R59).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM,1928,par.148b,p.165). The extent and character of resistance required to establish lack of consent depends upon the physical and mental condition of the parties, the relations existing between them and the surrounding circumstances (Wharton's Criminal Law (12th Ed., 1932), sec.734,p.995). The fact that accused Wright and Williams had carnal knowledge of both Frau Weiss and Frau Weinmann is established by the testimony of each of these women. In addition Wright admitted having intercourse with both of them while Williams admitted having intercourse with Frau Weinmann and attempting to have intercourse with the other. Pugh testified to having intercourse only with Frau Weinmann. Although the latter two named accused soldiers denied engaging in sexual intercourse with Frau Weiss, the evidence clearly shows that both of them, as well as accused Wright, were present in the German home on the evening in question and participated in acts alleged. Neither Williams nor Pugh opposed nor disapproved of the conduct of Wright, who seems to have been the most aggressive and sensual of the offenders, and therefore the court could reasonably have concluded that each assented to his acts and to the acts of the other, thereby aiding and abetting in the commission of the crimes charged (1 Wharton's Criminal Law, (12th Ed.), sec.246,pp.333-334). All were jointly charged and since the proof shows joint action each is responsible for the acts of the others. The distinctions between principals and aiders and abettors have been abolished by Federal Statute and are not recognized in military justice (CM ETO 1453, Fowler and authorities therein cited).

Concerning the issue of use of force and lack of consent, while accused deny force and claim welcomed participation on the part of the German women, the surrounding circumstances of the case evidence an intention on the part of accused to accomplish their desires regardless of any protest or resistance with which they might be confronted. While the function of the Board of Review is not to weigh evidence but to determine if the record contains substantial evidence to sustain the findings of the courts, in rape cases the testimony should be carefully scrutinized. Particularly isthis true in an enemy country where the prosecuting witnesses normally may be expected to evidence hostility and enmity. Although Wright

and Williams denied that they entered the house with drawn pistols, Pugh's testimony contradicts their statements in this connection. Such contradiction on this material and vital point tends to discredit their testimony. The fact that the record is devoid of any evidence that the women forcibly resisted accused is by no means controlling in determining their lack of consent as the testimony of the victims reveal that they were frightened, afraid that they would be killed, and that they begged accused to spare their lives. This evidence negatives the contention that the women willingly submitted to accused's lustful demands. Acquiescence gained through fear engendered in the woman ravished negatives consent and where she ceases resistance "under fear of death or great bodily harm" the consummated act is rape (2 Wharton's Criminal Law (12th Ed.,1932),Sec.701,p.942). The presence of hostile conquering soldiers armed with pistols which they pointed at their intended victims, refutes any reasonable probability that the women consented to the acts of sexual intercourse but manifests that they submitted thereto by reason of fear of death or grievous bodily harm, threatened or impending. The crimes of rape, as to each accused, and under the circumstances herein alleged, are thus established (CM ETO 9611, Prairiechief; CM ETO 12650 Combs and Shimmel; CM ETO 14206 Platta; CM ETO 14128, Brandon and Mitchner).

6. The charge sheet shows that accused Pugh is 26 years of age and was inducted 17 April 1942 at Fort Thomas, Kentucky; accused Wright is 24 years and seven months of age and was inducted 14 October 1942 at Camp Shelby, Mississippi; accused Williams is 30 years and eight months of age and was inducted 8 January 1943 at Camp Beauregard, Louisiana. No prior service is shown for any of accused.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any 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, the sentence of accused Pugh, and the sentences of accused Wright and Williams as commuted.

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 (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).

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

BOARD OF REVIEW NO. 5

15 SEP 1945

CM ETO 13000

U N I T E D S T A T E S	XXI CORPS
v.	Trial by GCM, convened at Tauberbischofsheim, Germany, 14 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade CAREY M. PUGH (35451781), 496th Signal Heavy Construction Company, and Privates First Class LUSTER WRIGHT (34472112) and HAROLD A. WILLIAMS (38378295) both of the 4th Platoon, 4223rd Quartermaster Car Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Carey M. Pugh, 496th Signal Heavy Construction Company, Private First Class Harold A. Williams, 4223rd Quartermaster Car Company, and Private First Class Luster Wright, 4223rd Quartermaster Car Company, acting jointly and in pursuance of a common intent did, at Dittigheim, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Hilda Weinmann.

Specification 2: In that * * * did, at Dittigheim, Germany, on or about 4 April 1945, forcibly and feloniously, against her will, have carnal

knowledge of Elli Weiss.

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 specifications thereunder. No evidence of previous convictions was introduced as to accused Pugh and Williams. Evidence was introduced as to accused Wright of one previous conviction by summary court for absence without leave of one day in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, accused Pugh 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. All of the members of the court present at the time the votes were taken concurring, accused Wright and Williams were sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, XXI Corps, approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Pugh and forwarded the record of trial for action, as to Pugh pursuant to Article of War 50½, and as to Wright and Williams under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to accused Wright and Williams, but owing to special circumstances in the case and the recommendation of the convening authority, commuted it as to each accused, 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 sentences pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 4 April 1945 at about 8:30 o'clock three colored soldiers appeared at a house located at number 67 in Littigheim, Germany (R8,23). They knocked on the door and were admitted into the house. Living there at this time were Frau Hilda Weinmann, aged 27, her son, aged two, and her sister, Frau Elli Weiss, aged 45, and the latter's son, nine years of age. Frau Weiss who opened the door testified that she distinctly remembered seeing "two revolvers" being pointed at her and she identified in court accused Wright and Williams as the soldiers who pointed the pistols at her (R23,24). Accused Wright, "with revolver in hand" followed her into the kitchen, where he stood in front of her and "all of a sudden" turned off the lights (R24). She asked him to turn the lights on, but he "refused to do it". She switched the lights back on as "she knew what he was up to" (R24). He turned the lights off again and "in the darkness" lifted up her dress and took her pants off. She begged him to let her alone and offered him jewelry. She also begged him to let live, because she had heard "so much of atrocities at the least bit of resistance" (R24). He did not reply immediately but later answered her plea for mercy by saying "No" (R24). He then "threw" her on the kitchen table and engaged in sexual intercourse with her (R24). She denied consenting to the act of intercourse but stated that she "did it only under force" (R24).

In the meantime accused Williams stayed in the bedroom with Frau Weinmann while accused Pugh remained in the hallway (R8,9). Frau Weinmann identified in court both of these accused, as well as accused Wright, as the soldiers present in her home on the evening in question (R9). She testified that "they" threatened her "with pistols" and that she was "afraid and terrified" because she had heard on the radio that assaults were being committed on German women (R9). Accused Williams took her by the hand, turned out the lights, pushed her onto the bed, took off her dress and engaged in sexual intercourse with her. He had previously pointed a pistol at her chest and she was afraid he would kill her. She did not scream but "begged" him "not to do anything" and "not to kill" her (R10). After completing the act, Williams left and the "slim fellow", identified as accused Pugh, entered the room and engaged in sexual intercourse with her (R10). Shortly thereafter an elderly German woman, and neighbor of Frau Weinmann, entered the house and the soldiers again drew their pistols (R10). Following this they "gave" the women some chocolate candy and departed (R10,16,20,21,24).

At about 10:30 PM that night, accused Wright and Williams returned and told the women that they would remain until six o'clock the next morning (R10,11,25). Although not drunk accused Williams appeared to have been drinking at this time and both accused were armed with pistols (R11). Frau Weinmann told accused that her child was sick and begged them to let her alone and to leave (R11). The soldiers' attention was not diverted by the women's efforts to talk with them as accused Wright took Frau Weiss into the kitchen and again engaged in sexual intercourse with her (R25), while accused Williams remained in the bedroom with Frau Weinmann. Later Williams drove Frau Weinmann into the kitchen and again had sexual intercourse with her (R11). After this episode in the kitchen, they returned to the bedroom where Williams forced her to completely undress and again had intercourse with her on the bed. Williams also undressed (R12). At the same time accused Wright "forced" Elli upstairs and engaged in sexual intercourse with her. While upstairs in the bedroom Wright kept his pistol lying on the floor and within his reach (R27). Later Wright and Williams exchanged women and each had intercourse with the other woman (R13,28). Altogether during the course of the evening, according to the testimony of the women, Williams had intercourse with Frau Weinmann three times and with Frau Weiss once, while Wright had intercourse with Hilda Weinmann twice and with Elli Weiss three times (R13,14,27). Both women maintained that none of the acts of sexual intercourse was consented to by them but that they had intercourse after begging the accused to let them live. They were alone and were afraid they would be killed as the soldiers were armed (R9,14,24,28). Accused left the house at about 1:30 that night. The following morning Frau Weinmann reported the attacks to someone at the Town Hall and shortly thereafter an investigation was made by the American military authorities (R13,14).

There was received in evidence, over objection of the defense, a statement made by accused Pugh during the investigation wherein he stated that Wright and Williams had been drinking heavily on the evening in question and that accused Wright "forced" the older lady into the kitchen with his pistol (R59,Pros.Ex.A).

4. The accused, after their rights as witnesses were explained to them, each elected to testify in his own behalf (R35,36).

Williams testified that on the evening in question, he accompanied Wright and Pugh to the village where the women lived and that he knocked on the door, which was opened by Elli Weiss, who smiled and welcomed their entrance into the house (R36). He shook the hand of the younger lady, Hilda Weinmann, and observed a ring on her finger. He made a sign indicating his desire to have sexual intercourse with her and offered her chocolate if she would engage in the act with him. At first she seemed not to understand but after asking her a second time "she smiled and nodded her head and sat on the side of the bed" (R37). He then turned out the lights and after the girl "pulled down her pants herself", he engaged in sexual intercourse with her. He had his pistol under his field jacket and "never taken it out" (R37). Later the three soldiers left the house together after Pugh shook hands with the older lady who made signs to them "as for us to come back" (R38). He indicated the sign made as a forward movement of the hadd (R38). They went to their barracks and had a few drinks following which he and Wright returned to the house. They sat around talking and making signs for a few minutes. Later, the old lady sat on Wright's knee. The younger one was sitting on the bed, looking at Williams and laughing. He asked her about the baby and the child's father, and was informed that the child's father was a German soldier. He then noticed Wright and the older woman go into the kitchen and after they returned to the room a few minutes later, he went into the kitchen with the youngest girl but could not have intercourse with her and they returned to the room, following which Wright and the older woman left them alone and went upstairs. Frau Weinmann then ate some chocolate and gave the baby a piece of candy. She laid her baby "far enough back" on the bed to permit them to lie down (R39). She then made signs for Williams to lie down on the bed and go to sleep. He removed his jacket, pants and shoes, turned out the lights and got into bed with her. She "put her face to mine and rubbed her face aside mine two or three times" and tried to assist him in having intercourse with her (R40). He was unable to do anything (R40). Williams then went upstairs and told Wright that he was unable to have intercourse with the girl and Wright asked him if he would like to try the older woman, which he did but was still unable to have intercourse. During the time that he had or was trying to have intercourse with the girl or the older woman, neither of them resisted in any way. In fact both of them assisted him in trying to have intercourse (R40).

Accused Wright's testimony is similar to Williams'. He added that when he entered the house the first time he gave Elli Weiss some chocolate candy and indicated that he desired to have intercourse with her and that she led him to the kitchen, spread a robe on the floor, removed her pants, and permitted him to engage in sexual intercourse with her (R46). When they returned the second time the older lady welcomed them "with a bow and a smile" (R46). He admitted having sexual intercourse with both women (R52). Neither of them offered any resistance to his advances but both helped him in having sexual intercourse (R48,49). His pistol was fastened on his pants. He took off his pants during the evening but never removed his pistol from the holster (R51,52).

Accused Pugh's testimony is substantially in accord with Wright and Williams' story concerning what occurred on the evening in question. He admitted having sexual intercourse with Frau Weinmann, after giving her chocolate and asking her permission. Her only response or request was, "Don't turn off the lights" (R55,56). After completing the act of sexual intercourse with her, he left the house with Wright and Williams and did not return there with them (R55). On cross-examination by the prosecution, he admitted seeing Wright and Williams with pistols in their hands when they entered the house, as he remembered telling them to put their pistols away as they "might scare the ladies" (R56). He denied that Wright forced the older woman into the kitchen with the pistol as recited in his pre-trial statement (Pros.Ex.A), and stated that he did not know why he made that statement during the investigation (R59).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM,1928,par.148b,p.165). The extent and character of resistance required to establish lack of consent depends upon the physical and mental condition of the parties, the relations existing between them and the surrounding circumstances (Wharton's Criminal Law (12th Ed.,1932), sec.734,p.995). The fact that accused Wright and Williams had carnal knowledge of both Frau Weiss and Frau Weinmann is established by the testimony of each of these women. In addition Wright admitted having intercourse with both of them while Williams admitted having intercourse with Frau Weinmann and attempting to have intercourse with the other. Pugh testified to having intercourse only with Frau Weinmann. Although the latter two named accused soldiers denied engaging in sexual intercourse with Frau Weiss, the evidence clearly shows that both of them, as well as accused Wright, were present in the German home on the evening in question and participated in acts alleged. Neither Williams nor Pugh opposed nor disapproved of the conduct of Wright, who seems to have been the most aggressive and sensual of the offenders, and therefore the court could reasonably have concluded that each assented to his acts and to the acts of the other, thereby aiding and abetting in the commission of the crimes charged (1 Wharton's Criminal Law, (12th Ed.), sec.246,pp.333-334). All were jointly charged and since the proof shows joint action each is responsible for the acts of the others. The distinctions between principals and aiders and abettors have been abolished by Federal Statute and are not recognized in military justice (CM ETO 1453, Fowler and authorities therein cited).

Concerning the issue of use of force and lack of consent, while accused deny force and claim welcomed participation on the part of the German women, the surrounding circumstances of the case evidence an intention on the part of accused to accomplish their desires regardless of any protest or resistance with which they might be confronted. While the function of the Board of Review is not to weigh evidence but to determine if the record contains substantial evidence to sustain the findings of the courts, in rape cases the testimony should be carefully scrutinized. Particularly is this true in an enemy country where the prosecuting witnesses normally may be expected to evidance hostility and enmity. Although Wright

and Williams denied that they entered the house with drawn pistols, Pugh's testimony contradicts their statements in this connection. Such contradiction on this material and vital point tends to discredit their testimony. The fact that the record is devoid of any evidence that the women forcibly resisted accused is by no means controlling in determining their lack of consent as the testimony of the victims reveal that they were frightened, afraid that they would be killed, and that they begged accused to spare their lives. This evidence negatives the contention that the women willingly submitted to accused's lustful demands. Acquiescence gained through fear engendered inthe woman ravished negatives consent and where she ceases resistance "under fear of death or great bodily harm" the consummated act is rape (2 Wharton's Criminal Law (12th Ed., 1932), Sec.701.p.942). The presence of hostile conquering soldiers armed with pistols which they pointed at their intended victims, refutes any reasonable probability that the women consented to the acts of sexual intercourse but manifests that they submitted thereto by reason of fear of death or grievous bodily harm threatened or impending. The crimes of rape, as to each accused, and under the circumstances herein alleged, are thus established (CM ETO 9611, Prairiechief; CM ETO 12650 Combs and Shimmel; CM ETO 14206 Platta; CM ETO 14128, Brandon and Mitchner).

6. The charge sheet shows that accused Pugh is 26 years of age and was inducted 17 April 1942 at Fort Thomas, Kentucky; accused Wright is 24 years and seven months of age and was inducted 14 October 1942 at Camp Shelby, Mississippi; accused Williams is 30 years and eight months of age and was inducted 8 January 1943 at Camp Beauregard, Louisiana. No prior service is shown for any of accused.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any 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, the sentence of accused Pugh, and the sentences of accused Wright and Williams as commuted.

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 (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229,WD,8June 1944,sec.II,pars.1b(4)3b).

Judge Advocate

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

1. In the case of Privates First Class LUSTER WRIGHT (34472112) and HAROLD A. WILLIAMS (38378295) both of the 4th Platoon, 4223rd Quartermaster Car 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 13000. For convenience of reference, please place that number in brackets at the end of the orders (CM ETO 13000).

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

(As to accused Wright and Williams, sentence as commuted ordered executed. GCMO 457, USFET, 4Oct 1945).

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

BOARD OF REVIEW NO. 5

7 SEP 1945

CM ETO 13004

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at Hurth, Germany, 19 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private PHILLIP J. DISANO (37415067), 492nd Medical Collecting Company, 50th Medical Battalion	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Philip J. Disano, 492d Medical Collecting Company, did, at Bihain, Belgium, on or about 12 January 1945, while on special duty with the Third Battalion Medical Section, 33d Armored Regiment, misbehave himself before the enemy, by refusing to go to the front in an ambulance half-track, when ordered to do so by Captain Donald J. Drolett, 33d Armored Regiment, while the companies to which he was attached as an aid man were engaged with the enemy.

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 review-

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ing authority, the Commanding General, 3rd Armored Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence 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 execution of the sentence pursuant to Article of War 50½.

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

On 12 January 1945, Company G, 33rd Armored Regiment, together with another company, was engaged in clearing some high ground which the enemy was using for artillery observation (R7,8). Accused was an aid man in the medical detachment and a member of a crew of three men on a half-track detailed to pick up the wounded of Company G and to evacuate them to an aid station located nearby in Bihain, Belgium (R8,9,10). The company was receiving fairly heavy shelling from the enemy (R14,15). At about 7:00 pm the driver of the half-track reported at the aid station that he was unable to get accused and the other member of the crew to accompany him on the detail. When asked by a sergeant why he would not go, accused merely said that he could not, and was "immediately referred" to Captain Donald J. Drolett, Medical Corps, battalion surgeon, and accused's superior officer (R6,18). Accused had been at the front all day, but there was nothing peculiar about his behavior. At the time of this incident the front was a "pretty hot spot" and shells were flying close to the aid station. Everyone was more or less tense and although there seemed to be a "tenseness" about him, accused, appeared to be fairly cool and collected (R15,17-19). Captain Drolett, who had had previous experience with combat exhaustion cases, observed him and did not think that he was suffering from combat exhaustion (R10), so he ordered him to go back with the driver and informed him that if he refused he would be placed in arrest and court-martialed. Accused stated that he was not going back, that he was afraid (R10,13-15). He did not obey the order (R12). The driver was given other help and brought in the casualties (R19).

4. Technician Fifth Grade Mark D. Hargrove, driver of the half-track to which accused was detailed, a witness for the defense, testified substantially as follows:

Accused had gone up to the front in a peep to evacuate the wounded. When he returned to the command post of Company H,

> "he couldn't talk and he was trying to get under something, under a bench there. I couldn't understand him for a little while * * * He was all out of breath, seemed like he couldn't breathe; he couldn't talk, he tried to get under a bench along the wall; every time a shell would go off

he'd flinch and try to get a little further under" (R21,22).

About an hour later witness received a call to go out and pick up the wounded, but he could not persuade accused and the other member of the crew to go with him. Accused was "too scared to get out of the place"; "he didn't know what he was doing at the time, I don't think" (R22). While it is not unusual to be scared "up there", accused was "unusually scared". Still another hour later, witness and accused left the command post of Company H and went to the aid station two blocks away where Captain Drolett was located (R24). Witness had been with a medical unit for almost four years and has frequently observed men suffering from combat exhaustion (R21).

Accused, after his rights as a witness were explained to him, elected to be sworn (R25) and testified that on January 12 he went up to the front in a peep to evacuate the wounded. They got the wounded out but when they returned to the peep they found it was gone. He was scared and started going back. He reached the building, and "that's when I broke up and I was scared as hell". He was later ordered by Captain Drolett to go back to the front in the half-track, but he did not go because he was too scared. He "didn't exactly refuse"; he was too scared to go up (R26). The company to which he was attached was engaged with the enemy. He had been with the combat unit about two weeks and this was not his first engagement with the enemy (R27).

5. The evidence established that accused was serving in the presence of the enemy and that he refused to obey the order of his superior officer as alleged. Refusal to obey the order of a superior officer in the presence of the enemy constitutes misbehavior within the meaning of Article of War 75 (CM ETO 4820, Skovan; CM ETO 5359, Young). Whether the refusal was due to cowardice or to the fact that his ability to control his actions was temporarily shattered by the impact of battle so as to render him incapable of obeying the order, was a question of fact which the court on the conflicting evidence before it, resolved against accused. Since the court's finding is supported by substantial evidence, it will not be disturbed (CM ETO 1663, Ison; CM ETO 4074, Olsen; CM ETO 4095, Delre).

6. The charge sheet shows that accused is 21 years of age and was inducted 28 January 1943 at Jefferson Barracks, Missouri. 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 if of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted.

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8. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). Penitentiary confinement is authorized by Article of War 42 when it is imposed by way of commutation of a death sentence. 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

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 7 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private Philip J. Disano (37415067), 492nd Medical Collecting Company, 50th Medical 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 13004. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13004).

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

(Sentence as commuted ordered executed. GCMO 429 USFET, 21 Sept 1945).

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

BOARD OF REVIEW NO. 3

27 JUL 1945

CM ETO 13018

U N I T E D S T A T E S	45TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 45, U.S. Army, 29 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MICHAEL T. OSTROWSKI (20109834), Company I, 179th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Michael T Ostrowski, Company I, 179th Infantry, did, at or near Arches, France, on or about 23 September 1944, desert the service of the United States, and did remain absent in desertion until 1 April 1945.

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

haven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 23 September 1944 accused was a member of Company I, 179th Infantry, which had been assigned the mission of crossing the Moselle. About three hours before daylight, accused was present with his platoon, which was given an order to disperse while waiting its turn to cross the river. When the time came for the platoon to cross accused could not be found by his platoon sergeant, who searched for him about ten minutes before the platoon was forced to cross the river without him (R4-5). At 0900 hours, the platoon sergeant went to the command post and reported accused absent without leave. A searching party was sent back across the river and inquiry was made at the battalion and regimental aid stations. When accused could not be found, he was listed on the company morning report for 26 September as missing in action as of 23 September. This action was necessary "due to the fact that we made a search for him" (R6,3-4, Pros.Ex.A).

A duly authenticated extract copy of the morning report of Company I was introduced in evidence without objection showing that on 28 January 1945 the entry showing accused missing in action was corrected to read "Duty to AWOL 23 Sept 44". Another entry for 7 April 1945 shows accused "Fr AWOL to Conf Regt'l Stock April 1/45" (R3-4, Pros.Ex.A).

Accused's platoon sergeant and company clerk testified that, to the best of their knowledge, he was not present with the company between 23 September 1944 and 1 April 1945 (R5-6).

The investigating officer testified that after he had advised accused of his rights under Article of War 24, accused stated that on the night of 23 September, while his unit was waiting to cross the river,

> "he became very nervous and finally became so nervous he left. After he had been gone a few days, he knew he had done wrong and would be punished for it so he stayed away a long time" (R7).

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R8).

5. Absence without leave of accused from his organization from 23 September 1944 to 1 April 1945, a period of more than six months, was sufficiently established by the testimony and by the morning report entries. The court was clearly warranted in inferring, from the length of accused's

wrongful absence in an active theater of operations alone, that he intended, at the time of absenting himself, or at some time during his absence, to remain away permanently (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll).

6. The defense objected to proof of the tactical situation of accused's organization at the time of the initial absence because accused was charged with simple desertion only. The court admitted only such "testimony as leads up to the time the accused is alleged to have left" (R-5). Such ruling was favorable, rather than injurious, to accused, since it is permissible to prove absence without leave with intent to avoid hazardous duty or to shirk important service under a specification charging simple desertion only (CM ETO 5117, De Frank; CM 245568, III Bull. JAG 142). The court properly considered the circumstances under which accused left his organization in determining his guilt of the offense charged.

7. The only proof of the place of desertion is that accused left his organization near the Moselle River, whereas the Specification alleges that he deserted at or near Arches, France. "As the place of desertion is not of the essence of the offense, the variance is immaterial within the contemplation of Article of War 37" (CM ETO 5564, Fendorack; CM ETO 9257, Schewe).

8. The Specification fails to allege either the place or manner in which accused's wrongful absence was terminated. This deviation from the approved form of specification is not fatal, however. The offense of desertion is complete when the person absents himself without authority with the requisite intent (MCM 1928, par. 130a, p. 142), and proof of apprehension or surrender at a particular time and place is not essential for a conviction of wartime desertion (see CM ETO 9975, Athens, et al; CM ETO 2473, Cantwell; CM ETO 4691, Knorr; CM NATO 2044, III Bull. JAG 232). In the absence of proof to the contrary, the presumption is that accused returned voluntarily to military control (CM 236914, II Bull. JAG 270). It follows that the same presumption applies to a specification alleging desertion or absence without leave, which fails to allege manner of termination.

9. Accused is 24 years of age (R9). The charge sheet shows that he served in the Massachusetts National Guard from 13 October 1937 to 12 October 1940, enlisted for three years in the Massachusetts National Guard on 13 October 1940, at Worcester, Massachusetts, and was inducted into federal service 16 January 1941.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Avery Jr Judge Advocate

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

BOARD OF REVIEW NO. 5

CM ETO 13023

30 AUG 1945

U N I T E D S T A T E S	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Schinveld, Holland, 13 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private DUANE R. LEIGHTON (32946813), Company C, 313th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Duane R. Leighton, Company "C", 313th Infantry, did, near Rosiers, Aux Salines, Meurthe et Moselle, France on 13 November, 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in deserting until his return to military control at Charmes, Meurthe et Moselle, France on 20 December, 1944.

13023

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, Commanding General 79th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in 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. The evidence for the prosecution was substantially as follows:

Accused was a member of Company C, 313th Infantry, which from 25 October to 12 November 1944 was located at Rosiers Aux Salines, Meurthe et Moselle, France, training for future operations (R5,6,8,11). On 11 November 1944 the battalion commander gave notice to officers and non-commissioned officers that the 79th Infantry Division was going into combat again and that the by-word was "turkey on the Rhine" (R6). The commanding officer of Company C assembled the company on the company street in Rosiers and informed the men that they were alerted for movement into the front lines, that they were going into combat, and instructed them to check their combat equipment, and to have with them their full quota of ammunition (R6,7,9,11). Accused was present at this formation (R9). Late on 12 November the company left Rosiers by truck for the assembly area situated in a small town in the vicinity of Rosiers (R7,9,12). Accused left with the company (R9). When the company detrucked at its destination in the darkness of early morning, 13 November, accused was reported missing (R7,10,12). The company was then in the assembly area and the regiment was in division reserve (R7). A search was made for him in and near the trucks and in the immediate area, but he could not be found. He had no permission to be absent. He remained absent without leave until 20 December when he returned to military control at Charmes, Meurthe et Moselle, France (R7,8,10,12,13).

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R14). The prosecution stating it had no objection, the defense introduced in evidence the report of the division neuro-psychiatrist relating to accused. It states that accused shows no evidence of being mentally ill and that he was mentally responsible for his actions at the time of the alleged offense, but that there was one extenuating feature in the case, namely, that he was suffering from a kidney ailment and inflammation of one of his testicles even before he went into combat (R14;Def.Ex.A).

5. Absence without leave was adequately proved as alleged. At the time he absented himself, accused and the rest of his company were equipped and ready for combat and moving toward the front lines. Notice of impending action had been brought home to him by his commanding officer. The court was fully warranted in finding that when accused left his company under these circumstances, he did so with intent to avoid action against the enemy (CM ETO 1432, Good; CM ETO 1589, Heppding; CM ETO 4165, Fecica). The offense charged was therefore proved (MCM, 1928, par.130a, p.143).

6. The charge sheet shows that accused is 28 years and ten months of age and was inducted 28 October 1943 at Binghamton, New York. He had no prior service.

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

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

John Townsend Judge Advocate

Jos L. Weiss Judge Advocate

Anthony Julian Judge Advocate

(106)

1st Ind.

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

1. In the case of Private DUANE R. LEIGHTON (32946813), Company C, 313th 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 13023. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 13023).

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

(Sentence as commuted ordered executed. GCMO 422, USFET, 19 Sept 1945).

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

BOARD OF REVIEW NO. 1

9 OCT 1945

CM ETO 13090

U N I T E D S T A T E S v. ASTVALDUR B. BRYNJOLFSSON, a civilian employee of the War Department serving with the Armies of the United States in the field	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Polygon Hotel, Southampton, Hampshire, England, May 17-18, 1945. Sentence: Total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Astvaldur B. Brynjolfsson, a civilian employee of the War Department, serving with the armies of the United States in the field, did, at Bournemouth, Hampshire, England, on or about 14 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Enid Marian Simpson, a human being, by beating her upon the face and head and other portions of her body with his fists.

Specification 2: In that * * * did, at Bounemouth, Hampshire, England, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of one Enid Marian Simpson.

He pleaded guilty of Specification 1, except the words "with malice aforethought, willfully, deliberately, and with premeditation", of the excepted words not guilty, not guilty to Specification 2 and not guilty to the Charge, but guilty of a violation of the 93rd Article of War. In

view of evidence submitted by accused and despite the statement that he wished his pleas of guilty to stand, the court proceeded with the trial after all evidence was introduced as if accused had pleaded not guilty to the Charge and both specifications (R123). Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of Specification 1, except the words "with malice aforethought", "deliberately", "and with premeditation", substituting therefor "and" between the words "feloniously" and "unlawfully", guilty of Specification 2, and of the Charge not guilty as to Specification 1, but guilty of a violation of the 93rd Article of War and guilty as to Specification 2. 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 forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Accused, on the date of the alleged offenses, was a civilian (R8-9,90;Pros.Exs.1,30), 20 years, nine months of age (charge sheet), and according to papers accompanying the record of trial, of Icelandic nationality. With respect to his status, the record shows that, at Brooklyn, New York, on 18 April 1944, he entered into an employment contract as an able bodied seaman with the United States, to serve on a vessel controlled by the War Department for a period of one year from arrival in the European Theater of Operations, unless sooner relieved at the pleasure of the government. In the contract he agreed, among other things, to abide by the rules, regulations, customs and discipline of the service. Pursuant to the contract, he became attached to the United States Army Transportation Corps, Water Division, with which, prior to and on the date in question, he was serving as an employee of the War Department in Bournemouth, Hampshire, England, to which place, on 7 March 1944, he had been ordered by the Port Captain of the 14th Port to proceed in order to await orders assigning him for transportation (R8-9;Pros.Ex.1). The conclusion that he was serving with the armies of the United States in the field (R9,90;Pros.Exs.1,30) is thus supported by the evidence, which clearly establishes that he was subject to military law under Article of War 2(d) and therefore subject to the Articles of War and to the jurisdiction of courts-martial (CM ETO 14632, Lang, and authorities therein cited; CM ETO 15734, Kendrick; see compilation of authorities holding civilian seaman serving on ships under Army control subject to military law, IV Bull.JAG 227). He was no less so subject by reason of his status as an alien and a minor (AW 2(d); Ex parte Dostal (DCND, Ohio, 1917) 243 Fed. 664,669; Ex parte Beaver (DCND, Ohio, 1921), 271 Fed. 493,495; cf: McCune v. Kilpatrick (DCED, Va., 1943), 53 Fed.Supp.80,85).

A subsidiary question arises as to the propriety of a trial by a United States Army court-martial, duly appointed and sitting in England, of a civilian national of Iceland who is subject to United States military law. Some doubt as to this may arise from the general rule of international law that the state of the situs of a crime has jurisdiction to try and punish the criminal, and the effect upon such rule of the particular rule that the courts-martial of the armed forces of any state derive power to try and punish members of such forces from the municipal law of their own government. Any such doubt is removed, however, by legislation enacted by the British Parliament, recognizing, or at most ceding, jurisdiction over members of American armed forces who commit crimes in England. The United States of America (Visiting Forces) Act, 1942 (5 and 6, Geo. 6, c.31), provides in pertinent part as follows:

> "1.-(1) Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America.
>
> * * *
>
> (2) * * * where a person against whom proceedings cannot by virtue of that /foregoing/ subsection, be prosecuted before a court of the United Kingdom is in the custody of any authority of the United Kingdom, he shall, in accordance with /certain official directions/ be delivered into the custody of such authority of the United States of America as may be provided by the directions * * *.
>
> * * *
>
> 2.-(1) For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces:
>
> Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom". (Underscoring supplied).

Since accused, as above demonstrated, was subject to the military law of the United States and, although not a citizen or national thereof, entered into employment in connection with the military forces thereof outside the United Kingdom, to-wit, at Brooklyn, New York, he is deemed under the above Act to be a member of said forces and thus within the exemption from criminal proceedings in United Kingdom courts. The jurisdiction of the court-martial appointed by the Commanding General, United Kingdom Base, to try accused, has been thus recognized or at most ceded by the above Act and the propriety of such trial may not be questioned. Similarly, power to detain and imprison accused, notwithstanding the cessation, by virtue of his sentence or otherwise of his status as a member of our military forces, is expressly recognized "for the removal of doubt", by Section 8 (2) of the Allied Powers (War Service) Act, 1942 (5 and 6 Geo. 6, c.29). (For a full discussion of the matter see Schwelb, "The Status of the United States Forces in English Law", 38 Am.Journ. Int. Law No. 1, Jan. 1944, pp. 50,65-68). Papers accompanying the record indicate accused, against whom criminal proceedings by the British Crown had evidently been instituted, was released from custody of the British authorities on the basis of a certificate by the Staff Judge Advocate of the 14th Port, dated 28 March 1945, stating that accused was on the date of the alleged offenses subject to United States military law. Such certificate was executed pursuant to Section 2(2) of the Visiting Forces Act, supra (see letter, 25 Mar. 1945, from Director of Public Prosecutions, London, and copy of mentioned certificate).

4. Evidence, on the merits, was, in pertinent summary, as follows:

On the evening of 13 March 1945, accused met the deceased, Lance Corporal Enid Marian Simpson, of the British Auxiliary Territorial Service, who was then in her early twenties (R11,56,63). According to pretrial statement, this meeting was at a dance pavilion at Bournemouth, Hampshire, England (R114-118;Pros.Ex.30). That statement and his testimony at the trial showed that later that evening he had sexual intercourse with her in a nearby park (R91), over her verbal protest (R104), which he construed as consent (R105). The following evening (14 March) he again met her at the pavilion where each consumed about a pint and a half of ale. On this occasion, accused's behavior was normal and, although his voice seemed louder than on the previous evening, he did not appear to be under the influence of intoxicating beverages (R10-11). Corporal Simpson also seemed normal and happy, and no difficulties or differences between her and accused were noticeable (R13). Accused testified that after drinking a considerable quantity of whisky, gin and beer during the day, as also stated in his pretrial statement, he met Corporal Simpson and danced and drank with her at the pavilion until the dancing stopped (about 2145 hours (R10,13)). Thereafter he started walking with her to her billet (about a half-hour walk (R12,13-14)), and suggested that they go to the place where they had intercourse the preceding evening. Because she was late in returning the night before, however, they walked further up the street at her

request (R92). When accused, during this walk, suggested sexual intercourse, she said, "You are a bad boy" (R107) and "You Americans are funny, you always think of that kind of stuff" or something of that nature. She neither consented nor refused to have intercourse with him (R108).

When they arrived by a grassy spot, like a garden, near a house, they proceeded to it and sat down and accused started making love to her (R92,105-106). He lay on his side next to her, kissed her and placed his free arm either on or around her (R106-107). After this point, accused remembered nothing until he heard a noise like a man walking in an empty barrel or tank, a "bump, bump, or something", and talking, saw a light, and was handcuffed by an English policeman (R92,104-105,110,113). He did remember urinating (R107), "something about her drawers" (R108), that his hands were subsequently photographed and scraped (R92,105) and a needle stuck into his finger (R111). He did not remember opening his clothes or hers, raising her dress or having sexual intercourse with her (R97,108-109). He did not believe he had any sort of an argument with her, although he might have (R109); her verbal reluctance to have intercourse at the time did not anger him and he did not remember striking her (R110). In his pretrial statement accused said he "had a connection" with Corporal Simpson in the "gardens" and she was willing, after which he remembered nothing until the police came (Pros.Ex.30). He did not intend to say he "had a connection with her", however; did not understand parts of the statement, including the words "sexual intercourse"; and did not know what was in it. Asked if he signed it despite this, he said "Yes, What else could I do?" (R99,119-120). He did not remember being warned of his rights (R100-101). Prosecution's evidence was that the statement was voluntary, unaccompanied by threats or promises of reward and understood by him, and followed a warning to him as to his rights (R114-118).

At about 2245 hours on 14 March, one of the women who occupied a flat at the rear of the Anglo-Swiss Hotel, in Bournemouth, about a 25-minute walk from the pavilion, heard some normal sounding talking in the hotel grounds near her window (R12,15,19,37;Pros.Ex.6). After a "minute or so", the voices suddenly grew louder and agitated as if there were an argument (R15,17,19), and at that moment she heard a "terrifying" woman's scream and seconds later another similar scream, both of which seemed to come from nearer her flat than the preceding normal talking (R16,17). Shortly thereafter she heard a scuffle outside, leaned out of her window and twice called out, but all was quiet and she saw no one outside (R16, 17,18). Almost immediately she heard a movement of the loose pipes on the floor of the basement and then three loud knocks or bangs. Some three or four minutes after hearing the noise of the pipes, she heard a sound similar to that of heavy breathing or snoring from underneath the flat (R16,18,20). She then proceeded to a nearby hotel and at 2310 hours, about five minutes after calling out of the window, telephoned the local police station for help (R16,18,20,23,41,44,56). At 2312 hours, four members of the Hampshire Joint Police Force arrived on the scene and one of them discovered accused lying upon deceased upon the metal piping and boarding in the basement beneath the flat, and asked accused what he was

doing there, to which he replied, "It was not me; I did not do it, sir" (R23,42). While speaking, accused rolled over and exposed his erect penis which he withdrew from close proximity to deceased's vagina, and which touched her vagina and pubic hair. He was removed from her body (R23,31,41-42,45,57). The girl's upper clothing had been torn open and her skirt rolled up around her waist, leaving her naked from the neck to the waist and from the hips to the knees. Her head was in a pool of blood, her face was bloody, and there was a wound on her left jaw, from which no blood was flowing. Her legs were spread apart (R23,30,42,45, 57,62;Pros.Exs.7,8). The presence of a large wet bloodstain, two pools of blood and a long trail of blood spots leading to the basement, and the presence of blood on the clothing of both accused and deceased part of which was scattered about the area outside the basement, indicated that a struggle had occurred and she had bled profusely. There were also drag marks leading to the basement (R24-27,39,46,57-59;Pros.Exs.2,5,12-29). The police were not able to detect movement of the pulse in either of her hands or over her heart. (R23,57). One of them stated she was dead, which accused promptly denied and at first refused to believe. After a pause, however, he exclaimed, "Oh, my head; someone else has been here" (R23-24,42,45). He appeared perfectly normal, had no difficulty in standing, walked normally, and spoke clearly but his breath had a slight odor of intoxicating liquor (R31-32,43-44).

At 2350 hours, a physician arrived at the scene and found the girl dead (R46,63). He testified that her face gave evidence of having been pummeled (R66,67) and there was blood on the left side of the head (R63). The left eye was bruised. The toes and fingers were just beginning to cool, but underneath the scanty clothing the body was warm (R63-65). In the physician's opinion, life had become extinct at any time from 30 to 60 minutes, depending upon the amount of blood lost by the victim, before his examination of the body, which could have been alive as late as 2315 hours (R65,67). If the blood patches on the scene were of considerable size, death would have occurred earlier (R67). The fact that a non-medical man could not at 2310 hours detect any pulse or heart movement would not be a final criterion of the non-existence of life, which might still exist at the time (R65).

The physician who performed the autopsy upon deceased the following morning (15 March) testified that there was no evidence of the use of a knife, but that there was a slit 5/8 of an inch in length in the skin under the chin and severe bruising around the jaw; the main artery on the left side of the face had been ruptured, with extreme loss of blood; on the right side, the jaw had been forced up against the base of the brain with sufficient force to fracture such base; the right temporal bone showed fractures radiating throughout the base of the skull, with internal hemorrhage in the brain causing compression therein. The force of the blow itself caused the brain to be contused (R70). There was no other external injury of any consequence, but the bruising extended from the jaw up the side of the face to the eye and nose. There were bloodstains on the right hand and on the genitals. The blood was Group "A". The girl had been menstruating, but the period was about completed.

The rupture of the hymen was not recent. No semen were present in the vagina. There were no signs of violence in or about her genitals and there was no evidence of recent intercourse (R71,72). The cause of death in witness' opinion was contusion of the brain with associated compression thereof by bleeding from a fractured scalp, as well as the contributing factor of external loss of blood. In his opinion, the only explanation of the blow was that it was caused by an uppercut to the point of the jaw by a closed fist. In his opinion, the blow would not cause immediate death, but the victim did not live a long time. Although she became unconscious immediately, he could not say how long as a matter of minutes after the infliction of the blow life became extinct, because there was no evidence to indicate this with exactness (R71,72).

A medical examination of accused shortly after his apprehension revealed that he was apparently sober and mentally normal,but depressed. His pupils were not dilated, his response to commands was immediate, and he stood up without difficulty (R66). His condition was consistent with a recent attack of petit mal, a form of epilepsy (R72-73). His hands were covered with blood (R36,69;Pros.Exs.10,11), but there were no bruises or scratches on his body. There was a minute spot of blood about half way along the upper surface of his penis (R69), but not enough to be typed (R70). His blood was Group "O" (R74). Blood taken from his clothing (Pros.Exs.25-29) was Group "A" (R70).

When charged with murder of the girl at 0300 hours 15 March by one of the police, accused stated he "might have done it", "did not mean to kill her", did not know or remember anything about it and did not see how he could have done it, but that if he had he would take what was coming to him (R46-47).

A mental examination of accused, conducted over a period of about three weeks, commencing 9 April (R75), resulted in medical conclusions that he was on 14 March 1945 and at the time of the examination, sane and responsible for his acts (R76). There was nothing to indicate he was in any way mentally defective, deranged or abnormal (R79,84). Results of an electro-encephalic test indicated immaturity rather than abnormality in accused (R80-81). However, such results did not preclude the possibility of the existence of petit mal, a form of epilipsy which might commence suddenly and last a short time and during which time people do commit crimes, although not usually (R80-83, 84-86).

5. In addition to his testimony hereinbefore set forth, accused, after being warned as to his rights (R88-89), testified that he was a heavy drinker (R94) and that he had a similar lapse of memory in Bournemouth in December 1944 while drinking liquor, after which he discovered that his money and papers were missing and there was a large sword tied to his side. He was later informed he had cut a man with the sword (R93).

6. a. Specification 1 (Murder):

The undisputed circumstantial evidence is reasonably consistent only with the hypothesis that accused asked Corporal Simpson for a repetition of their sexual relations of the evening before, was refused and struck her an extremely forceful blow with his fist on the jaw for the purpose of obtaining sexual gratification from her by force, against her will, and regardless of her non-consent. This was an assault with intent to commit rape (CM ETO 10728, Keenan, and authorities therein cited). His intent at the time of the blow is made manifest by the evidence that he thereafter dragged her to the basement under the flat at the rear of the hotel, threw her upon the pipes and boarding and, having opened her clothing and lowered his trousers, lay upon her in at least an endeavor to effect penetration. Her ensuing death thus warranted charging him with and would have supported a finding of guilty of murder. Under the Manual for Courts-Martial, 1928 (par.148a, pp.163-164), at common law and under statutes (40 CJS sec.21a,b, pp.868-870), an unintential homicide, committed by one who at the time is engaged in the commission or attempted commission of a felony, is murder. So where the homicide results from the commission or attempted commission of the felony of rape, it is murder, even though death precedes the actual attempt to penetrate (State v. Knight 115 Atl. 569 (1921), 19 ALR 733,738; 26 Am.Jur.sec.195, p.286).

The court found accused guilty of willfully, feloniously and unlawfully killing deceased in the manner alleged, in violation of Article of War 93 (R128). Such finding, as in the case of a specification in the same language, would be supported by proof of either voluntary or involuntary manslaughter (United States, v. Meagher, 37 Fed. 875, 880 (1888); United States v. Boyd, 45 Fed. 851,855; 142 U. S. 450, 35 L. Ed. 1077 (1890); Roberts v. United States, 126 Fed. 897, 127 Fed. 818, cert. den. 193 U.S. 673, 48 L. Ed. 842 (1904); cf: CM ETO 393, Caton and Fikes; CM ETO 1317, Bentley; CM ETO 6235, Leonard). The proof herein, which as indicated would have supported findings of guilty of murder (CM ETO 5156, Clark; CM ETO 5157, Guerra; CM ETO 16187, Rollins), sustains findings of guilty of the lesser included offense of voluntary manslaughter (26 Am.Jur., sec.283, p. 350; CM ETO 3362, Shackleford) and the Board of Review therefore concludes, in the absence of indication in the evidence or court's action to the contrary that accused was found guilty of voluntary manslaughter and that such findings were proper.

b. Specification 2 (Rape):

Accused was charged in this specification with the rape of Enid Marion Simpson. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). It is elementary that if the girl had died prior to accused's penetration of her private parts with his penis, which penetration, the Board of Review assumes arguendo without deciding, was established by the circumstantial evidence, he was not guilty of rape (cf: CM ETO 15787, Parker and Behnerman), whatever other offense he may have committed. What evidence there was that the girl was still alive at the time of the assumed penetration was

wholly circumstantial. Given its fullest effect, this evidence establishes only that the probabilities were that the girl did not die immediately after the blow on her jaw was struck (probably at 2245 or 2250 hours) and that death might not have occurred at the time accused was discovered upon deceased, over 20 minutes later (about 2312 hours). Against this is the evidence that the girl had bled profusely from the wound in the jaw from 2245 or 2250 hours until a time not later than 2312 hours, directly after which the wound was not bleeding, thus pointing toward a relatively rapid demise, and the testimony that she could have died as early as 2250, about the probable time of the blow and that at 2312 hours her pulse and heart gave no sign of movement. Accused's stated reluctance to believe that she was dead is of meagre probative value, under the circumstances, upon the objective factual question of the existence of life. The same may be said of his pretrial statement that he had "a connection" with the girl, who was willing, on the evening in question, after which he could remember nothing (Pros.Ex.30), as it may not without more be assumed that he was referring to the sexual act in question. But even if he was, his statement does not exclude the reasonable hypothesis that she was dead at the time. A careful reading of the record leaves one in utter doubt as to whether the girl was alive or dead at the time accused was found upon her. Only a sexual act at this time with the girl still alive could support the charge of rape.

Circumstantial evidence is insufficient to sustain a conviction unless it excludes every reasonable hypothesis except the one of accused's guilt of the offense sought to be proven (Buntain v. State, 15 Texas Criminal Appeals 490), and where it is as consistent with innocence as with guilt (People v. Razezicz, 206 N.Y. 249, 99 N. E. 557 (1912)). Here an essential element of the offense, without which accused cannot be guilty thereof, is the existence of life in the victim at the precise time of its commission, but the circumstantial evidence of that ultimate fact fails to meet the required standards because it fails to exclude the reasonable, if not probable, hypothesis that the girl not only was dead, but had been dead for an appreciable time, before the assumed penetration occurred and is fully consistent with that hypothesis. The Board of Review is therefore of the opinion that the findings of guilty of rape are not sustained by the evidence (CM ETO 7867, Westfield; CM ETO 9306, Tennant; CM ETO 13416, Wells). This case is clearly different from CM ETO 15787, Parker and Bennerman, where there was no evidence the murder victim was dead at the time she was raped and affirmative evidence she was then alive.

As indicated in paragraph 6a, supra, however, accused was clearly proven guilty of an assault upon the girl with intent to commit rape (CM ETO 10728, Keenan). There is no indication in the record that she was not alive at the time the lethal blow was struck but on the contrary every indication that death was caused thereby and that accused's purpose in striking her was to force her to submit her body to his sexual gratification, despite her resistance and without her consent. In the opinion of the Board of Review, the record supports so much of the findings of guilty of rape as involves findings of guilty of assault with intent to commit rape,

a lesser included offense (MCM, 1928, par.148b, p.165; CM ETO 1743, Penson).

7. a. The failure of proof that accused beat portions of victim's body in addition to her face and head, as alleged in Specification 1, was not fatal as such allegation may be regarded as immaterial and surplusage (cf: CM ETO 764, Copeland and Ruggles, Jr.).

b. The defense endeavored to establish, through cross-examination of prosecution witnesses, that accused's lapse of memory might have been caused by a sudden and even initial attack of petit mal and that he thus might not have been accountable for his actions at the time of the alleged offense. Even assuming that the defense established such possibility, the court was not bound to accept it as an actuality, in view of the absence of any evidence of such affliction and of affirmative prosecution evidence that accused behaved normally and was not mentally deranged, defective or abnormal at the time in question. The findings of the court, implicit in its findings of guilty, that accused was legally responsible for his acts is supported by substantial evidence and therefore is binding upon the Board of Review on appellate review (CM ETO 9877, Balfour).

c. The questions as to whether accused's pretrial statement was voluntary and understood by him were of fact and exclusively for the court's determination. Its implied affirmative findings in this regard in the findings of guilty are supported by substantial evidence and may not be disturbed upon appellate review (CM ETO 4294, Davis and Potts, and cases therein cited). The same applies to the factual questions of accused's intoxication and its effect upon the specific intent to rape (CM ETO 3280, Boyce); there was substantial evidence that accused was in control of his faculties at the time of the assault.

8. Accused was sentenced to forfeit all pay and allowances due or to become due and to be confined at hard labor for life. Although the forfeiture portion may be inoperative because of paragraph 12 of his employment contract with the government (Pros.Ex.1), authorizing the United States to terminate the same and all pay, rights and claims against the United States thereunder in the event accused at any time should be unable to prosecute work by reason of misconduct, or because of its expiration, nevertheless, there is no legal objection to the forfeiture provision to the extent to which it may be operative with respect to any existing rights of accused under the contract (SPJGJ CM 247640, 16 March 1944, III Bull. JAG 97; SPJGJ 1945/93, 17 January 1945, IV Bull. JAG 7; cf: CM ETO 14632, Lang).

While there is no legal objection to accused's imprisonment by United States authorities (Sec.5(2), Allied Powers (War Service) Act, 1942, supra, par.3), the confinement portion of the sentence is excessive. The limitations on punishment prescribed by the Manual for Courts-Martial, 1928 (par.104c, pp. 97-101),

"announce proper and wise standards for arriving at appropriate punishments of civilians as well as soldiers (SPJGJ 1942/5787, 16 December 1942, 1 Bull. JAG 362)" (SPJGJ 1945/93, 17 January 1945 IV Bull.JAG 7).

In the last cited authority, it was held that the portion of a sentence against a civilian imposing total forfeitures should be set aside as void and inoperative in so far as it exceeded two-thirds of the pay of the accused per month for six months, the maximum punishment prescribed by the manual for the offense for which he was convicted. The maximum punishment imposable upon an enlisted man for voluntary manslaughter includes confinement for 10 years (MCM, 1928, par.104c, p.99); that for assault with intent to commit rape includes confinement for 20 years (ibid.). But, if an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, punishment should be imposed only with reference to the act or omission in its most important aspect (MCM, 1928, par.80a, p.67; CM 231710, Beardon et al, 18 BR 277 (1943); cf: CM ETO 2905, Chapman; CM 232652, Brinkerhoff, 19 BR 151 (1943); CM MTO 6166 (1945) IV Bull JAG 177). Accordingly only so much of the portion of the sentence under consideration is valid as includes confinement at hard labor for 20 years.

9. The charge sheet shows that the accused is 20 years nine months of age and that he entered service under contract with the Government effective 1 May 1944 to serve one year unless sooner relieved at the pleasure of the government.

10. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty by exceptions and substitutions of Specification 1 in violation of the 93rd Article of War, so much of the findings of guilty of Specification 2 as involves findings of guilty of an assault with intent to commit a felony, to-wit, rape, upon Enid Marian Simpson, at the place and on the date alleged in violation of the 93rd Article of War, and so much of the sentence as imposes forfeiture of all pay and allowances due and to become due, and confinement at hard labor for 20 years.

11. 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), and upon conviction of assault with intent to commit rape by said article 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 44, sec.II, pars.1b(4), 3b).

Wm. F. 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. 3

28 AUG 1945

CM ETO 13096

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Munich, Germany, 3 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOSEPH J. BALCERZAK (33679807), Company L, 15th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Joseph J. Balcerzak, Company "L", 15th Infantry, (then Company "B", 15th Infantry) did, at Anzio, Italy, on or about 20 February 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at Rome, Italy, on or about 19 June 1944.

Specification 2: In that Private Joseph J. Balcerzak, Company "L", 15th Infantry,

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did, at Grandvillers, France, on or about 21 October 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control at Paris, France, on or about 7 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, he was found guilty of Specification 1, except the words, "at Rome, Italy, on or about 19 June 1944", substituting therefor the words, "at a time and place unknown", of the excepted words not guilty, of the substituted words guilty, guilty of Specification 2, except the words, "at Paris, France, on or about 7 January 1945", substituting therefor the words, "at a time and place unknown", of the excepted words, not guilty, of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority approved only so much of the findings of guilty of Specification 2 and the Charge as it pertains thereto as involves findings that accused did on 21 October 1944 absent himself without proper leave from his organization and did remain so absent until his return to military control in a manner and at a place and on a date unknown, in violation of Article of War 61, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

a. Specification 1: The company clerk of Company B, 15th Infantry, testified that on 20 February 1944, his company, of which accused was then a member, was deployed in open fields in a holding position, in contact with the enemy, at Anzio, Italy, sending out patrols and receiving fire from enemy artillery and self-propelled guns. The command post was located "in back of a pretty shot-up house" (R10-12). On that day accused received permission to go to the rear to "the medics" (R10,12). The witness, whose duty it was to keep the company rosters and make physical checks as to the men present, did not see accused again with the company between 20 February and 19 June 1944, and received no notice from the medics regarding him, although it was customary for the battalion sergeant major to call in information as to men going through medical channels.

The witness was "pretty sure" he made a morning report entry showing accused "from duty to hospital and dropped" (R10-12).

It was shown by a noncommissioned officer of the Medical Detachment, 15th Infantry, that under the standard operating procedure for battalion aid stations, a man appearing for medical treatment was either admitted to a hospital or sent back to his company. Before he was admitted to the hospital, his name was first entered on the station blotter, an official record, but if he was returned to his company, his name would not appear on the station blotter (R13). Accused's name did not appear on the station blotter for the dates between 19 February and 3 March 1945, which indicated that if he came for medical aid he was not admitted to the hospital and was sent back to duty (R14,16). If accused had been evacuated through an aid station of another regiment and admitted to a hospital, a record normally would have been sent to his own regiment and his name would have been entered on the station blotter usually within 7 to 10 days after his admission (R15-17).

A duly authenticated extract copy of the morning report of Company B, 15th Infantry, introduced in evidence over objection of the defense that the entries, were not current and constituted hearsay, shows that on 21 July 1944 an entry was made showing accused from duty to missing in action since 20 February, revoking a former remark which showed him absent sick in line of duty and transferred to the Detachment of Patients, Fifth Army. An entry for 4 August 1944 revoked the remarks as to missing action and shows accused "dy to AWOL since 20 Feb" (R20-22; Pros.Ex.B).

b. Specification 2; A section leader of the Medical Section, 3rd Battalion, 15th Infantry, testified that on 21 October 1944, his battalion, of which Company L was a part, attacked and knocked out a road block in the vicinity of Brouvelieures, near Grandvillers, France, sustaining casualties. He knew nothing as to the tactical situation of Company L on that date (R18-19).

A duly authenticated extract copy of the morning report of Company L for 21 October 1944, introduced in evidence without objection, shows accused from duty to absent without leave (R9; Pros.Ex.A).

4. After his rights were explained to him, accused elected to make an unsworn statement, which was read by defense counsel (R23-34). The first portion of the statement, read from a psychiatric report on accused, dated 16 February 1945, is as follows:

> "Information Furnished By the Soldier: Soldier showed examiner a letter from an uncle which he claims to have received only 15 Feb. 1945. This letter describes illness and worry of parents, urges combat fortitude, tells of bonds being bought by family etc . . . Soldier pur-

ports to believe that his misbehaviour might aggravate parents illness and worry and he finds apparently new motivation in this letter" (R24).

The unsworn statement proper is as follows:

"I was inducted May 12, 1943. I joined the 3rd Division when they were training for the Anzio amphibious landing. I was only 18 years old at the time I joined the Division. I made the invasion with my outfit. We dug in to the beach just outside of Anzio and we were no sooner in position when we got bombed and strafed and several fellows that had come over with me were killed and wounded. We got bombed and strafed the next day too. A couple of days later, we were walking up to our position when the Kraut started firing and we took shelter in a house, and when we walked into the house there were three bodies of civilians laying there and one was a baby. They had all been shot in the head by the Kraut. The Kraut shelled us all day and nite. One shell landed in the next foxhole. A couple of days later we were laying in a gully after a nite attack. We had been stopped there by MG fire. The Lt. told us we would have to dig in along side the gully, so we went out in the open and started digging in. When day broke, the MG's opened again and some fellows got hit. The Sgt hollered to head for the gully, but there were only a couple of us left by that time. There was only 32 men left in the company. When we got in the gully, I head somebody groaning on top of the ridge so I got the medic and the two of us crawled out. It was a jerry. I helped the medic bandage him. All the time we were up there, the Kraut were sniping at us. When we pushed out in the attack we saw dead GI's on the road. We caught so much flat trajectory fire in that attack that we had to turn back and reorganize the men that were left" (R24-25).

5. a. The evidence fairly shows that on 20 February 1944, while accused's organization was actually under fire and in contact with the enemy at Anzio, Italy, accused received permission

to go to the rear for medical treatment, and did not return to his company before 19 June 1944. If he ever reached the medical aid station, there is a strong probability shown that he was not admitted to a hospital and was ordered to return to his company. Under the circumstances shown, the court was fully warranted in concluding that he went to the rear with the intention of absenting himself to avoid further combat with the enemy as charged (CM ETO 7413, Gogol; CM ETO 5293, Killen; CM ETO 10955, Volatile; CM ETO 11116, Purnell). Accused's unsworn statement is not inconsistent with, but tends to fortify, the conclusion of the court.

Since the offense of desertion was complete when accused absented himself from his organization without authority with the necessary intent, it was not necessary that the court find that he returned to military control at the time and place originally alleged in Specification 1, or at any time certain (see CM ETO 9975, Athens et al; CM NATO 2044, III Bull. JAG 232).

Any possible objection to the morning report entries of 21 July and 4 August 1944 was cured by the testimony indicating that accused wrongfully left his organization on 20 February as charged (CM ETO 8631, Hamilton).

b. The competent morning report entry of Company L for 21 October 1944 clearly established accused's absence without leave as of that date. The battalion was in combat at the time. Since there is no showing in the record as to the place, date or manner of accused's return to military control, and since the duration of his unauthorized absence is material only in extenuation or aggravation, the reviewing authority properly modified the findings to conform with the evidence (see CM ETO 2473, Cantwell; MCM, 1928, par.130a, p.142-143).

6. The charge sheet shows that accused is 20 years of age and was inducted 12 May 1943 at Erie, Pennsylvania. No prior service is shown.

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

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Hewey Jr Judge Advocate

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

31 AUG 1945

CM ETO 13103

U N I T E D S T A T E S	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Kissingen, Germany, 19 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 35 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private LESTER R. ISRAEL (6576608), Company E, 15th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Lester R. Israel, Company "E", 15th Infantry, did, at Riquewihr, France, on or about 18 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was returned to his organization at Ribeauville, France, on or about 22 January 1945.

Specification 2: In that * * * did, at Hunaweier, France, on or about 23 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 returned to his organization at Pagny sur Moselle, on or about 23 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 specifications. No evidence of previous convictions was introduced. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorable 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 35 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The absence without leave charged in each of the specifications is adequately established by competent extract copies of the appropriate morning reports (Pros.Exs.A,B). The only question therefore, is whether the record contains substantial competent evidence of the intent to avoid hazardous duty alleged in each instance. Since this intent is specifically charged in the specifications, its existence at the time of commencement of each of the absences in question must be proved in order to sustain the findings of guilty of desertion (CM ETO 5958, Perry, et al). However, the intent may properly be inferred to have existed where it is shown that accused at the time of his departure was aware of present or imminent hazardous duty (CM ETO 8708, Lee; CM ETO 5958, Perry, et al).

4. With respect to the desertion alleged in Specification 1, the evidence shows that absence without leave commenced on 18 December 1944 (R7; Pros.Ex.A). The only proof of the existence or imminence of hazardous duty on that day is contained in the following testimony of Private Aubut, one of prosecution's witnesses (R8):

"Q: Could you tell to the court what the situation was in your company from December 18, 1944 up till about January 22, 1945?

A: Well it varies sir. Around December 18th we were outposting the Rhine and somewhere between there we went into a defensive position on a hill.

Q: While you were outposting the Rhine, was there any enemy activity?
A: Yes, sir, occasional shelling * * *" (underscoring supplied).

Even assuming that "outposting the Rhine", accompanied by occasional shelling, constitutes hazardous duty within the meaning of Article of War 28, it is obvious that the evidence shows not that such duty was in progress on 18 December 1944 when accused's absence began, but merely that it existed "around" that date. This is insufficient to prove the existence of hazardous duty at the time of commencement of the absence (CM ETO 4564, Woods), and whatever value it might have as evidence that such duty was then imminent is of no consequence here in view of the complete failure of proof that accused was or had reason to be aware of it (CM ETO 8300, Paxson). Hence, there is nothing to support the inference drawn by the court that his absence was designed to avoid hazardous duty.

5. A similar lack of proof characterizes the record relative to the desertion alleged in Specification 2. This is based upon an absence proved to have commenced on 23 January 1945 (R7; Pros.Ex.B). It is shown that "on or about" that day, accused's organization was "preparing to move in behind the 30th and 7th in reserve, after which we were to go through them and attack in the Colmar Woods" (R8,9) (underscoring supplied). The company was assembled for briefing on the attack and was briefed, but the witness "wouldn't say everyone was there" (R9). The attack actually occurred and the unit sustained casualties (R9). There is no evidence of combat activity or other hazardous duty on the day accused's absence began and, as previously indicated in connection with Specification 1, evidence that preparation and breifing for an attack occurred on or about such day constitutes inadequate proof that such activity occurred on or before the day (CM ETO 4564, Woods). Therefore, as far as the record reveals, the preparation and briefing apparently relied on to show present or imminent hazardous duty may well have occurred after accused's departure, thus foreclosing the possibility that he was aware of it. This, combined with the absence of proof that accused was present at the briefing in any event, removes any basis for inference that he was aware of the impending attack and deserted for the purpose of avoiding it (see CM ETO 8300, Paxson). There is no proof that his unit was in combat or even in reserve, but "was preparing" to go into reserve.

Of course, the mere fact that his organization engaged in combat during his absence is insufficient to establish an intent to avoid hazardous duty at the time of departure (CM ETO 7532, Ramirez).

6. The charge sheet shows that accused is 24 years of age and enlisted at Fort MacArthur, California, on 21 April 1939. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and the offense. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the specifications and the Charge as involves findings that accused did, at the times and places and for the periods alleged in each specification, absent himself without leave from his organization in violation of Article of War 61, and legally sufficient to support the sentence.

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

Lester A. Van... Judge Advocate

Martin A. Meyer Jr. Judge Advocate

John R. Anderson Judge Advocate

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

BOARD OF REVIEW NO. 4

11 AUG 1945

CM ETO 13104

UNITED STATES	)	3RD INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at
	)	Bad Kissengen, Germany,
Private HAROLD T. FINGLAND	)	23 April 1945. Sentence:
(20211767), Headquarters	)	Dishonorable discharge,
Company, First Battalion,	)	total forfeitures and con-
30th Infantry.	)	finement at hard labor for
	)	life. Eastern Branch, United
	)	States Disciplinary Barracks,
	)	Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Harold T. Fingland, Private, Headquarters Company 1st Battalion 30th Infantry, did, at or near Mad de Quarto, Italy on or about 1 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Bagnoli, Italy on or about 9 November 1944.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification, except the words "was apprehended at or near Bagnoli,

Italy on or about 9 November 1944," substituting therefor the words "returned to military control at a time and place unknown," of the excepted words, not guilty, of the substituted words, guilty. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused was returned to his company from hospital on 30 June 1944 (R8.) The next day (1 July 1944), he was discovered to be absent and a thorough check of the area failed to reveal his whereabouts. His absence was without authority and he was not present for duty with the company at any time during the period from 1 July 1944 to 9 November 1944 (R8-9;Pros.Ex.A). A written statement made by accused to the investigating officer after proper warning of his rights was received in evidence without objection by defense (R11;Pros.Ex.B). In it accused stated that about three weeks after reaching Anzio, Italy, he began to feel shaky and nervous. He was sent to the hospital where he underwent several air raids. When he was returned to his company he felt "like I couldn't take it any more," and hence left. He stayed around the Red Cross Club and hospital area. He did not turn himself in because he was afraid and although he wanted to do the right thing, he was too nervous and scared (Pros.Ex.B).

4. Accused after being warned of his rights by the president of the court, elected to make an unsworn statement through counsel (R13). He described in detail the manner in which the combat activity he had undergone had affected his nervous system, saying that "When I got back to my company the fear of airplanes and shells were so much on my mind that I just could not take any more of them." He pointed out that he had first entered the Army on 19 September 1937, and has twice been honorably discharged with character ratings of excellent, and he expressed a desire for an opportunity to return to duty and to continue to serve his country (R13-16).

5. Since the record of trial contained no specific evidence of the time and place of accused's return to military control, the court by substitution and exception found him guilty of desertion and of remaining in desertion until he "returned to military control at a

time and place unknown." Qualification of the findings in this particular form is unfortunate in its tendency to suggest a finding that the period of absence without leave may have been of a shorter duration than that alleged. The manual for courts-martial specifically provides that "A condition having been shown to have existed at one time, the general presumption arises, in the absence of any indication to the contrary, that such condition continues" (MCM 1928, par.112, 130a, pp.110,143). Hence, the unauthorized absence, having been amply proved to have commenced on 1 July 1944, may properly be presumed to have continued at least until 9 November 1944, the date of termination alleged in the specification (CM ETO 8147, Pierce), in view of the clear-cut evidence that accused was not present for duty with his company at any time between the two dates specified. Therefore, the court's finding may and should be regarded as designed merely to reflect the lack of proof of the exact time, place and manner of termination of the absence and not to constitute a finding that the period of absence ended earlier than 9 November 1944. On this basis, the finding of guilty of desertion is clearly supported by the evidence, an unexplained absence without leave of more than four months being sufficient to justify an inference of the intent not to return (CM ETO 1629 O'Donnell).

The defense moved to have stricken from the record testimony by the first sergeant that accused was a member of his company (R9). This motion was made on the ground that the sergeant's testimony was not the best evidence in the matter and was denied by the court. The court's action appears to have been proper (See CM ETO 8164, Brunner). In any event, however, no suggestion was made by the defense that accused was not a member of the company and the admission of his identity as the person described in the specification which arises from his plea to the general issue therefore supplies adequate proof that he was (See CM ETO 5004 Scheck).

6. The charge sheet shows that accused is 30 years of age and enlisted on 10 December 1941. Two periods of prior service are shown, one from 19 September 1937 to 26 March 1940 and one from 15 October 1940 to 9 December 1941.

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, Green-

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haven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Lester A. Davidson Judge Advocate

Martin A. Meyer Jr. Judge Advocate

John R. Anderson Judge Advocate

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

BOARD OF REVIEW NO. 1

9 OCT 1945

CM ETO 13125

U N I T E D S T A T E S	XII CORPS
v.	Trial by GCM, convened at Viechtach, Germany, 19 May 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class THOMAS G. KING (34776613) and Private DENZIL A. THOMAS (33209062), both of Company C, 282nd Engineer Combat Battalion	

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

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

2. Accused were charged separately and tried together, by direction of the appointing authority and with their consent, upon the following charges and specifications:

KING

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Thomas G. King Company C 282d Engineer Combat Battalion, Bad Salzschlirf, Germany did, at Fulda, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Anna Hehl, 30 Niesigerstrasse, Fulda, Germany.

Specification 2: In that * * * did, at Fulda, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Anna Hehl, 30 Niesigerstrasse, Fulda, Germany.

THOMAS

CHARGE: Violation of the 92nd Article of War.

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Specification 1: (Same as for King except for substitution of name of accused).

Specification 2: (Same as for King except for substitution of name of accused).

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. No evidence of previous convictions was introduced against King. Evidence was introduced against Thomas of one previous conviction by summary court for wrongfully entering an "off-limits" establishment in violation of a standing order and of Article of War 96. Three-fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved each of the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

The advance party of accused's organization moved into Fulda, Germany, on 1 April 1945, at which time clean-up operations were still in progress (R57). In Fulda, a Miss Anna Hehl (29 years old (R25,47)) lived on the ground floor of a house, her sister-in-law, Mrs. Anna Hehl (35 years old (R17,25)) on the second floor, and a Mrs. Bertha Rauck on the third floor (R9,12,17,31-32). About 2030 hours, when it was dark, on 3 April (R32,39), Miss Hehl was about to lock the door when she saw the two accused (R33). She did not close the door but pulled it inward in case they wished to enter (R38). They followed her into the house uninvited (R33), and went into the kitchen where she and Mrs. Hehl were eating supper with two Italian boys (R18,33). Accused Thomas fired his rifle into the ceiling about two minutes after they entered the kitchen (R19,33). Both accused were drunk (R11,29). The Hehl women were frightened and Miss Hehl wished to leave but they would not allow her to depart (R33). They continued to threaten the people with rifles (R33,93). Mrs. Rauck heard the shot (R9,89) and came downstairs. Mrs. Hehl called her into the kitchen where accused immediately pointed their guns at her (R10,19). She told the girls that this was not a laughing matter, but was serious (R34,95). However, they were not having a good time and were very much worried (R21,28-29,97). Both accused talked to Mrs. Rauck, who told them she was an American citizen and had been in the United States. She was obliged to show her papers and Thomas escorted her upstairs with his gun (R11,19). Mrs. Hehl went along with a candle (R19,34). Miss Hehl remained downstairs with the Italians, who told her not to be scared (R34). The people returned from upstairs and accused forced the two Italians to leave by threatening them

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with their guns (R11,18-19,34). Mrs. Hehl locked the front door as directed by accused, one of whom put the key in his pocket (R12,20,34). Mrs. Rauck was directed to tell the girls that accused wished to stay with them and when she refused one said, "well, our guns will tell them that, it is not necessary" (R15).

The whole party then went upstairs where another family was awakened by the girls but accused forced these people at gun point to return to bed (R12,19-20,34) and directed Mrs Rauck to stay in her room or she would be shot. She was afraid and complied. During the night she heard the girls call her and scream for help (R12), and also heard slamming of doors. She did not think, however, of opening the window and calling for help (R94).

Accused pointed their rifles and made gestures that the girls should descend to the cellar with them (R20,34), but they were too scared to go (R27). They were more afraid to go into the cellar than to let the accused have intercourse with them because they were afraid accused would immediately shoot them in the cellar (R28).

The larger soldier, Thomas, pushed Mrs. Hehl and pointed his rifle into the kitchen, the lights were turned out and he evidently attempted to have intercourse with her in a chair. It was very uncomfortable and "they didn't like that" (R20,37). She testified he did not violate her in the chair (R20), but that she was then compelled to lie on the kitchen floor where he pulled her panties down and inserted his penis into her private parts (R21). The rifle was behind her back and it was very uncomfortable (R28).

> "I didn't consent, I know the score. I didn't consent, in other words I was cold. I am a married woman, I know the score and I acted accordingly but I was cold. I didn't consent to it. I didn't have any pleasure by it in other words" (R21).

Then King, who was nude, came over and inserted his penis into her private parts. She did not consent. During these two acts she did not scream or call for help because nobody would come anyway. Accused were not armed but their rifles were in the kitchen (R22). When asked what she did to prevent the first act, Mrs. Hehl said she was thinking of something different altogether, just what, she did not remember (R26). Asked if she was not thinking of resisting at all, she said accused kept threatening them, they were hollering and no help came (R27), she could not say exactly if accused threatened them if they did not have intercourse, because they kept threatening them so many times she did not know "what it was" and was afraid she was going to be shot right away (R28).

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Miss Hehl testified that, in the meantime, the smaller soldier, King, was on the couch with her. He put the candle out and pulled her clothes off (R34), without tearing anything except her apron (R40). When she struggled against him, he hit her on the hands; she hollered and held her mouth (R34), but later she said she did not remember whether he had his hand continuously over her mouth or not (R38). He then removed all his clothes (R34) and put his penis into her private parts (R35). This intercourse was her first and was painful; that was why she hollered (R35,48). She did not consent; she

> "was always so backwards, never had intimate relations with men before. He did that in all different positions, going for quite a while" (R35).

Then he called the large soldier, Thomas, who came over to her and put his penis into her private parts. This was not so painful as the act with King, but it was disgusting and she did not consent (R35,48). After she washed herself a little blood came out (R48). The only reason she did all this was because she was afraid the soldiers would shoot her (R42).

Someone put the lights on and Miss Hehl put on her brassiere and panties (R39). King wanted to go to the bathroom, naked. Mrs. Hehl told him to put his trousers on (R22,35), and was obliged to accompany him and held the candle outside the bathroom door (R23). When asked why she was anxious to have him put his pants on, Mrs. Hehl said it looked "kind of silly" to go nude to the bathroom, she did not think it was very comfortable, and, finally, when asked whether she was interested in his comfort, she said "Everything was very terrible, simply terrible" (R29).

Accused then compelled the women to go into the bed room, where one of accused locked the door and put the keys in his pocket (R23,35). Miss Hehl had to go to the toilet, Thomas opened the door, went with her and on his return he or King locked the door and pocketed the keys again. Each put his rifle next to one of the two beds and got into bed (R35). Miss Hehl testified she had to take off her overcoat, blouse and panties because Thomas pointed a rifle at her. She then had to get into bed with him. He placed his penis in her private parts, but she did not consent. He then fell asleep (R36). Mrs Hehl testified that she had to lie down next to King in the other bed (R24), where he placed his penis in her private parts; she did not consent (R25). King then fell asleep (R36). She did not enjoy the acts at all, which disgusted her (R28).

When in the kitchen with the lights out, Miss Hehl could not jump out the window because they could have seen her and their rifles were next to them (R40). There was a back door to the house which could have been opened from the inside (R41,42), but she did not escape when the soldiers were asleep because the other door was locked. She was "scared to fool around with" a rifle (R43). There was nothing to prevent Mrs. Hehl from going outside and calling for help when she left

the room in the morning; accused were still sleeping (R45).

Accused slept until about 0530 hours (4 April) (R36). Mrs. Hehl was the first one up in the morning. King arose and unlocked the door. She went into the kitchen and made coffee for accused (R44-45). Miss Hehl did not arise and accused then left without bothering them any more (R36).

Shortly after accused left, Mrs. Rauck went downstairs, found the girls upset and crying, and said she would go to the commandant's office and make a complaint. It was also the Hehls' idea to make a complaint but they did not know what to do (R46). Because accused told her they "could shoot any damn German they found", Mrs. Rauck wished to find out whether they could do anything like that (R89). After doing her housework, she went and made the report (R91), as a result of which a military police sergeant picked up Mrs. Hehl and she pointed out both accused on the street in the vicinity of the battalion command post (R50,53). An identification parade was held in which Mrs. Rauck, Mrs. Hehl, and Miss Hehl identified both accused (R55). They also identified both accused at the trial (R10,17,32).

After accused were advised of their rights by the investigating officer, they each told him they knew nothing of the case and were in their quarters at the time of the alleged offenses (R59).

4. Evidence for the defense may be summarized as follows:

On 4 April, a medical officer was called to examine the two women, and a third woman who spoke English was present and acted as interpreter. The unmarried woman and the American woman were disturbed but the married woman was quite calm. As they led him to believe they had not been harmed, he did not examine them for marks or bruises. In his opinion, nothing would have been shown by a vaginal examination, as the alleged attack occurred 20 hours earlier and the women said they had taken several douches; no vaginal examination was made (R63).

Each accused, after his rights were explained, elected to be sworn as a witness in his own behalf (R64-65,78) and testified in material substance as follows:

THOMAS: He and King joined their organization on 3 April 1945. That night after drinking cognac they took a walk and saw a girl open a door, step back and motion them into a house. They entered and drank wine with two girls and two Italians (R67) but Thomas said nothing to the latter about leaving. The rifle was fired accidently when he first entered the kitchen and scared him more than it did them (R72). An American woman came down and they talked to her. The Italians left. The married woman moved over to King. Thomas was with the single girl, went into the bedroom, pulled off his clothes and got into the bed. The girl did likewise and he had intercourse with her, but only in the bedroom. He stayed all night (R68). He did not point the gun at or threaten her;

she made no resistance and did not cry or holler (R69). He had sexual relations only with the single girl. The gun was by the fireplace and he did not have it in his hand until he left the next morning (R72). He did not lock the door (R68). The girl did not appear angry at any time and he had no difficulty in inserting his penis in her. She did not bleed (R70). He did not tell Mrs. Rauck they wished to sleep with the girls (R73), argue with King or hold his hand over the single girl's mouth (R76). He was not drunk (R71). He told the investigating officer he was not at the house because he believe it was better to do so (R77-78).

KING testified to substantially the same facts as Thomas except that he was with the married woman (R79,80-81,86). He was hugging the married woman on his lap and gave her chocolate. In the bedroom she motioned him to remove his shirt. She followed him into the bed. At one time he went to the bathroom accompanied by her with a candle and he took his gun along (R80,83). She did not resist his advances but reciprocated. She was not angry (R81). Neither accused pointed their guns at the girls, threatened them or forced them to enter the bedroom (R86).

5. The sole evidence of accused's guilt as charged consists of the testimony of German witnesses, the two prosecutrices and their neighbor, Mrs. Rauck. The vital question in the case is the propriety and effect of certain rulings by the law member limiting the scope of cross-examination of the witnesses. Upon cross-examination of Mrs. Rauck, a prosecution's witness, the following colloquy occurred:

"Q. Are you a member of the Nazi party?
A. No.

Q. Why did you leave the United States?
A. I left it because my mother was ill at home. I have another married sister and a brother. I was not married and my sister thought I should be the one to come back and take care of my mother.

Prosecution: I object to this as being improper and having no bearing on the case.

Law Member: Objection sustained.

Defense: If the court please, it bears on the credibility of this witness.

Law Member: I have sustained the objection.

Defense: No further questions" (R14).

At the conclusion of the redirect examination of Mrs. Rauck the following interchange is shown by the record of trial:

"Defense: I again request that I be permitted to cross examine this witness to determine whether her testimony may be relied on and I want to quote to you from General Bradley's Special Orders 'The German has been taught that the national goal of domination must be obtained regardless of the depths of treachery, murder and destruction necessary. He has been taught to sacrifice everything--ideals, honor, and even his wife and children for the state. Defeat will not erase that idea. The Nazis have found that the most powerful propaganda weapon is distortion of the truth. They have made skilful use of it and will re-double their efforts in the event of an occupation in order to influence the thinking of the occupational forces. There will probably be deliberate, studied and continuous efforts to influence our sympathies (R15) and to minimize the consequences of defeat. You may expect all manner of approach--conversations to be overhead, underground publications to be found; there will be appeals to generosity and fair play; to pity for "victims of devastation"; to racial and cultural similarities; and to sympathy for an allegedly oppressed people. There will be attempts at sowing discord among Allied nations; at undermining Allied determination to enforce the surrender; at inducing a reduction in occupational forces; at lowering morale and efficiency of the occupying forces; at proving that Nazism was never wanted by the "gentle and cultured" German people'.

I think in view of those facts, which are specifically set forth in orders to all soldiers of the American Army, that we are entitled to determine the interest and the background of this witness in order that the court may know whether or not they may rely upon her testimony.

Law Member: It is not necessary to request the privilege of proper cross examination. That privilege will be extended to you without request, but so far as the objection is concerned, the cross-examination must come within the rules of proper cross-examination. In so far as I am personally capable of doing so, I am going to rule on all objections strictly according to law.

RECROSS EXAMINATION

Questions by the defense:

"Q. Are these Miss Anna Hehl and Mrs. Anna Hehl members of the Nazi party?
A. Not that I know of.

Q. Are their husbands or relatives serving or have they served in the German armed forces?

Prosecution: I am going to object, it is not being proper cross examination and if the defense wishes to follow this line he should do it in the proper way.

Law Member: Objection sustained.

Defense: No further questions" (R15-16).

Upon examination by the court of Mrs. Rauck as its witness, the following colloquy occurred:

"Q. Will you explain the circumstances of your being in Germany again?

Prosecution: I object to that as not having any bearing on this case at all.

Law Member: Objection sustained" (R89).

And upon her examination as a court witness by the defense:

"Q. You left the United States in what year?

Prosecution: I object to that as not being material to this case in any way.

Law Member: Objection sustained.

Q. Did you leave the United States because you were in sympathy with the Nazi cause?
A. I did not.

Prosecution: I object to that for the same reason.

Law Member: Objection sustained.

Defense: If the court please, I think we are entitled to ask questions which tend to show the credibility of this witness.

Law Member: I agree with the defense counsel but I don't think the questions you are asking are admissible. We are going to try to limit

the evidence to the questions involved in the trial of a rape case.

Defense: You mean I am not to ask questions which show the credibility of this witness.

Law Member: You can ask questions which tend to impeach the witness. When you ask that kind I will permit the witness to answer. When they are not that kind of questions and they are objected to, I am going to sustain the objections.

Defense: No further questions" (R96-97).

The theory of the defense is illustrated by the following colloquy upon the direct examination of its medical witness who was called to examine the prosecutrices:

"Q. Did they appear to be under emotional strain?
A. Yes, sir, the unmarried one was somewhat disturbed, the other was apparently quite calm. The American woman was somewhat disturbed about the whole situation and made that fact known to us.

Q. Just what did she say, this American woman?

Prosecution: I object to that on the grounds of this not being material to this case.

Law Member: Objection sustained.

Defense: If the court please, it is our contention that these soldiers had a party with these two women and that this whole case was instigated by this busy body woman and we think we are entitled to show her as such and that is our defense and if we are not going to be permitted.

Prosecution: I object to the counsel referring to the English speaking woman as a busy body.

Law Member: I believe that the ruling made is correct and the objection is overruled.

Prosecution: Sustained?

Law Member: Sustained. I inadvertantly said overruled" (R62).

During the cross-examination of Miss Hehl appears the following:

"Q. You say this is the first time you ever had any sexual intercourse with any man?
A. Yes.

Q. How old are you?
A. Twenty-nine.

Q. Did you ever go to a Nazi youth camp?

Prosecution: I object to that as being incompetent, irrelevant and immaterial.

Defense: I think it is very material. It is a well known fact that Der Fuehrer encouraged or awarded medals to these German women to have children whether they were married or otherwise, for Der Fuehrer and if it can be proven that this woman is giving false testimony about this particular thing it is going to affect all the rest of her testimony.

Law Member: Objection sustained" (R46-47).

It is apparent from the record that after the limitation of cross-examination of Mrs. Rauck, the defense, in cross-examining the prosecutrices, by reason of the former rulings, abandoned its course of attempting to show bias, prejudice, ill will or hatred against the accused on political, idealogical or related grounds and resorted to other means of attempted impeachment.

6. The code of evidence prescribed for courts-martial in the Manual for Courts-Martial provides in pertinent part as follows:

"Cross-examination should be limited to matters having a bearing upon the testimony of the witness on direct examination. As one purpose of cross-examination is to test the credibility of the witness, he may always be cross examined as to matters bearing upon his credibility, for instance, he may be interrogated as to his relationship to the parties and to the subject matter of the case, his interest, his motives, inclinations, and prejudices * * * The court and its members may ask a witness other than the accused any questions that either side might properly ask such witness" (MCM, 1928, par.121b, pp. 126-127).

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The foregoing is a recognition of the fundamental right of every accused person to cross-examine on material facts every witness who testifies against him, which right is inherent in due process of law, expressed in the Fifth and Sixth Amendments to the Federal Constitution (United States v. Keown (DC WD, Ky., 1937) 19 F. Supp. 639,646, and authorities therein cited). The language of the Manual is also a recognition of the firmly established right to show bias and prejudice of a witness towards the accused by cross-examination which, although it may elicit answers not relevant to the issue, "throws a direct light on the credibility of his evidence" (Furlong v. United States (CCA-8th, 1926) 10 F (2d) 492,494). The last cited case held that the sustaining of an objection to cross-examination designed to elicit unfriendly feelings of prosecution witnesses toward the defendant was error, but not prejudicial because of the defense testimony showing bias, prejudice and ill will. In Alford v. United States, 282 U. S. 687, 75L. Ed. 624 (1931), a former employee of the defendant on direct examination gave damaging testimony, including conversations between accused and the witness and others. Upon cross-examination, questions seeking to elicit the witness' place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination. Defense counsel insisted they were proper and that the jury had a right to know who the witness was, where he lived and his business. An additional ground urged was that the witness was allegedly in custody of federal authorities. The Supreme Court by the then Mr. Justice Stone (now Chief Justice) wrote as follows:

> "Cross-examination of a witness is a matter of right. The Ottawa, 3 Wall 268,271, 18 L. ed. 165,167. Its purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood (cf, Khan v. Zemansky, 59 Cal. App. 324, 327 ff., 210 Pac.529; 3 Wigmore, Ev. 2d./sec. 1368, I. (1) (b)); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment (Kirschner v. State, 9 Wis. 140; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41; People v. White, 251 Ill. 67, 72 ff., 95 N. E. 1036; Wallace v. State, 41 Fla. 547, 574, ff., 26 So.713); and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (Tla-Koo-Yel-Lee v. United States, 167 U.S. 274, 42 L. ed. 166, 17 S, Ct. 855; King v. United States, 50 C.C.A. 647, 112 Fed. 988; Farkas v. United States (C.C.A. 6th) 2 F. (2d) 644; see Furlong v. United States (C.C.A. 8th) 10 F. (2d) 492,494).

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing (72 Vt. 334,340,47 Atl. 1075; Martin v. Elden, 32 Ohio St. 282,289). It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. Tla-Koo-Yel-Lee v. United States, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855, supra; King v. United States, 50 C. C. A. 647, 112 Fed. 988, supra; People v. Moore, 96 App. Div. 56,89 N.Y. Supp. 83, affirmed without opinion in 181 N.Y. 524, 73 N.E. 1129; cf. People v. Becker, 210 N. Y. 274, 104 N. E. 396. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safe-guards essential to a fair trial. Nailor v. Williams, 8 Wall. 107,109, 19 L. ed. 348,349; see People v. Stevenson, 103 Cal. App. 92, 284 Pac. 491; cf. Brasfield v. United States, 272 U.S. 448, 71 L. ed. 345,47 S. Ct. 135. In this respect a summary denial of the right of cross examination is distinguishable from the erroneous admission of harmless testimony. Nailor v. Williams, 8 Wall. 107, 109 19 L. ed. 348,349; supra.

The present case, after thewitness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. State v. Pugsley, 75 Iowa, 742, 38 N. W. 498, 8 Am. Crim. Rep. 100; State v. Fong Loon, 29 Idaho, 248, 255 ff., L. R. A. 1916 F, 1198,158 Pac. 233; Wallace v. State, 41 Fla. 547, 26 So. 713, supra; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203, supra; 5 Jones Ev. 2d ed. sec. 2366.

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgement in determining when the subject is exhausted. Storm v. United States, 94 U. S. 76, 85, 24 L. ed. 42,45; Rea v. Missouri, 17 Wall. 532, 542,543, 21 L. ed. 707, 709, 710; Blitz v. United States, 153 U.S. 308, 312, 38 L. ed. 725, 726, 14 S. Ct. 924. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyohd the bounds of proper cross-examination merely to harass, annoy or humiliate him. Third Great Western Turnp. Road Co. v. Loomis, 32 N. Y. 127, 132, 88 Am. Dec. 311; Wallace v. State, 41 Fla. 547,574 ff., 26 So. 713, supra; 5 Jones, Ev. 2d ed. sec. 2316. But no such case is presented here. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. Tla-Koo-Yel-Lee v. United States, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855, supra; Nailor v. Williams, 8 Wall, 107, 109, 19 L. ed. 348, 349, supra; King v. United States, 50 C. C. A. 647, 112 Fed. 988, supra; People v. Moore, 96 App. Div. 56, 89 N. Y. Supp. 83, supra; cf. People v. Becker, 210 N. Y. 274, 104 N. E. 396, supra" (282 U. S. at 691-694, 75 L. ed., at 627-629) (Underscoring supplied).

It was held in State v. Radon (Wyo.), 19 Pac (2d) 177, that denial of fair latitude in cross-examination of a state's witness, to show that his testimony in chief was biased, is denial of a substantial right and safeguard essential to a fair trial. (See also 70 CJ, sec. 1165, pp. 958-961; sec. 1025, p.817, and cases cited in footnotes, particularly People v. Pantages 212 Cal. 237,297 Pac. 890, to the effect that a proper cross-examination includes inquiry as to motive in giving certain testimony). Where the evidence sought to be elicited may show the witness' interest or bias, the right exists to question him as to political views or affiliations, and as to membership in certain organizations, including an organization hostile to persons of the nationality and religion of the party against whom the witness testifies (70 CJ, sec. 1177, pp.978-979, and cases cited in footnotes). Even a denial by the witness of bias, prejudice or interest does not preclude the right of further inquiry as to specific matters tending to show the existence of the condition denied, and refusal to permit

such cross-examination, depending upon the circumstances, will constitute error (70 CJ, sec. 1198, p. 993). Although the permissible scope of cross-examination for the purposes under consideration is largely within the discretion of the trial court, its ruling will not be upheld in case of a clear abuse of this discretion (70 CJ loc. cit. supra; Annotation, 74 ALR 1157), as is clear from the above cited cases.

In denying the defense the right to inquire into the background of Mrs. Rauck for the purpose of showing her interest, bias, prejudice, and hatred toward accused as members of the victorious military occupational forces, the law member clearly limited the defense's right to legitimate cross-examination, abused his discretion and committed serious prejudicial error. We cannot determine what would have been the result if full cross-examination had been permitted; it is enough under the authorities that it might have elicited evidence which would have entirely discredited the witness, whose testimony was highly corroborative of that of the prosecutrices and, with theirs, constituted the only basis upon which the instant convictions may stand. It is obvious from the record that the denial of this right to cross-examine Mrs. Rauck was taken by the defense counsel as a denial of the right so to cross-examine each of the prosecutrices. His attempts to discredit their testimony, evidently as a direct result of the law member's ruling as to Mrs. Rauck's cross-examination did not raise the question of their background, bias, prejudice, or hatred toward American soldiers. Instead, he limited himself to an endeavor to show inconsistencies and improbabilities in their testimony, in which he was at least partially successful as shown below, and to attacking Mrs. Hehl's chastity and Miss Hehl's testimony as to her prior virginity. The extent to which he might have gone in discrediting the testimony of the prosecutrices is indicated in the testimony elicited by the court from Miss Hehl that her brother, the husband of Mrs. Hehl, the other prosecutrix, was at the time of trial in the German Army (R47). The fact that this evidence appears and that Mrs. Rauck's answers appear denying membership in the Nazi party (R14) and that she left the United States because she was in sympathy with the Nazi cause (R96), explaining that she came from that country to care for her ill mother (R14), and denying contact with German soldiers and knowledge of instructions as to conduct from Nazi authorities (R95-96), does not lessen the gravely prejudicial effect of the rulings upon accused's substantial rights, under the above authorities.

Particularly is the foregoing true in view of certain inconsistencies and improbabilities in the testimony of Mrs Hehl and in other testimony with respect to her: Asked what she did to prevent the first alleged act of intercourse (on the kitchen floor with accused Thomas) she stated, "I was thinking of something different altogether", she did not remember what (R26). Although accused threatened her if she did not descend to the cellar (R28), she did not go there because "It was too dark and I was too afraid". She was more afraid to go there than to let one of the soldiers have sexual intercourse with her "because I was afraid they were going to shoot us right away in the cellar" (R28); although

she was very much excited, she wished King to put on his trousers before going to the bath room because "It looks kind of silly to go nude to the bath room * * * I don't think it is very comfortable"; asked whether she was interested in his comfort, she testified, "Everything was very terrible, simply terrible" (R29). Upon direct examination, she made the following cryptic reply to the question whether she consented to Thomas' first act:

> "I didn't consent. I know the score. I didn't consent, in other words, I was cold. I am a married woman, I know the score, and I acted accordingly but I was cold, I didn't consent to it. I didn't have any pleasure by it, in other words" (R21).

In the early morning (4 April) after the alleged offenses, according to Miss Hehl's testimony, Mrs. Hehl arose first, went to the kitchen, and made coffee for accused. At this time, with the soldiers evidently asleep, there was nothing Miss Hehl knew of to prevent her sister-in-law from going outside the house and calling for assistance. The latter gave coffee and water to the soldiers voluntarily (R44-45). Neither prosecutrix complained of the affair but on her suggestion left this to Mrs. Rauck (R26,45-46) who told each that it was a serious case (R34,95). It is apparent that the defense counsel had at least begun to make inroads upon the credibility of Mrs. Hehl and that he might well have completely discredited her if he had felt free to examine her fully as to her attitude toward accused.

With respect to Miss Hehl, the law member committed error in refusing to allow the defense to attempt to show she falsely testified as to her virginity (R35,46-47) by attempting to adduce evidence that she had borne a child or had intercourse for that purpose either at a Nazi youth camp or elsewhere pursuant to official Nazi policy (R47). In State v. Rivers, 82 Conn. 454, 74 Atl. 757 at 759 (according to 70 CJ sec. 1094, p.881) fn. 40:

> "Complainant, in testifying to circumstances leading up to the assault, stated that accused asked her to go into the bedroom with him, that she refused and he insisted, when she told him that she had never been with anybody, and would not go with him. It was error to exclude questions asked her on cross-examination as to whether a year before she and another girl had not slept in the same bed with a certain man, and whether she had not admitted it in police court, and whether she had not during the past year and a half had an indecent picture taken of herself, since, if her testimony that she had made the statement to accused was wilfully false, the jury might not have accepted other parts of her testimony, and if she had admitted her previous unchaste acts the jury might have thought it improbable that she made the claimed statement to accused, and

> in testifying to the statement made to accused, she in effect, testified that she was chaste previous to the assault".

The court there said:

> "In the case of this character a broad latitude of cross-examination should be allowed the accused to test the veracity of such a witness. For that purpose, although chastity of the complainant is not strictly in issue, courts may properly in such cases permit the accused to inquire on cross-examination as to particular acts of immorality and unchastity of the complainant, either before or after the date of the alleged assault, which tend to show that such witness is unreliable and unworthy of credit" (Underscoring supplied).

Had the desired cross-examination been allowed and the evidence shown that Miss Hehl had had prior intercourse, the court might well have disbelieved the remainder of her testimony as well. Accused had a right to have this field explored and its denial was substantially prejudicial to them regardless of the materiality of what might have been developed (Alford v. United States, supra).

The total effect upon each accused of the law member's rulings in cutting off proper cross-examination of the prosecution's essential witnesses was "to deny a substantial right and withdraw one of the safeguards essential to a fair trial" (Alford v. United States, supra), and for this reason the findings of guilty and sentence must fall (Cf: CM ETO 4564, Woods). AW 37(23), 37(1); 17(1)

7. The charge sheet shows that accused King is 20 years of age and was inducted 11 June 1943 at Camp Croft, South Carolina, and that accused Thomas is 24 years nine months of age and was inducted 1 August 1942 at Abingdon, Virginia. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

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

Wm. F. Rumsey 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. 3

31 AUG 1945

CM ETO 13126

U N I T E D S T A T E S	)	XII CORPS
	)	
v.	)	Trial by GCM, convened at
	)	Viechtach, Germany, 25 May
Private WILLIAM GREEN	)	1945. Sentence: Dishonorable
(38223698), Battery A,	)	discharge, total forfeitures
452d Antiaircraft Artillery	)	and confinement at hard labor
Automatic Weapons Battalion	)	for life. United States
(Mobile)	)	Penitentiary, Leavenworth,
	)	Kansas.

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

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

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

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

Specification 1: In that Private William Green, Battery A, 452d Antiaircraft Artillery Automatic Weapons Battalion (Mobile), did without proper leave absent himself from his organization at Eslarn, Germany from about 0030 hours 27 April 1945 to about 0230 hours, 27 April 1945.

Specification 2: In that * * * did without proper leave absent himself from his organization at Eslarn, Germany from about 0930 hours 27 April 1945 to about 1400 hours, 27 April 1945.

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

Specification: In that * * * did at Eslarn, Germany, on or about 27 April 1945, forcibly and feloniously against her will have carnal knowledge of Erika Meissner.

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

Specification: In that * * * did, at Eslarn, Germany, on or about 0030 hours, 27 April 1945 in the night-time feloniously and burglariously break and enter the dwelling house of Adolph Ignacy Schneider with intent to commit a felony, viz, rape, therein.

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 Charge I, of Specification 1 thereof and guilty of Specification 2 except the words "to about 1400 hours," substituting therefor the words "to about 1100 hours," and guilty of the remaining charges and specifications. Evidence was introduced of one previous conviction for absence without leave for a period of two hours 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 U. S. Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The pertinent evidence for the prosecution is summarized as follows:

At about 0030 hours on 27 April 1945 accused and Private Clifford A. Bailey, both of Battery A, 452d Antiaircraft Artillery Weapons Battalion (Mobile), armed with carbines, arrived at the home of Adolph Ignacy and Ruth Schneider in the village of Eslarn, Germany and "kept hitting on the door, hard" so that "the whole house was awakened" (R7-8,10,13,17-18,28,37). At the demand of accused she tried to unlock the door, but was unable to do so. The key was delivered to him through the window. Since he was also unsuccessful with the key in opening the door he asked her to "open the window and then he came in through the window and then the other one". She could see "how the door was all smashed up and we were all in fear". She "wasn't scared because he was colored but he was kind of drunk and insisted on getting in". She "had to" open the window, because if she "didn't he would have broken down the window" (R12). He carried in his

pocket a bottle of whiskey nearly full (R8,18). Upon his request that she have everyone come down who lived in the house, the residents gathered together downstairs, including her husband and their children (R11,24), "Mrs. Schrim" and her daughter, Mrs. Erika Meissner, age 28 (R8-9,19,24, 26,28) and Rosa Androsek (R11). Accused made threatening use of his carbine and two knives which he waved about, forcing Mrs. Schneider and Erika to accompany him into a room. He then directed Mrs. Schneider to leave (R9,13,19,25,38). Erika was very much afraid of him because he was drunk and becoming very angry. He made faces at her and threatened to shoot her. He turned out the light in the room, threw her on the bed, pulled up her nightgown, kissed her, got on top of her and inserted his male organ into her private parts. She was frightened and shaking, " * * * was almost going crazy * * * couldn't fight him, * * * was too scared, he always wanted to shoot and he was drunk". Others in the house heard her cry and scream, but could not go to her aid because Bailey "stood in the door * * * spread his arms out in the door frame" and prevented it (R9-10,11,21,29-30,32-33). During all this time accused was wearing glasses or frames without glass (R8,10,12,14,18,41). Accused and Bailey left about 0230 hours (R21,22,39). They returned later in the morning before noon when accused brought some conserves and ladies silk stockings for "the ladies, the ones that were here in the night" (R22,23,31).

Accused had no authority to be absent from his organization, located about a mile from the Schneider home, on either of his visits there that morning (R42-43,44,49). He was seen approaching the Schneider house at about 1330 hours on 27 April by his battery commander (R43).

4. For the defense, six soldiers of accused's organization testified regarding his presence within the battery area the night of 26-27 April 1945. He was seen at 2100 hours on 26 April "sitting around in the tent" with Private Bailey drinking beer (R52,60). Private Hollis B. Watts joined them after 2100 hours. They "had a little bottle there to drink" (R62). At about 2000 or 2100 hours accused was seen "washing up the dishes or something" (R55). A soldier coming off guard duty at 2230 hours saw him "sitting there talking with the boys" (R64). At 0200 hours on 27 April he was heard talking in his tent to another soldier and at 0300 hours was seen sitting beside a stove on a water can (R59). None of the witnesses ever saw accused wear glasses except dust glasses worn while "on the move" (R53,56,59,61,62,64).

After his rights were explained, accused testified that the night of 26 April 1945 he remained in his tent all evening, except for a couple of times when he went to the adjoining artillery command post to get beer. He denied that he was at the Schneider home the night of 26-27 April. He never had worn glasses at any time. He denied the truth of Bailey's testimony regarding their presence in the Schneider home the night of 26-27 April (R33-39), but admitted they were there

during the morning of the 27th. A man offered them beer and he gave him some stockings and two cans of "C rations" therefor. He admitted he was then absent without authority (R67-76).

5. a. Charge I, Specification 1. That accused was absent without leave, as alleged, is supported by substantial evidence. In this regard, the court was warranted in believing the prosecution's witnesses and disbelieving accused and the defense witness who placed him in his tent at 0200 hours on 27 April.

b. Charge I, Specification 2. In advising accused regarding his rights, the law member said:

> "First, you may take the stand and be sworn like any other witness. If you do this you may be cross examined on your testimony both by the trial judge advocate and by members of the court. Their cross-examination can cover not only the things about which you have testified but can also cover every matter in the case connected with your guilt or innocence, including collateral matters to impeach your credibility" (R65-66).

This was error insofar as it conflicts with the Manual for Courts Martial which states:

> "Where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified".
>
> "In questioning an accused the court and its members must confine themselves to questions which would have been admissible on cross-examination of the accused by the prosecution" (MCM, 1928,par.121b, p.127).

In his testimony on direct examination accused made no reference to the absence without leave alleged in Specification 2 of Charge I. However, cross-examined regarding this alleged absence by the prosecution and the court, he admitted his presence near the Schneider home sometime before luncheon time(R70-71). The defense objected to these questions because accused did not testify about the allegations contained in Specification 2 of Charge I. The law member overruled the objection (R72) and in his further cross-examination accused admitted his absence without authority "sometime that morning, sir, between, well, nine or ten o'clock, sir" (R72). No substantial right of accused was injuriously affected by

this error, since, excluding all of accused's testimony in this regard, his absence in accordance with the court's findings of guilty was clearly established by other compelling evidence (CM 130415,Dig.Op.JAG,1912-1930, sec.1284,p.634; and see CM ETO 1201,Pheil, and authorities therein cited; CM ETO 4701, Minnetto, and authorities therein cited).

c. Charge II and Specification. The court's findings of guilty are supported by substantial evidence, which contains all the elements of the crime of rape, and are final and binding upon appellate review (CM ETO 4661, Ducote, and authorities therein cited).

d. Charge III and Specification. The prosecution was required to prove

> "(a) That the accused broke and entered a certain dwelling house of a certain other person, as specified; (b) that such breaking and entering were done in the nighttime; and (c) the facts and circumstances of the case (for instance, the actual commission of the felony) which indicate that such breaking and entering were done with the intent to commit the alleged felony therein" (MCM,1928,par.149d,p.169).

As indicated in the summary of the evidence above, it was clear and undisputed that accused entered the dwelling house through a window that was opened at his request by a resident thereof, following his inability to open the door with the key which had been delivered to him. As stated in the Manual for Courts-Martial, to constitute burglary

> "There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not constitute a breaking; * * *" (MCM,1928,par.149d,p.168). (Underscoring supplied).

However, there is a constructive breaking when the entry is gained by intimidating the inmates through violence or threats into opening the door (MCM, 1928,par.149d,p.169). The question then arises in this instance whether or not the inmates were intimidated by violence into opening the door. The evidence showed that no threats were made by accused before he entered the dwelling (R11-12). Regarding the violence used, accused and his companion "hit on the door" (R7), they "were hitting on the door, hard, with a carbine, I think, because they broke the door so much so that the whole house was awakened" (R8). Evidence of the force

used was further supplied by the fact that the lock would not thereafter function either for Mrs. Schneider when she tried to open the door with the key nor for accused when he tried the key after it had been passed out to him (R8). Accused and his companion were armed with carbines (R10). She testified she could see "how the door was all smashed up and we were all in fear". It was the first time in her life she had seen a colored person. She "wasn't scared because he was colored but he was kind of drunk and he insisted on getting in". She "had to" open the window, because if she "didn't he would have broken down the window" (R12).

In the opinion of the Board of Review, the court was fully warranted upon all the evidence to conclude that Ruth Schneider was intimidated by accused's violence into opening the window and granting him entrance into the dwelling. That he intended to commit the crime of rape was demonstrated by his subsequent conduct. The evidence supports the court's findings of guilty (cf. CM 230541, Daniel, 17 B.R. 385 (1943)).

6. The charge sheet shows that accused is 40 years of age and was inducted 17 August 1942 at Camp Livingston, Louisiana. 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 rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and of burglary by Article of War 42 and section 22-1801 (6;55), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229,WD,8 June 1944,sec.II,pars. 1b,(4),3b).

B. R. Keefer Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 2

CM ETO 13139

7 SEP 1945

UNITED STATES v. Private PAUL A. RIDENOUR (36889316), Headquarters Company, 750th Railway Operating Battalion	HEADQUARTERS, DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Lyon, France, 2 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Paul A. Ridenour, Headquarters Company, 750th Railway Operating Battalion, did, at Lyon, France, on or about 24 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Eugene Bourret, a human being, by shooting him with a pistol.

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 was introduced of any previous convictions. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be con-

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fined 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. Summary of Evidence for the Prosecution: On 23 November 1944, about 11:15 pm, at Lyon, France, the accused, a soldier of the 750th Railway Operating Battalion (R12,17), and another soldier visited a bar located in a house of prostitution known as 21 Rue Gilibert (R19;Pros. Ex.A). They sat at a table for about an hour and had some drinks. The accused was jolly and enjoying himself and "seemed to have his full senses". His companion left him and walked back to camp. When he had almost reached the camp a half hour later, the accused rejoined him, at which time he acted normally (R20-22,25). After his companion had left him in the bar room the accused walked over to the bar. There were then only three other persons in the room, (1) Madame Prudhomme, a bar maid who stood behind and about in the middle of the bar, (2) Eugene Bourret, the deceased and the proprietor, who also stood behind the bar but toward the end on the right of the accused as he faced the bar, and (3) Madamoiselle Passous, one of the female inmates, who stood on the right hand side of the accused (R27-28). Accused ordered and paid for a beer. It was closing time and Madame Prudhomme was indicating by gestures that the accused leave (R145). As he talked to Madame Prudhomme the accused slowly pulled a pistol from the top of his trousers. He then quickly pulled off the safety and pointed the pistol at Madame Prudhomme (R29,143). When Madamoiselle Passous observed these things she turned away and walked out of the room saying nothing (R30,148). About the same time Madame Bourret, the deceased's wife, came into the room and went behind the bar to get some alcohol. She saw the accused at the bar with pistol in hand and her husband and Madame Prudhomme behind the bar (R58). She placed the latter as in back of the till or cash drawer. Her husband was checking his books (R59). Madame Prudhomme who could understand some English told Madame Bourret in French just what the accused was demanding but because the accused could not understand French the testimony was rejected from the evidence (R62-63,69). Bourret then walked to the left end of the bar and came around toward the accused who backed up and away from the bar and when Bourret came within about 8 feet of him he fired the pistol at him (R65) and killed him (R66). The deceased had nothing in his hands at the time and nothing was said between the two (R67). After firing the fatal shot, the accused was unable to get out of the main door of the establishment as it was locked. He fired a shot at the lock but could not open the door. He then returned to the bar room and by pointing his pistol at some of the inmates he was finally let out of another door (R33-34). The deceased was taken to a hospital and an emergency operation was performed but he died shortly thereafter (R91).

Accused was placed under arrest and made a voluntary pretrial statement written by him in longhand and admitted in evidence without objection (R87;Pros.Ex.E). In it he admitted that he was in the establishment about midnight of 23 November 1944 after all of the other

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patrons including his friend had left. There were only two others there, the proprietor and a bar maid, both of whom were behind the bar. They were closing up the place. He walked over to the bar and ordered a beer and reached in his wallet for money with which to pay for the beer and handed it to the bar maid. She handed it to the deceased who returned the change to her and she to the accused. When he put his change in his wallet he observed a 1000 franc note therein which he had been trying to get changed. He asked the bar maid for change for his 1000 franc note. She did not seem to understand. He repeated his request several times, that he wanted a thousand francs, meaning change for the bill. She turned to the proprietor and said something. The latter came from behind the bar and said something in French which accused did not understand. He then slapped accused around the face several times with his hand. The accused pulled his pistol out from the top of his trousers and fired it at the proprietor when he was an arm's length away. The proprietor then sat down. Accused became frightened and tried to get out of the establishment. The door or gate was locked so he fired a bullet at the lock but could not open it. He, with gun still in hand, asked several of the prostitutes how to get out. One got a key and let him out of another door.

4. Evidence for the defense: An extract copy of the arrest slip showing that when the accused was arrested soon after the shooting he had in his possession 1102 francs was admitted in evidence (R95).

He elected to testify in his own behalf. He related that he had purchased the pistol about a week or ten days previous to the shooting from a French soldier; that he had shown it to his companions in camp who had handled it; that he took it with him that night because he wanted to sell it, but said nothing about it to his two companions of the earlier part of the evening (R99,103,106,114). He did not know that it was loaded and he carried it inside of his pants because it was more comfortable to carry in that manner (R107,127). He then repeated substantially the same story as summarized above in his pretrial statement except that he claimed that he took the 1000 franc note out of his billfold when asked that it be changed (R101). He then returned the bill to his billfold and started for the door when the proprietor attacked him by striking him across the face four or five times (R110). He drew out the revolver to scare him off but when the proprietor struck him again the jar of the blow caused the gun to go off (R101).

5. The accused has been convicted of the murder of Eugene Bourret by shooting him with a pistol. Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill, Criminal Evidence (4th Ed., 1935) sec.557, p.1090). There was, therefore, substantial competent evidence to support a finding of guilty of murder on the part of the accused unless he was excused in the killing on the grounds of self-defense. To kill another in self-defense is legally excusable.

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

The evidence for the prosecution clearly showed that the accused was the aggressor and drew his weapon apparently for the purpose of robbing the establishment. The proprietor was unarmed and it was unnecessary for the accused to kill him in order to save his own life or to prevent great bodily harm to himself. The accused claimed in his pretrial statement that he fired to prevent the assault that the proprietor made upon him. At the time of the trial he claimed that one of the blows delivered by the proprietor caused the gun to accidentally discharge, thereby shifting his grounds of defense from that of self-defense. In any event the conflict of evidence presented issues of fact which were in the exclusive province of the court to determine. Inasmuch as the court has resolved the issues against the accused and its findings are based upon substantial evidence in the record, its decision will not be disturbed by the Board upon review (CM ETO 4194, Scott; CM ETO 14048, Mason).

6. The charge sheet shows the accused to be 28 years six months of age. Without prior service, he was inducted 10 November 1943 at Fort Sheridan, Illinois.

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

8. The penalty for 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).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
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14 SEP 1945

BOARD OF REVIEW NO. 1

CM ETO 13154

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS
	) ZONE, EUROPEAN THEATER OF
v.	) OPERATIONS
	)
Private ERVIN E. FURMAN(32601803)	) Trial by GCM, convened at Paris,
and HERMAN M. FRANCIS (32684769),	) France, 28, 30 April 1945.
both of 542nd Port Company, 507th	) Sentence as to each accused:
Port Battalion, and Private ALVIN	) Dishonorable discharge, total
DAVIS (34139863), 19th Reinforcement	) forfeitures and confinement at
Depot	) hard labor for life. 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 soldiers named above has been examined by the Board of Review.

2. Accused were charged separately and tried together upon the following charges and specifications:

FURMAN

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

Specification: In that Private Ervin E. FURMAN, 542nd Port Company, 507th Port Battalion, European Theater of Operations, United States Army, did, at his organization, on or about 17 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Chartres, France, on or about 27 January 1945.

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

Specification: (Finding of guilty disapproved by reviewing authority)

CHARGE III: Violation of the 94th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

FRANCIS

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

Specification: In that Private Herman M. FRANCIS, 542nd Port Company, 507th Port Battalion, European Theater of Operations, United States Army, did, at his organization on or about 17 November 1944 desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 19 January 1945.

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

Specification: In that * * * in conjunction with Private Walter [illegible]LEY, deceased, 960th Quartermaster Company, European Theater of Operations, United States Army, Private Alvin DAVIS, 19th Reinforcement Depot European Theater of Operations, United States Army, Private Ervin E. FURMAN, 542nd Port Company, 507th Port Battalion, European Theater of Operations, United States Army and Private John J. Maciejczak, deceased, 19th Reinforcement Depot, European Theater of Operations, United States Army, did, at or near Charleroi, Belgium on or about 17 December 1944, knowingly and willfully misappropriate three (3) Government motor vehicles, 2½ ton 6x6 trucks numbers 4253839, 4266534 and 4201403, value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

DAVIS

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

Specification: In that Private Alvin DAVIS, 19th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization on or about 11 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 19 January 1945.

CHARGE II: Violation of the 96th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE III: Violation of the 94th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, accused Furman was found not guilty of Charge III and Specification and guilty of the remaining charges and specifications preferred against him; accused Francis was found guilty of both charges and specifications preferred against him; and accused Davis was found guilty of Charge I and Specification and not guilty of the remaining charges and specifications preferred against him. Evidence was introduced of two previous convictions against Furman, by special court-martial, one for absence without leave for five days in violation of Article of War 61, and one for disobedience of a lawful order and unlawfully carrying a concealed weapon in violation of Article of War 96. No evidence or previous convictions was introduced against Francis. Evidence was introduced of one previous conviction against Davis by special court-martial for absence without leave for 14 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, 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 disapproved the findings of guilty of the Specification and Charge II as to accused Furman, and as to each accused 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.

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3. Competent and substantial evidence shows that each accused absented himself without leave from his organization on the date alleged. It similarly establishes that the absence of accused Davis and Francis was terminated by apprehension on 19 January 1945. The prosecution stipulated that accused Furman's absence was terminated by surrender at Chartres, France, on 27 January 1945. The evidence shows that the accused associated with each other in Paris during their absence, that they were armed, and that Furman surrendered a week after a gun battle in which two of his companions were killed and at least one military policeman was wounded. The record thus reveals as to each accused an unexplained absence of two months in a foreign theater in war time during all of which time they could have easily returned to military control. This is a sufficient basis on which to predicate an intent to desert (CM ETO 952, Mosser; CM ETO 1629, O'Donnell). As to both Davis and Francis, the record of trial is legally sufficient to sustain the findings of guilty of Charge I and Specification preferred against each. As to accused Furman, the record is legally sufficient to support only a finding of guilty of desertion (Charge I and Specification) terminated by surrender at the time and place alleged.

4. The remaining specification (Specification of Charge II) alleges that Francis in conjunction with accused Davis and Furman, and two deceased soldiers, knowingly and willfully misappropriated three Government vehicles at or near Charleroi, Belgium, on or about 17 December 1944. A French civilian testified that Francis brought him to a garage on Avenue Chatillon to buy some gasoline. A man named "Walter" was involved with Francis in this transaction. Furman was present at the time although he was not concerned in the sale of the gasoline. The witness stated that Francis and "Walter" wanted him to buy "the whole truck load" of gasoline (R25-26).

Monsieur Adrien Hebert testified that he lived at 44 Avenue de Chatillon, Paris, and that his employer owned a garage which had been requisitioned by the American authorities. From the window of his home he was able to see the tops of trucks as they went into the garage and on the morning of 18 January he saw three American trucks enter it. He never saw Davis or Francis . Furman was arrested in Hebert's home "in the evening" (R27-28).

It was stipulated by and between the prosecution, defense and accused that if Agent David L. Lustig were present in court he would testify that on 19 January 1945 he searched a garage at 44 Avenue de Chatillon, Paris, and discovered three trucks, numbered 4253839, 4266534 and 4201403 and that one truck was loaded with jerricans of gasoline (R28).

Sergeant Vincent Kenney, Corps of Military Police, testified that he arrested Francis in the backyard of an apartment building at 44 Avenue Chattillon (or Chatillon) on 19 January (R29-30).

Agent Vincent S. Reilly, Criminal Investigation Division, testified that Francis was brought to the office of the Criminal Investigation Division on the night of 19 January and that there were found in his possession three trip tickets. The first of these was dated 15 January, listed a Furman as driver, and the vehicle number as 4201403 (R32; Pros.Ex.C). The second was dated 18 December 1944 and listed Walter Medley as the driver of vehicle number 4241953 (R32-33; Pros.Ex.D). The last of these was dated 15 January and listed J. Macijczak as driver of vehicle number 4266534-S (R33; Pros.Ex.E).

It was stipulated by and between the prosecution, the defense and accused that the three trucks had a value of more than $50.00 and that they were Government property furnished and intended for the military use thereof (R52).

An extrajudicial confession of Francis, in the form of two separate statements, was admitted in evidence over the objection of the defense that it was involuntary (R49; Pros.Exs.H,I). Accused testified that on 25 January 1945 he was questioned at Cage B, Paris Detention Barracks. When the interrogators were not satisfied with the story he told, they stood him against a wall and struck and kicked him in the face and privates with their knees and fists. There were two people involved in this, a lieutenant who held accused against the wall at the point of a gun and an enlisted man with a scar on his face. They beat him for twenty or thirty minutes and inflicted a cut on the inside of his lip. That was the only mark the beating left and he was not treated at the prison hospital. In addition to beating him, they threatened to release him to "two Southern fellows" who resented negroes being in Paris and mixing with white people. Accused was told by his inquisitors that two members of the Corps of Military Police were hurt and that two of his companions were dead and that they did not see any reason why he should continue to live. Agent Reilly who was not present during the alleged beating then took a statement from him. He did not tell Reilly or the officer before whom he swore to the statement that he had been beaten. There were a couple of prisoners, a corporal and "runners" in the room when the statement was taken. Accused did not know whether they were there while he was being beaten. He did not know whether the alleged beating occurred between breakfast and lunch or lunch and dinner. He did not contend that he was mistreated on 5 February when he made his second statement. He stated that he signed that because he had already signed the one he gave on 25 January (R40-46).

Reilly testified that he took the first statement from accused about 2:00 pm. Accused was not present in the room when he arrived and he had to send a prisoner to bring him. Accused was warned of his rights under Article of War 24. At all times during the questioning of accused, there were two other prisoners, messengers, the corporal in charge of the room, and an investigating officer present in the room.

Reilly left the room once for two minutes. Accused was not cut, was not trembling or afraid, nor did he have the appearance of a man who had been beaten. Accused did not tell witness that he had been beaten. Before signing his statement, accused read it and made some corrections in it (R37-39,46-48).

In his confession, accused stated that about 17 December 1944 he, Walter Medley, Furman, a white soldier named "Jackie" and two others stole a jeep near Etoile and drove to Belgium. In Charleroi, Belgium, they stole three trucks. In one of these they found a trip ticket for vehicle number 4241953, dated 18 December 1944, and Walter wrote his name thereon and changed the date. The three trucks were stored in one garage and were used to haul loads of gasoline for sale on the black market (R49; Pros.Exs.H,I).

5. After an explanation of his rights, each accused elected to remain silent (R51-52).

6. Whether accused's confession was voluntary was a question of fact for the court. A full hearing was had on this issue and the evidence was in conflict. The resolution of this conflict was for the court (Lyons v. Oklahoma, _____ U. S. _____, 64 Sup.Ct.Rep. 1208 (Adv. Sheet No. 16), June 5, 1944; CM ETO 15843, Dickerson; CM ETO 13279, Tielemans et al). The evidence as to accused Francis' arrest at 44 Avenue Chatillon where the trucks were garaged, his attempt to sell a "truckload" of gasoline there to a French civilian, and his possession of trip tickets for two of the trucks, sufficiently establish the corpus delicti of the offense, and together with his confession constitute substantial evidence to the effect that he was guilty as charged (CM ETO 14040, McCreary). The record is legally sufficient to support the findings of guilty, as to Francis, of this Specification and Charge.

7. The charge sheets show that accused Furman is 22 years 11 months of age and was inducted 21 December 1942 at Fort Dix, New Jersey; that accused Francis is 24 years of age and was inducted 15 December 1942 at Fort Dix, New Jersey; and that accused Davis is 25 years six months of age and was inducted 13 February 1942 at Camp Shelby, Mississippi. No prior service is shown as to any of accused.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of any of accused were committed during the trial. The Board of Review is of the opinion that, as to accused Furman, the record of trial is legally sufficient

to support only so much of the findings of guilty of the Specification of Charge I as involves a finding of guilty of desertion at the time and place alleged, terminated by surrender at the time and place alleged, and, as to Francis and Davis, legally sufficient to support the findings of guilty, and the sentence as to each accused.

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in either a penitentiary or a disciplinary barracks is authorized upon conviction of desertion by Article of War 42. 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. Lawrence Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald K. Carroll Judge Advocate

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

CM ETO 13155

1 SEP 1945

U N I T E D S T A T E S v. Technician Fifth Grade FRED N. BUSBY (38606745), Technician Fourth Grade NICK S. ANTHES, (35923329), Private CLIFTON C. YOUNG (39420445) and Staff Sergeant HOWARD D. FESLER (35406166), all of Headquarters and Headquarters Company, 716th Railway Operating Battalion.	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 31 January and 1 February 1945. Sentence as to each (suspended as to all except Anthes): Dishonorable discharge, total forfeitures and confinement at hard labor as follows: Fesler, eight years; Young, six years; Anthes and Busby, seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as to Anthes.

HOLDING and OPINION 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 and the Board submits this, its holding and opinion, 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 on the following charges and specifications:

FESLER and YOUNG

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Staff Sergeant Howard D. Fesler, and Private Clifton C. Young, both of

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Headquarters and Headquarters Company, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, at or near Versailles, France, and at or near Paris, France, and at various and sundry places between said places, between 1 September 1944 and 30 November 1944, jointly and in conjunction with each other, and other members of 716th Railway Operating Battalion, 724th Railway Operating Battalion, and other railway operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy, and to other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit. (As amended in record of trial)

Specification 2: (Motion to strike granted by court)

Specification 3: In that * * * did, jointly and in the execution of a conspiracy previously entered into between themselves, at or near Versailles, France, on or about 25 November 1944, wrongfully dispose of six (6) pounds of Pork luncheon meat and two (2) cans of Vienna sausage, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Specification 5: In that Staff Sergeant Howard D. Fesler, Headquarters and Headquarters Company, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 22

November 1944, wrongfully dispose of two hundred forty (240) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 6: In that Staff Sergeant Howard D. Fesler, Headquarters and Headquarters Company, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 1 November 1944, wrongfully dispose of two (2) cans of bacon and two (2) cans of Chedder Cheese, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Specification 7: In that Staff Sergeant Howard D. Fesler, Headquarters and Headquarters Company, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 1 November 1944, wrongfully dispose of four (4) cans of Pork Sausage, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

ANTHES

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Technician Fourth Grade Nick S. Anthes, Headquarters and Headquarters Company, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, and at or near Paris, France, and at various and sundry places between said places, between 1 October 1944 and 20 November 1944, in conjunction with other members of 716th Railway Operating Battalion, 724th Railway Operating Battalion, and other railway operating personnel, agree and conspire to defraud the United States

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through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy and other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit.

Specification 2: In that * * * did, at Paris, France, on or about 15 October 1944 and 23 October 1944, wrongfully dispose of fifty (50) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 3: In that * * * did, at Paris, France, on or about 10 October 1944, wrongfully dispose of three (3), three (3)-pound cans of coffee, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

BUSBY

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Technician Fifth Grade Fred N. Busby, Headquarters and Headquarters Company, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, and at or near Paris, France, and at or near Villeneuve St. Georges, France, and at various and sundry places between said places, between 1 September 1944 and 15 November 1944, in conjunction with other members of 716th Railway Operating Battalion 724th Railway Operating Battalion, and other railway operating personnel, agree and conspire to defraud

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the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to his own purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy, and other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to his own purpose of personal profit.

Specification 2: In that * * * did, at Villeneuve St. Georges, France, on or about 15 November 1944, wrongfully dispose of two (2) cases (twenty (20) pounds per case) of coffee, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Each accused pleaded not guilty to and was found guilty of all charges and specifications preferred against him. No evidence of previous convictions was introduced against any of accused. Three-fourths of the members of the court present at the time the vote was taken concurring in the cases of Fesler, Anthes and Busby and two-thirds of such members, concurring in the case of Young, accused were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the following periods: Fesler—25 years; Young—eight years; Anthes and Busby—each 15 years. The reviewing authority approved the sentence in each case but reduced the period of confinement in the cases of Busby and Anthes to seven years, in the case of Young to six years and in the case of Fesler to Eight years and suspended execution of the sentences as thus modified in the cases of Busby, Young and Fesler. In the cases of Fesler and Young, the proceedings were published in general Court-Martial Orders Number 577, dated 2 June 1945 and in the case of Busby in GCMO 583, 2 June 1945. In the case of Anthes, the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, was designated as the place of confinement and the record of trial was forwarded for action pursuant to Article of War 50½.

3. The charges and specifications in this case and the facts relied upon to prove the allegations thereof are similar to those in

CM ETO 8234, Young et al. As in the Young case, each accused is alleged to have participated in a general "black market" conspiracy to defraud the United States in violation of Article of War 96 (Specification 1 as to each), and incident to the conduct involved in such conspiracy, to have committed certain specific acts of wrongful disposition of government property, also in violation of Article of War 96, thereby diverting essential supplies from use in the theater of operations during a critical period of combat operations (Specifications 3,5,6,7 as to Fesler; Specification 2 as to Busby; Specification 3 as to Young; Specifications 2 and 3 as to Anthes).

The principles of law laid down in the Young case are therefore squarely applicable to the facts here presented and the question before the Board of Review is whether the findings of guilty and the sentences are proper on the basis of those principles. The corpus delicti of the offense of conspiracy as well as of the other offenses charged has clearly been proved, as it was in the Young case, by competent and substantial evidence, such evidence, however, except as hereafter noted with reference to Anthes and Busby, in no way identifying accused as the offenders. For this purpose, reliance, again as in the Young case, must be placed upon the extra-judicial statements of each accused. A factual question was raised as to the voluntary character of the statements of Anthes, Busby and Fesler, but inasmuch as the court's determination thereof is supported by substantial competent evidence, it will not be disturbed by the Board of Review (CM ETO 7518, Bailey et al). The statements thus having been admitted, an analysis of them must be made to determine whether, as a matter of law, they sufficiently connect accused with the offenses charged to justify the findings of guilty of participation in the conspiracy as well as the findings of guilty of the individual specifications laid under Article of War 96. In the latter connection, it must particularly be noted that the holding in the Young case does not operate to permit any theft or wrongful disposition of government property, ordinarily chargeable under Article of War 94, to be laid under Article of War 96, but rather is limited in its application to such thefts or wrongful dispositions as arise out of a course of conduct such as that which was the subject of the conspiracy here alleged and proved and which resulted in a "direct and positive interference with and obstruction of the national defense and of the war effort".

a. As to accused Anthes and Busby:

Anthes and Busby, apart from their statements, were directly connected with the conspiracy by the testimony of Lieutenant Robert P. O'Reilly, Criminal Investigation Division, Army of the United States, who acted as an undercover agent in the investigation of pilfering and looting of trains in their organization (R30). He testified that maintenance men and cooks were working with the operating crews in this respect and that during his investigation, both Anthes and Busby conversed with him "concerning the pilfering and resale of supplies, telling me how much money they were making" (R31-32). Anthes admitted in his statement (Pros.Ex.A) that he had on various occasions purchased some ten cartons of cigarettes at prices ranging from 100 to 500 francs per carton from soldiers whose names he had forgotten and had sold five such cartons to French civilians at a profit. These are the transactions referred to in Specification 2

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(Anthes). He also admitted the sale of three cans of coffee to French civilians described in Specification 3 (Anthes), stating, however, that he took the cans from an open case of coffee which he found in the washroom of his billet. Busby admitted in his statements (Pros.Ex.C&G) that on 15 November 1944, he bought two cases of coffee from a military yardmaster at Villeneuve St. George, France, and sold them to French civilians at a profit of $186, this being the transaction described in Specification 2 (Busby).

This evidence leaves no doubt of Busby's guilt of both offenses charged against him since the acts committed by him fall readily within the pattern contemplated by the holding in the Young case. As to Anthes, his admission relative to the purchase and sale of cartons of cigarettes, combined with the testimony of Lieutenant O'Reilly, are considered sufficient to justify the court's inference that the property involved was of the character described in the Specification alleging conspiracy and to justify the consequent findings of guilty of Specifications 1 and 2 laid against this accused. With respect to the coffee transaction (Specification 3 (Anthes)), accused's explanation of the manner and place in which he acquired the property, constituting as it does the only evidence on the subject, is not considered sufficient to raise the necessary inference that the coffee was knowingly obtained under the circumstances contemplated in the Specification. In other words, although a theft and wrongful disposition of government property are shown, there is no satisfactory proof that the stolen property was diverted from the stream of supply to the theater of operations in the manner and under the circumstances held by the Young case to be essential to the validity of such a Specification under Article of War 96. Hence it is the opinion of the Board of Review that the finding of guilty of Specification 3 (Anthes) is unsupported by the evidence. Nor will the record of trial support a finding of guilty of wrongful disposition of the property under Article of War 94. A conviction may not rest upon the unsupported confession of accused, some independent evidence tending to show that the "offense charged has probably been committed" being necessary (MCM 1928, par.114, p.115). The record in the present instance contains no independent evidence of the theft or wrongful disposition of any government property other than that pilfered from the trains, hence it cannot be said to supply evidence of the corpus delicti of wrongful disposition of property obtained from other sources. The invalidity of this finding of guilty, however, does not affect the sentence as to this accused, as modified by the reviewing authority.

b. As to accused, Fesler:

Fesler was in charge of the Headquarters and Headquarters Mess, 716th Railway Operating Battalion. In his statement (Pros.Ex.D), he admits having received without payment 24 cartons of cigarettes from a military policeman who was guarding the trains at Matelot yards. He sold none of these, but distributed some of them to various members of his mess crew. The military policeman gave him the cigarettes because he, Fesler, had previously told him that the men in the mess had none. The solicitation and receipt by accused of 24 cartons of cigarettes from a railway guard at a time when such a quantity was not legitimately obtain-

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able and when the rifling of railroad cars was a matter of common knowledge in the battalion, is sufficient to justify the inference that the property so obtained was pilfered from the train as alleged and that accused was aware of its source. The findings of guilty of the conspiracy alleged in Specification 1 and of the wrongful disposition of the cigarettes alleged in Specification 5 against this accused are therefore legally sufficient. Accused also admitted the wrongful disposition of the government property described in Specifications 3, 6 and 7 (Fesler) but stated that he stole the supplies from the Headquarters and Headquarters Company Mess. The property therefore, according to the only evidence adduced, was not a part of the stream of supply constituting the subject of the conspiracy and hence, for the reasons stated above in connection with the theft of coffee by Anthes, the record of trial is legally insufficient to support the findings of guilty either of these specifications or of wrongful dispositions under Article of War 94. The invalidity of these findings of guilty, however, does not affect the legality of the sentence as to this accused as modified by the reviewing authority.

c. As to accused Young:

This accused admitted receiving one carton of cigarettes from Fesler who told him he had gotten them from a military policeman in the railway yards and further stated that on several occasions, he received packages of cigarettes from "different men that came in the mess hall" where he worked as a cook. He was also aware that various men of the battalion were engaged in theft of food stuffs from the trains (Pros.Ex.B). Accused was not charged with the wrongful disposition of these cigarettes and the only question is whether his receipt of them sufficiently identifies him as one of the conspirators to justify the finding of guilty of the conspiracy alleged in Specification 1 (Young). It is the opinion of the Board of Review that it does not. While there is some basis for inference that accused was aware that the relatively trivial amount of cigarettes he received was probably pilfered from the trains, there is nothing on which to base the conclusion that he had any connection with the theft or the thieves, nor is there anything to indicate that he solicited the cigarettes in advance or in any way conspired or induced their diversion or that of any other property from the legitimate channels of supply. At most, therefore, he was guilty of knowingly receiving stolen goods and should not have been convicted of conspiracy.

Accused was also charged with and convicted of the wrongful disposition of pork luncheon meat and Vienna sausage (Specification 3 (Young)). While he admits participation with Fesler in this transaction (Pros.Ex.B), he obtained the property from Fesler whose statement shows that it was stolen from the company mess (Ex.D). For the reasons given above in connection with Fesler's participation in the matter, the evidence of this theft is insufficient to justify the findings of guilty of conspiracy (Specification 1 (Young)), or wrongful disposition either under Article of War 96 (Specification 3 (Young)) or under any other Article of War.

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4. The charge sheets show the respective ages of accused as follows: Busby—32 years and six months; Anthes—38 years and ten months; Young—24 years and nine months; Fesler—29 years and three months. Busby was inducted 27 November 1943 at Lubbock, Texas; Anthes, 6 December 1943 at Cleveland, Ohio; Young, 22 November 1943 at Sacramento, California; and Fesler, 8 June 1942 at Columbus, Ohio. No prior service is shown for any of accused.

5. The court was legally constituted and had jurisdiction of the persons and offenses. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused Young; legally insufficient to support the findings of guilty of Specifications 3, 6 and 7 as to accused Fesler, but legally sufficient to support the sentence as to such accused; legally insufficient to support the findings of guilty of Specification 3 as to accused Anthes, but legally sufficient to support the sentence as to such accused; and legally sufficient to support the findings of guilty and the sentence as to accused Busby.

Custin A Daniels Judge Advocate

Martin A Meyer Jr. Judge Advocate

John R. Anderson Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater 1 SEP 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat.724; 10 USC 1522 and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 USC 1522), is the record of trial in the case of Private CLIFTON C. YOUNG (39420445), Headquarters and Headquarters Company, 716th Railway Operating 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.

(As to accused YOUNG, findings and sentence vacated. GCMO 453, USFET, 19 Sept 1945).

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

BOARD OF REVIEW NO. 3 7 SEP 1945

CM ETO 13174

U N I T E D S T A T E S	2ND INFANTRY DIVISION
v.	Trial by GCM, convened at Pilsen, Czechoslovakia, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HAROLD F. DRUCE (38567404), Company I, 38th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private (then Staff Sergeant) Harold F. Druce, Company I, 38th Infantry, did, at Vielsalm, Belgium, on or about 16 November, 1944, desert the service of the United States, and did remain absent in desertion until he voluntarily returned to military control at Paris, France, on or about 14 December 1944.

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

Specification. In that * * * did, at Munstereifel, Germany, on or about 9 March, 1945, desert the service of the United States and did remain absent in desertion until he was apprehended by military police at Liege, Belgium, on or about 26 March, 1945.

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

Specification. In that * * * having be placed in confinement at 2d Infantry Division Stockade on or about 15 February, 1945, did, at Munstereifel, Germany, on or about 9 March, 1945, escape from said confinement before he was set at liberty by proper authority.

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

3. The evidence for the prosecution was as follows:

a. Original Charge and Specification. Accused was a staff sergeant on 14 November 1944 in Company I, 38th Infantry. Its location at that time was not shown. He was one of a party of ten men who went on that date to Vielsalm, Belgium, on a two day pass. When the group returned to their organization on 16 November accused was not present. He was not authorized to be absent beyond 16 November (R9-10). At that time his company was in a defensive position in pill boxes in the vicinity of Prum and "Although the situation was static, there was continuous artillery and mortar fire and numerous patrols initiated

by both the Germans and ourselves. The casualties were light, but regular" (R14). Accused voluntarily returned to military control at Paris, France, on 14 December 1944 (R8; Pros.Ex."No.1").

b. Additional Charges I and II and specifications thereunder. On 9 March 1945 accused was in confinement at the 2nd Infantry Division Stockade in Munstereifel, Germany (R16,21). About noon his absence was discovered. A roll call and search of the stockade area failed to reveal his presence. He had not been released from confinement and was not authorized to be absent (R17,19). He was apprehended by military authorities at Liege, Belgium on 26 March 1945 (R8; Pros.Ex."No.1").

4. After being advised of his rights, accused elected to remain silent (R22). No evidence was introduced in his behalf.

5. a. Under the original Charge and Specification, it was shown that accused absented himself while away from his organization, which he left properly at a place not disclosed 14 November 1944 on a two day pass. On or about 16 November when he was required to return to duty, his company occupied a defensive position of a hazardous nature in Germany. There was no evidence that accused was aware of this fact at the time his unauthorized absence commenced. There is therefore no evidence to support a finding that he absented himself with intent to avoid hazardous duty. The question presented is whether this absence without proper leave from Vielsalm, Belgium, on 16 November 1944 terminated by a voluntary return to military control at Paris 28 days later was such a prolonged absence as would justify the court "in inferring from that alone an intent to remain permanently absent" (MCM, 1928, par.130a, p.143). In CM ETO 1629, O'Donnell, in which accused was charged with desertion and the evidence disclosed that his absence without leave extended for 37 days and was terminated by his voluntary surrender to military control, the court found him guilty as charged. The Board of Review, in holding the record legally sufficient, stated as follows:

> "When there was submitted competent proof of a substantial nature that accused was absent without leave for 37 days from his organization in England under existing conditions, the burden was cast upon him to go forward with the proof - the 'burden of explanation' - and to show that, during the period of his unauthorized

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absence he intended to return to the service (CM ETO 1317, Bentley; CM ETO 527, Astrella). Although he took the stand under oath and was not only given every opportunity to explain his absence without leave, but was also repeatedly interrogated with reference thereto, he pointedly refused to offer any explanation whatsoever, save only that he missed his train on his attempted return to his station after the expiration of his pass. Such fact alone is wholly inadequate to defeat the inference of intent not to return, a reasonable and just inference to be drawn from the prosecution's evidence. The issue as to whether the accused was guilty of desertion in remaining absent without leave under the circumstances was one of fact to be decided by the court upon all of the evidence in the case".

In CM ETO 1567, Spicocchi, accused, stationed in Northern Ireland, failed to return from a nine day furlough, which authorized him to visit "some point in England, Scotland or Wales". He remained absent for 22 days when he was apprehended by a sergeant of the Criminal Investigation Division, in a room with a woman in London. He was in uniform, correctly identified himself and admitted he was absent without leave. At the trial, accused elected to remain silent. The court found him guilty as charged. The Board of Review held the record legally sufficient to support only so much of the findings of guilty as involved conviction of the accused of absence without leave in violation of Article of War 61.

In the instant case, there was no evidence showing where accused's organization was located when he left on pass with other enlisted men and none indicating that at that time there was any hazardous duty to be anticipated. In accordance with the Spicocchi case, supra, and the authorities therein cited, the Board of Review is of the opinion that accused's unauthorized absence under the circumstances shown, terminated in 28 days by his voluntary surrender in Paris, was not such a prolonged absence as to justify the court in inferring from that alone an intent to remain permanently absent. In this instance, there was no evidence tending to show a motive for desertion or tending to show that prior to going absent without leave accused stated that he was going to desert, or sufficient evidence from which the court could reasonably infer that

he intended not to return to the military service. The facts are entirely consistent with innocence of desertion and there is no material evidence to sustain a finding of guilty of desertion, but sufficient only, in the opinion of the Board of Review, to support a finding of guilty of the lesser included offense of absence without leave in violation of Article of War 61.

b. As to Additional Charge II and Specification, although the evidence did not disclose clearly what restraint was included within the confinement described as "the stockade", it was apparent that at the time he freed himself from such restraint "the stockade" was patrolled by guards (R18). Even if accused may have effected his escape by stealth rather than by force his offense was none the less an escape from confinement within the meaning of Article of War 69 and the evidence supports the court's findings of guilty (MCM, 1928, par.139a, p.153; CM ETO 3153, Van Breemen).

c. Regarding Additional Charge I and Specification, the evidence of accused's escape from confinement in Munstereifel, Germany, and his apprehension by military authorities in Liege, Belgium, 17 days later on 26 March 1945 was sufficient under the circumstances to support the court's findings of guilty (CM ETO 7379, Kaiser; CM ETO 9333, Odom).

6. The charge sheet shows that accused is 21 years of age and that he was inducted 19 November 1943 at Oklahoma City, Oklahoma to serve for the duration of war plus six months. He had no prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C Sherman Judge Advocate

J. B. Keeney Judge Advocate

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

BOARD OF REVIEW NO. 2

CM ETO 13178

U N I T E D S T A T E S v. Privates First Class CHARLES W. O'NEIL (32932436) and GEORGE B. TWEEDY (32924210), and Privates WILLIAM E. EWING (35167783), RUFUS N. CASEY (33725452) and MACK SHELVIN (34151233), all of Company C, 184th Engineer Combat Battalion.	NINTH UNITED STATES ARMY Trial by GCM, convened at Rheydt, Germany, 9 April 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. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

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

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

O'NEIL

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class Charles W. O'Neil, 184th Engineer Combat Battalion, did, at or near Krefeld-Forstwald, Germany, on or about 11 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Gertrude Peters.

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EWING

CHARGE: Violation of the 92d Article of War.

Specification: In that Private William E. Ewing, 184th Engineer, Combat Battalion, did, at or near Krefeld-Forstwald, Germany, on or about 11 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Maria Tillmanns.

CASEY

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Rufus N. Casey, 184th Engineer Combat Battalion, did, at or near Krefeld-Forstwald, Germany, on or about 11 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Gertrude Peters.

TWEEDY

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class George B. Tweedy, 184th Engineer Combat Battalion, did, at or near Krefeld-Forstwald, Germany, on or about 11 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Maria Tillmanns.

SHELVIN

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Mack Shelvin, 184th Engineer Combat Battalion, did, at or near Krefeld-Forstwald, Germany, on or about 11 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Gertrude Peters.

Each accused pleaded not guilty and, all of the members of the court present when the vote was taken concurring, each was found guilty of his respective Charge and Specification. Evidence of previous convictions was introduced as follows:3of accused O'Neil, one by special court-martial for seven days' absence without leave and two by summary court for one day each; one of accused Casey by summary court for absence without leave for two days; two of accused Shevlin by summary

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court for seven and three days absence without leave, all in violation of Article of War 61. No evidence was introduced of previous convictions of either accused Ewing or Tweedy. All the members of the court present when the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Ninth United States Army, approved each sentence but recommended that each sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due him, and confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed each of the sentences but, owing to special circumstances in each case and the recommendation for clemency by the convening authority, 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 each of their natural lives, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentences pursuant to Article of War 50½.

3. In brief the prosecution's evidence is:

Frau Margarete Balz of Krefeld-Forstwald, Germany, identified all five accused (R10) and then later limited this identification to Shelvin, Tweedy and Casey (R12). She testified that three of them, she was not sure which ones, came to her house about 2:00 o'clock on the afternoon of 11 March (1945) and asked the way to St. Tonis (R10,12). At that time her two daughters, Maria, 18 years old, and Gertrude, 24 years old, and a Frenchman were there. Gertrude was the taller daughter. Accused remained about five minutes and left. All of them came to the house about 7:30 that evening (R11), and "sort of invited themselves in". Inside they split up, two went into her bedroom, one was sitting in the living room, one by the door and one was holding them in the living room with his pistol (R12). Two soldiers sat on a bench with the older daughter, one holding a pistol to her chest and then pushed her along against her will into the bedroom. The other daughter was holding onto her mother and was afraid, but one soldier hit her over the head with a club and pushed her also into the bedroom. When the mother looked into the bedroom, a soldier pointed a pistol at her and she thought he was going to kill her. The mother then left and went to a neighbor but found them in bed and she then heard the soldiers leaving (R13). She testified that the daughters were crying (R14) very hard (R16) when they went to the bedroom and when she returned from the neighbors, told her they had had sexual intercourse. They were in a nervous and distressed condition (R14). There were four soldiers in the bedroom with the two girls and afterwards the fifth went in and that is when she went to the neighbor's. They were at the house about an hour (R14).

The Frenchman who was at the house in the afternoon when the soldiers came was a liberated war prisoner and had gone home at the time of the trial (R13-14).

Gertrude Peters, the older and taller daughter (R18), identified accused Casey and Ewing as two of the three soldiers who were at their house at 3:00 o'clock the afternoon of 11 March 1945 and told a story similar to that of her mother (R19). The same two and three others returned at night. She identified the five accused positively. Tweedy first approached her and she refused him and a second soldier, O'Neil, came up and when she "refused myself further and further, the soldier loaded his pistol", and they both held her (R20-21) by the wrists, (R22) and forced her to the bedroom. She said, "No" and started crying and then O'Neil and Casey tossed her on the bed (R20,21), took her pants off "and I was still refusing them but I could not * * * they raped me". O'Neil first got on top of her (R22) and she "was trying to oppose him but I could not" and his penis entered her female organ against her consent. When he got through, he held her until Casey came on her and without her consent completed intercourse with her, his penis entering her female organ (R23). When he finished she got up but the second one stayed and Shelvin came in, also completing intercourse with her without her consent, his penis entering her female organ. They then discovered that her mother was gone. Her sister Maria was brought into the same bedroom (R24) on the same bed and Tweedy was first on top of her while the two girls lay beside each other. The other soldier who got on Maria then was Ewing (R25). Maria was crying while on the bed beside her. There was no light in the bedroom but the soldiers had flashlights. They were in the bedroom about 20 minutes (R27,31). She further testified that she had not had her "periodic sickness" since 24 February (R32).

Maria Tillmans testified that she knew the five accused (R32) and had first seen them in her parents' home. She identified Ewing and Casey as two of the three soldiers who were at the house on the afternoon of 11 March 1945 and who returned with O'Neil, Tweedy and Shelvin that night. Her story was similar to that of her mother and sister. She testified O'Neil pointed the pistol at her sister and "forced" her sister into the bedroom. Ewing and Casey then hit her with a wooden Club (R33-34) over the head (R39) and "forced" her into the bedroom despite her protests and crying (R33-35). They "tossed" her onto the same bed with her sister whom she could see they were holding and having intercourse with. She testified O'Neil was the first having intercourse with her sister (R36,40), but it was dark and she could not identify the other two although she knows there were

three. Her sister "was opposing them and cried very loud". They put her on the bed against her will and Ewing "forced" her legs apart and had sexual intercourse with her, his penis entering her female organs. When he finished, he held her and Tweedy had intercourse with her, she "could not help myself" and "didn't want it" (R36-37). He had his penis inside her sexual organ but did not complete the act when they discovered her mother had left. She testified she was in the room about 45 minutes and that the flashlight was the only light (R37-39).

First Lieutenant Peter J. O'Neil, 5th Armored Division, Military Police Platoon, identified all accused, testified that he investigated the alleged rape and on the 17, 18 March took signed statements from each of accused after they had been first fully advised of their rights. The statements were admitted in evidence as against only the maker of each (R41-42). O'Neil in his statement (Pros.Ex.1) stated that on Sunday, 11 March 1945, after evening chow, Casey, a truck driver, asked if he wanted to go with him and Ewing. Casey knew where there were two "good looking chicks and some cognac" and if he wanted to go, to get on the truck which was parked outside. Two other men, Shelvin and Tweedy, rode with him in the back of the truck, which was a "2½ ton 6x6" named Dorothy. It was driven by Casey, Ewing riding in front with him. The truck was parked off the road and just beyond the house they entered. All five were armed with M-1 rifles except O'Neil who had a .45 automatic pistol. Casey carried also, in his rear pants' pocket, a foot long wooden handled whip with leather thongs also a foot long. They knocked on the door and entered when it was opened. There were two girls 18 or 19 years old, an old lady 42 or 43 years old, a small boy 11 or 12 years old and a Frenchman about 40. Casey and Shelvin drank a little cognac the man produced. Tweedy then asked the taller of the two girls to "zig zig" and she refused. Ewing was in a corner asking the smaller girl for the same thing and she also refused and went to her mother. Casey tried pulling on the taller girl and hit her on the shoulder with his whip and when she still resisted, O'Neil walked over to her and loaded his pistol in front of her, took her arm and when she wouldn't come, again loaded his pistol. He then took hold of her and got her into the bedroom, Casey following with the flashlight as there was no other light. He told her to lay back on the bed and pulled up her dress and touched her pants, motioning for her to take them off, which she did. He placed his belt and pistol on a chair near the bed, unbuttoned his pants and had intercourse with her, not having a rubber. Ewing got the smaller girl into the room and on the bed opposite to them. Casey was telling him and Ewing to hurry. He finished and Casey was on the taller girl before he (O'Neil) left the room. Tweedy went into the room a few minutes after O'Neil left and about five minutes later Shelvin went in. Shortly after that a door

slammed and O'Neil noticed that the mother was gone. He yanked his gun out and ran into the kitchen where he could hear her hammering and hollering next door. He returned and "told the boys to hurry up" and Casey also tried to hurry them while O'Neil "stayed with the old guy who seemed to be French and still had my gun out". They then all left hurriedly by the truck.

Ewing's statement (Pros.Ex.2; R42-43), Casey's statement (Pros.Ex.3; R43-44), Tweedy's statement (Pros.Ex.4; R44-45) and Shelvin's statement (Pros.Ex.5; R45-47) were likewise admitted in evidence and read to the court.

Ewing's statement was about the same as O'Neil's. He stated "The people were scared when we entered Charles O'Neil stood in the doorway with his pistol out to see that no one left or entered the room". He told of "finally" getting the smaller girl into the bedroom where he "layed her down on the bed" and had intercourse with her, hurriedly leaving when O'Neil said "Mamma was gone". He left his gun belt behind and next morning Casey and another soldier returned to the house for it but reported it not there (Pros.Ex.2).

Casey's story was similar to O'Neil's. He told of striking the taller of the two girls with a whip when she refused to "zig zig" and of O'Neil cocking his gun twice to help persuade her and of his finally grabbing her and pulling her off the chair while she was calling to her mother who was afraid of doing anything "on account of the guns". He got on the larger girl when O'Neil got off, Ewing being on the smaller girl along side. Shelvin followed Casey and Tweedy was waiting for Ewing to finish. Shortly they all left in his truck. Ewing had left his belt behind but Casey did not want to go back, but finally went back within a block of the place to show another soldier where to go for the belt but he failed to find it (Pros.Ex.3).

Tweedy told a similar story (Prox.Ex.4) as did Shelvin (Pros. Ex.5).

4. The rights of accused as witnesses were explained to them and Ewing, Shelvin and Casey testified under oath. O'Neil and Tweedy remained silent (R69).

Ewing, Shelvin and Casey told much the same story as in their written statements except to deny the use of any force or threats. They admitted being armed (R49-50,54,56,58,60,64). Ewing said it was about dark when they went back in the evening. The taller girl went into the room. He followed her. The smaller one removed her pants, lay on the bed and completed the act of intercourse without any force. He did not

see O'Neil wave his pistol or intimidate the people (R50-51). Shelvin said O'Neil loaded and cocked his pistol, and that Casey hit the smaller girl with a whip (R58). All of the three testifying denied the use of force and insisted that the girls were willing and did not object to their attentions. They admitted the girls called "mamma" while going into the bedroom but insisted the mother nodded her head yes (R49-68). Mrs. Balz on being recalled, denied nodding her head affirmatively when accused were attempting to get her daughters into the bedroom, indicating that such act was all right (R69).

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

All of accused admitted the acts of intercourse. While all were armed and in their statements variously admitted that the people were scared, that a pistol was cocked in front of one of the girls and that both were pulled and "persuaded" to go into the bedroom, the three accused who testified denied that any force and coercion was used and insisted that the acts done were with consent of the mother and not only this consent but with the consent and active cooperation of both the girls. The only questions are that of consent and whether the requisite force was shown. The court had the opportunity to observe the witnesses and the duty to pass upon their credibility. They were not convinced by defendants' various conflicting stories and preferred to believe the prosecuting witnesses whose stories are more plausible and consistent with admitted physical facts. There is very substantial evidence in support of all the essential elements of the offenses charged and in such cases the findings of guilty by the court will not be disturbed (CM ETO 503, Richmond; CM ETO 11971, Cox et al).

6. The charge sheets show that O'Neil is 20 years, two months of age and without prior service was inducted 19 May 1945 at Fort Niagara, New York; that Ewing is 26 years, two months of age and without prior service was inducted 29 September 1941 at Fort Benjamin Harrison, Indiana; that Casey is 35 years, eight months of age and without prior service was inducted 21 May 1943 at Fort George G. Meade, Maryland; that Tweedy is 24 years, three months of age and without prior service was inducted 26 May 1943 at Fort Dix, New Jersey; and that Shelvin is 22 years, ten months of age and without prior service was inducted 20 September 1941 at Camp Shelby, Mississippi.

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 sentence of each accused.

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

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

13178

1st Ind.

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

1. In the case of Privates First Class CHARLES W. O'NEIL (32932436) and GEORGE B. TWEEDY (32924210), and Privates WILLIAM E. EWING (35167783), RUFUS N. CASEY (33725452) and MACK SHELVIN (34151233), all of Company C, 184th 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 sentences as commuted as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 13178. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13178).

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

(As to accused CASEY, sentence as commuted ordered executed. GCMO 277, ETO, 20 July 45).
(As to accused O'Neil, sentence as commuted ordered executed. GCMO 278, ETO 20 July 45).
(As to accused TWEEDY, sentence as commuted ordered executed. GCMO 279. ETO, 20 July45).
(As to accused EWING, sentence as commuted ordered executed. GCMO 280, ETO, 20 July 45).
(As to accused SHELVIN, sentence as commuted ordered executed. GCMO 281, ETO, 20 July 45).

13178

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

BOARD OF REVIEW NO. 1 20 SEP 1945

CM ETO 13199

U N I T E D S T A T E S	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Nabburg, Germany, 31 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 7 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.
Private MATTHEW J. GOLEJ (42106505), Company I, 358th Infantry	)	

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

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that Private Matthew J. Golej, Company I, 358th Infantry, did, without proper leave, absent himself from his organization at Lascheid, Belgium, from about 27 January 1945, to about 5 April 1945.

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 seven years. The reviewing authority approved the sentence

and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 54, Headquarters 90th Infantry Division, APO 90, U. S. Army, 11 June 1945.

3. The initial absence without leave rests upon the following entry in the company morning report, introduced in evidence by duly authenticated abstract copy thereof:

"4 May 1945

* * *

CORRECTION (14 Apr 45)
Golej, Matthew J 42106505 Pvt
Dy to AWOL 0830 14 Feb 45

SHOULD BE
Golej, Matthew J 42106505 Pvt
Dy to AWOL 0800 27 Jan 45 (Present status Duty, as reported on M/R dtd 22 Apr 45)

/s/ Raymond C. Lausten" (R9,Pros.Ex.A).

A private first class of the company testified that accused was present therein on 26 January 1945 at the time of a move from Bastogne to Wilwerdange, Belgium, but absent 27 January, and that he did not see him again until 22 April. The squad leader did not search for accused on 27 January because he received a report that he had gone to the aid station (R7-9,11-12). The prosecution "stipulated" that accused returned to military control on 5 April 1945 (R12).

4. After the defense counsel stated that accused's rights as a witness were fully explained to him, he elected to remain silent and no evidence was introduced in his behalf (R12).

5. The defense counsel objected to the introduction of the extract copy of the morning report on the grounds that it was not of a current entry, not identified, and not corroborated by other evidence. The latter two objections are untenable by the clear provisions of the Manual of Courts-Martial (MCM, 1928, par.116a, p.119, par.117a, p.121). Concerning the first objection on contemporaneousness of entry with event, and concerning the further possible objection that the entry was made after charges were preferred, it has already been held by the Board of Review sitting in the European Theater, following the opinion of The Judge Advocate General (SPJGN 1945/3492, 29 March 1945, IV Bull. JAG 86) that neither objection is warranted (CM ETO 9843, McClain; CM ETO 12951, Quintus). The reason is that the entries gain

admissibility because of the official duty of a responsible officer to record the true facts, and no useful purpose would be served by repeating detailed analysis here.

Nor need we question their prima facie correctness because many officers and men in the company were at the time thereof casualties or transferred, nor engage in inferences that the person making the entry (presumably the company commander or other officer authorized under existing regulations) gleaned his knowledge only from witnesses who were before the court. If such were done, the purpose of the morning report as prima facie evidence would be defeated. The law presumes that the person making the report performed his bounden duty, and knew and recorded the facts from knowledge gained at the time of the event recorded, or gained from responsible and official sources thereafter. It is important to the Army and to the prompt and fair administration of justice therein that the rules as to the admissibility of morning reports be not hedged about by artificial and sterile rules of form, too strict for the persons who operate the courts to administer and disconnected with any invasion of the rights of the accused. They constitute a convenient and practical method of making proof of the exceedingly simple fact of absence without leave, and the mode has many analogies in the civil courts. Since this entry does not appear to be obviously "not based on personal knowledge", it was presumptively correct (MCM, 1928, par.117a, p.121; CM ETO 5234, Stubinski; CM ETO 12151, Osborne). If the person making the entry had not such knowledge, it was the plain duty of the defense to call him to the stand if available; or to face the ultimate fact of justice both to the prosecution and the accused in the case, that if accused was regularly present in any Army unit during the period alleged, he could defeat the proof by the testimony of any one person from such unit. The means to secure such testimony, if existent, are available upon demand (AW 22; MCM, 1928, par.97, pp.86-89).

6. The trial judge advocate served as investigating officer in the case before his appointment on the court. His "stipulation" that accused returned to military control on 5 April constituted a judicial admission that unauthorized absence terminated earlier than other proof showed (MCM, 1928, par.130a, p.143).

7. The charge sheet shows that the accused is 19 years nine months of age and was inducted 21 July 1944 at Newark, New Jersey. 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 designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France as the place of confinement is proper (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug 1945).

Wm. J. Sumrow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Donald R. Cavell Judge Advocate

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

Board of Review No. 1

18 AUG 1945

CM ETO 13222

U N I T E D S T A T E S v. Private JAMES E. HOWARD (36393053), Company D, 392nd Engineer General Service Regiment	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Houen, Seine-Inferieure, France, 3 April 1945. Sentence: To be hanged by the neck until dead.

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

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

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

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

Specification: In that Private James Eugene Howard of Company D, Three Hundred Ninety Second Engineer General Service Regiment, did, at Darnetal, France, on or about 11 January 1945, with intent to commit murder, commit an assault upon Mr. Robert Alexander Prudent, of the French Police, by wilfully and feloniously shooting him with a rifle.

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

Specification: In that * * * did, at Darnetal, France, on or about 11 January 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully,

and with premeditation kill one Jack Goldsmith. Criminal Investigation Department, United States Army, 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 both charges and specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the findings and sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

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

On 10 January 1945, Company D, 392nd Engineer Regiment, returned to Darnetal, France, from Charlesville, France, where its mission had been to guard the Meuse River during the time of the December 1944 offensive of the Germans. In the Charlesville area warnings had been issued regarding the danger of German saboteurs and parachutists coming into the area. Accused, who was a member of Company D, had been on a patrol on that day or the day before, dispatched to make a search because of a report that a German soldier might be in the vicinity (R24).

At about 1430 hours on 11 January, a technical sergeant of accused's company saw him carrying his M-1 rifle, reminded him that they were cleaning their rifles and turning them in, and told him to clean his and turn it in. He did not ask accused whether he had any ammunition as all the ammunition had been turned in at Charlesville. Accused at that time made no remark that caused the sergeant to think that he was not exactly normal. He seemed to be good humored and did not appear to be "upset." (R7,8).

About 1700 hours (R14), accused came to the Darnetal bridge with a rifle in his hands and spoke to Corporal Cardell Nelson, who had been posted as guard there (R9). He stated that he was going on guard there, but Corporal Nelson replied that accused was not going on guard at that post. Accused then said, "If we can get along, we will and if we can't, we can't" and "if any officer comes along tonight, I am going to paint this son of a bitch red." He also said that he was going to "shoot this rifle tonight." After this he left the bridge and went toward the guardhouse. (R18)

Staff Sergeant Willie Brinson, the sergeant of the guard, heard accused say at the bridge that "he helped build that bridge and he was going to guard it" and that "if any officers came on the bridge he would set them on fire with his M-1" (R12).

Mademoiselle Mauricette Laban arrived at the cafe of her aunt and uncle in Darnetal at about 1730 hours. About three Americans were in the cafe playing billiards (R42). Her aunt and uncle were upstairs with an American policeman and a French policeman. She and her grandmother were alone in the kitchen, when accused entered carrying a rifle and a "bandoleer". He opened his rifle, took bullets from "something black in his belt," and put them into his rifle. She became afraid when she saw him load his rifle, went upstairs, and reported that she was afraid because there was a negro who had loaded his rifle. The police came down, the American policeman and the negro spoke to one another, and immediately afterwards the American drew his papers out. The Frenchman also took out his papers. At that moment the negro backed into the doorway. She was afraid and "took off". After she left the kitchen, she heard about five or six shots. Later she returned to the cafe and saw the French policeman wounded on the floor of the cafe and the American dead in the kitchen (R43,44).

Monsieur Robert Alexander Prudent, a police inspector of Rouen, France, accompanied by Jack Goldsmith of the Criminal Investigation Division, United States Army, wearing an American Army uniform (R12), on 11 January entered the cafe of Monsieur Laban in Darnetal to investigate a report of illicit traffic in merchandise between the cafe and the Allied troops (R30.) After finding certain groceries in the cafe and placing in their jeep outside some gasoline, cigarettes, coffee, butter, and other groceries, they went upstairs. When they were coming down again with Laban and his wife, Mademoiselle Laban came upstairs and told them about the negro in the kitchen. As they entered the kitchen, accused stood in the doorway, and held his gun "on guard" (31). Goldsmith and accused conversed together, using the word "jeep" (the only word understood by the French inspector), during which conversation accused raised his eyes and became nervous and angry. Goldsmith did not become angry (R36). He brought out his papers, which accused looked at and handed back. Accused held his gun on both of them. Goldsmith then asked Prudent for his papers. The Frenchman produced them, but accused pushed them aside with the barrel of his gun and looked at them over his rifle. Still keeping his gun on Goldsmith, accused returned them to Goldsmith, who turned to give the papers back to Prudent. The French inspector reached for the papers and Goldsmith backed away about four paces. At that moment accused backed up a little and immediately began to fire. (R31,33). He fired two or three shots at Goldsmith (R39). After he was fired on by accused, Goldsmith dropped the papers, brought out his revolver, and fired two shots, the last being fired while he was on the floor wounded. Accused continued to fire at Prudent, then backed into the cellar, and left. Prudent ran upstairs to a window and saw

accused firing in the direction of a jeep (R 34). Accused also fired at Monsieur Laban (R40). Prudent then went downstairs, saw Goldsmith lying on his stomach on the floor, took the papers, and turned Goldsmith over in order to take his revolver. As Prudent raised himself, accused appeared in the doorway leading to the street and fired two shots at him, the first bullet striking Prudent and the second shot going wild. Prudent pulled himself into the billiard room, fell, and lost consciousness (R34). Prudent had at no time fired at accused (R40,42). No threatening motions had been made toward accused before he began firing (R37). He fired more than ten shots in total at Goldsmith, Prudent, and Laban (R40).

At about 1800 hours, accused came to his company commander's quarters and reported that he had been shot at in a nearby cafe (R22,25,26). At this time he seemed normal and rational, though excited, and was perfectly steady on his feet (R23). Questioned as to what he was doing at the cafe, he answered. "Is that important, or is the fact that I was shot at important?" Asked whether he had done any shooting, he replied, "Yes, I did, plenty" (R26). The officer ordered him to deliver the M-1 rifle he was carrying, but he refused, using words to the effect that the rifle had been issued to him and he was going to keep it (R22). When the officer came out of his quarters, however, accused handed his rifle to him (R23). While he was walking with his company commander to the cafe, he said that there was a jeep there with certain things in it (R24).

In the cafe accused sat in a corner for several minutes, no one saying anything to him. Then he said that he did the shooting and that "they" started shooting at him first. He appeared sober at this time (R13,14). A medical officer tried to smell his breath but smelled no alcohol (R27). This officer testified that he asked accused for his version of what had happened.

> "His story was that he had gone into the cafe and I believe, he said, 'just to get a drink.' He had come in through the back door and he had some words with this CID man and the CID man had shot at him. Then he said he had just taken his rifle and backed out the door, shooting at the CID man" (R27).

Prudent was found to be shot through the right groin. Four bullet wounds of entrance and one wound of exit were in Goldsmith's back (R26). The cause of Goldsmith's death was hemorrhage and shock following funshot wounds, according to an autopsy made about a day after the shooting (R29;Pros.Ex.A).

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

elected to remain silent and no evidence was introduced in his behalf (R45).

5. In the midst of the presentation of the prosecution's evidence, just after the prosecution had called the next witness, Captain Harry Steiro, commanding Officer of accused's company, the following occurred:

"Defense: Just before you call him, Major, I would like to say something. This man has been investigated by the medical authorities and classed sane, as far as a certificate is concerned. That has been made by the 179th General Hospital and at the time that the trial started I thought possibly that something might come to him that would assist the defense. I thought the accused might assist the defense. I talked with him on two or three occasions and I have never been able to get anything which would assist me in properly defending the man before this court. Consequently, I would like to file a plea in bar of trial, at this time, on the grounds that the man is not mentally capable of assisting in his own defense. In argument on that, the man knows what the penalty for the crime is, but apparently has no conception of what has happened, as far as I can find out. So consequently, he hasn't assisted me at all. He told me two or three stories, none of which agree with one another. I can't even say that they are plausible. So, under the circumstances, both I and the assistant defense counsel are just simply groping in the dark as far as the man is concerned.

Law Member: Does the defense wish to introduce any evidence in addition to his statement to support the motion?

Defense: I have no other evidence to introduce other than the actions of the man himself towards the defense counsel. The only other evidence that might be brought before the court would be that of the Colonel of the 179th General Hospital. I don't know just how far they would go into the mentality of an individual other than to decide whether he knows the difference between right and wrong.

Law Member: Is that all the defense has to say?

Defense: Yes, sir (R19,20).

The trial judge advocate then argued in opposition to the plea, stating that the Battalion Surgeon of the 392nd Engineer Regiment would testify, and the trial judge advocate further declared that

> "The accused was the subject of a psychiatric investigation at the 179th General Hospital, and they found nothing wrong with him which would prevent him from being held responsible for his actions and in conducting his defense" (R20).

The report of this examination was not, however, offered in evidence during the trial, nor were any of the officers who made this examination called as witnesses.

After this argument the defense counsel said:

> "May it please the court, don't let it be misunderstood. The man has talked, as far as talking to the defense counsel is concerned. As far as I can see, he has attempted to cooperate, as far as he can" (R20).

The law member stated that the "motion" was then denied (R21).

After the prosecution rested, the defense counsel announced:

> "May it please the court, I have talked with the defendant and I have explained his rights to him and have advised him he could do as he pleased in connection with his defense, as far as going on the stand, or remaining silent was concerned and I have advised him to remain silent." (R45).

After the law member then explained accused's rights as a witness, accused stated that he fully understood his rights and wished to remain silent. (R45).

According to the record, accused stated at ehe beginning of the trial that he desired to be defended by the regularly appointed defense counsel and assistant defense counsel, and that he previously requested the services of a Lieutenant Hormitage, "who could not be obtained" (R3).

In the opinion of the Board of Review, the defense counsel's announcement to the court--

> "He told me two or three stories, none of which agree with one another. I can't even say that they are plausible"

--was highly prejudicial under the circumstances shown. For a defense counsel, whose solemn obligation and serious responsibility are to represent the interests of an accused, to announce in effect to the court trying accused on a capital charge that he has no plausible defense, is to violate his bounden duty to "guard the interests of the accused by all honorable and legitimate means known to the law" and "to represent the accused with undivided fidelity, and not to divulge his secrets or confidence" (MCM, 1928, par.45b, p.35). It is difficult to conceive of anything more nearly futal to the rights of an accused than for the court to hear from his defense counsel, who has received the confidences of accused, a statement to the effect that he had no plausible or consistent defense. This was little short of pleading guilty to a capital charge over the protests of the accused he was appointed to represent, who had previously entered a plea of not guilty.

The rule is basic that the guarantee of due process of law in the Fifth Amendment to the United States constitution extends to persons on trial before courts-martial (Grafton v. United States, 206 U. S. 333, 51 L.Ed. 1084 (1907); Sanford v. Robbins (C.C.A. 5th 1940), 115 F(2nd) 435; Schita v. King (C.C.A.8th 1943), 133 F(2nd) 283; United States v. Hiatt (C.C.A. 3rd 1944), 141 F(2nd) 664; and other authorities cited in CM ETO 4564, Woods). It is incumbent upon the Board of Review, as well as all other military justice authorities, to insure that every accused before a court-martial receives a fair trial.

The right to counsel is fundamental.

> "'Even the intelligent and educated layman has small and sometimes no skill in the science of law. * * * He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect' * * * Powell v. Alabama, 287 U.S. 45,69,77 L.Ed.158, 170, 84 ALR 527,540 (1932).
>
> "A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom.

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He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexities, or of his own ignorance or bewilderment" (Williams v. Kaiser, _____ U.S. _____, 65 Sup.Ct.(Adv.Rep.) 363 (1945), and authorities cited therein).

The right to counsel means the effective assistance of counsel (Avery v. Alabama, 308 U.S. 444, 84 L.Ed. 377 (1940); Amrine v. Tines (C.C.A. 10th, 1942) 131 F(2nd) 827; CM ETO 4564, Woods; CM ETO 4756, Carmisciano, IV Bull. JAG 173).

The general rule in the civil courts, as stated in Corpus Juris Secundum, is as follows:

"As a general rule, a new trial may be granted where the incompetency of counsel is so great that accused is prejudiced and prevented from fairly presenting his defense, and a new trial sometimes is granted because of some serious error on the part of such attorney in the conduct of the case; and in this respect accused's application will be treated more favorably when the attorney is one appointed by the court than when the attorney is one selected by himself. However, unless accused is prejudiced and thereby deprived of a fair trial, a new trial does not necessarily follow from either the attorney's incompetency or his neglect" (23 CJS, sec. 1443, pp.1158, 1159).

The Acting The Judge Advocate General once wrote:

"The rule of the courts of common law, both civil and criminal, that a party has no relief against errors, omissions, or poor judgment of his counsel, can have but a limited application in court-martial practice, where the majority of counsel are not learned in the law, and where it is the duty of every one connected with the administration of military justice, and not least my own, to see that the rights of every accused are adequately protected" (Op. Acting JAG filed with CM 200989, Osmen, 5 B.R.11,28, at pp.39-40 (1933)).

In the present case the court has sentenced accused to the maximum punishment possible for this or for any offense--to be hanged by the neck until dead. The evidence is strong that accused committed

the crime of murder, although the only eyewitness to the actual shooting was the French inspector. But the compelling evidence rule, ordinarily applied to determine whether an error is harmful cannot properly be applied under the present circumstances. To apply it here would be to beg the issue. Had not his own counsel announced to the court that his versions of what happened were in disagreement and seemingly not plausible, accused might well have decided to take the stand and testify. Perhaps his testimony would have been accepted by the court and the French inspector's rejected. His statement concerning his conversation with Goldsmith (not understood by the French witnesses, other than the word "jeep") might have cleared up some of the mystery surrounding the indicent. Possibly, accused's recent assignment to go on patrol duty to search for the German soldier, and the jeep containing groceries outside the cafe, which jeep frequently was referred to during the trial, might have had some bearing on the case. Certainly, if accused had been refused the right to testify, the error would have been fatal, regardless of the strength of the evidence. Here, while accused was given the opportunity to testify, his counsel had already "put two strikes against him" and virtually admitted to the court that accused had no plausible defense. This error on counsel's part is so grave that it stains the entire record and trial and it cannot be wiped out by a mere weighing of the evidence admitted.

For the reasons set forth above, the Board of Review is of the opinion that because of the statements in question made by the defense counsel at the trial under the circumstances shown, accused was deprived of the fair trial guaranteed him by the Fifth Amendment to the United States Constitution, and that therefore, the findings of guilty and sentence are invalid and should be vacated.

6. The charge sheet shows that accused is 32 years nine months of age and was inducted 23 July 1942 to serve for the duration of the war plus six months. No prior service is shown.

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

/s/ B. Franklin Riter Judge Advocate

/s/ Wm. F. Burrow Judge Advocate

/s/ Edward L. Stevens, Jr. Judge Advocate

(206)

1st. Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 18 Aug 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U.S. Army.

1. In the case of Private JAMES E. HOWARD (36393053), Company D, 392nd Engineer General Service Regiment, 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. The record of trial and the papers attached thereto strongly suggest the possibility that accused is insane or was at the time of the offense. It is therefore recommended, before further proceedings are undertaken in this case, that a thorough mental examination be made under the provisions of the Manual for Courts-Martial (MCM, 1928, par.35c, p.26; par 87b,p.74).

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 forwarded herewith. The file number of the record in this office is CM ETO 13222. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13222).

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. 3

CM ETO 13253

30 AUG 1945

U N I T E D S T A T E S	36TH INFANTRY DIVISION
v.	Trial by GCM, convened at Headquarters 142nd Infantry Regiment, APO 36, U. S. Army, 27 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private AMERICO F. BRAGALONE (35277131), Company C, 142nd Infantry	

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

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

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

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

Specification 1: In that Private AMERICO F. BRAGALONE, Company "C", 142d Infantry (then of Detachment 3, Ground Force Reinforcement Command), did without proper leave, absent himself from his place of duty at Phalsbourg, France from about 30 January 1945, to about 11 February 1945.

Specification 2: In that * * * did without proper leave, absent himself from his place of duty at Phalsbourg, France from about 13 February 1945, to about 15 February 1945.

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Specification 3: In that * * * did without proper leave, absent himself from his place of duty at Phalsbourg, France from about 16 February 1945, to about 22 February 1945.

Specification 4: (Disapproved by reviewing authority).

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

Specification: In that Private AMERICO F. BRAGALONE, Company "C", 142d Infantry, did, at Neuberg, France on or about 2 March 1945, 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 to shirk important service, to wit: combat with the enemy, and did remain absent in desertion until he returned to military control on or about 19 March 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of two previous convictions, one by summary court for absence without leave for three days, and one by special court-martial for absence with leave for 18 days, both in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the finding of guilty of Specification 4, Charge I, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

a. Specifications 1, 2 and 3, Charge I were proved solely by duly authenticated extract copies of the morning report of Detachment 3, Ground Force Reinforcement Command, each submitted at Phalsbourg, France, and each of which was introduced in evidence without objection. An entry for 31 January 1945 shows accused from duty to absent without leave on 30 January 1945, and an entry for 12 February 1945 shows him from absent without leave to confinement on 11 February 1945 (R6; Pros. Ex.1). An entry for 14 February 1945 shows accused fron confinement

to absent without leave on 13 February 1945, and an entry for 16 February 1945 shows him from absent without leave to confinement on 15 February 1945 (R6; Pros.Ex.2). An entry for 17 February 1945 shows accused from confinement to absent without leave on 16 February 1945 and an entry for 23 February 1945 shows him from absent without leave to confinement on 22 February 1945 (R6; Pros.Ex.3).

b. Specification of Charge II: Captain Nathaniel Kaplan testified that on 2 March 1945 he was commanding officer of Company C, 142nd Infantry, which was then holding defensive front-line positions on the west bank of the Moder River at Neuberg, France, receiving sporadic shelling from the enemy and sending out patrols. Upon arriving at the company, accused was called to the command post where Captain Kaplan told him that he was to go down to the third platoon which was in a holding position in the front line. Then, as Captain Kaplan turned to talk to one of the lieutenants in the company, accused "took off" without any permission and disappeared from the company. Captain Kaplan immediately started a search for him, but was unable to find him. Accused was not present in the company between 2 March and 19 March 1945 (R9-12).

A duly authenticated extract copy of the morning report of Company C, 142nd Infantry, for 4 March 1945, introduced in evidence without objection, shows accused "Duty to AWOL 2 March 1945" (R12; Pros.Ex.6).

A written stipulation, signed by accused and received in evidence, shows that accused "was under military control on the 19th of March 1945" (R12; Pros.Ex.7).

4. After his rights as a witness were explained to him, accused elected to make through counsel the following unsworn statement:

> "I was inducted on the 23rd of February 1942 and joined C Company in March of 1942. I came overseas with the 36th Division, making the landing at Salerno. I was wounded on Mount Maggiore, December 1943, and have been awarded the Purple Heart" (R13).

5. a. Competent morning report entires clearly establish accused's guilt of the three specifications of Charge I and Charge I. Aside from the certificate of the authenticating officer showing that the morning reports were submitted at Phalsbourg, France, there is no proof as to the place at which accused absented himself without leave. However, the place at which he absented himself is not of the essence of the offense, and any lack of proof in this respect is immaterial within the contemplation of Article of War 37 (see CM ETO 9257, Schewe; Dig.Op. JAG 1912-40, sec.416(10), p.270). 13253

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b. The undisputed testimony of accused's company commander shows that accused absented himself without leave on 2 March 1945, at the place alleged, immediately after he had been advised by the commander that he was to join a platoon which was then in a holding position in the front lines. This testimony is partially corroborated by the competent morning report entry establishing absence without leave of accused on 2 March 1945. Under the circumstances, the court was fully warranted in inferring an intention on the part of accused to avoid hazardous duty or to shirk important service as charged (CM ETO 5293, Killen; CM ETO 7413, Gogol; CM ETO 10955, Volatile; CM ETO 11116, Purnell).

6. The charge sheet shows that accused is 24 years of age and was inducted 23 February 1942 at Martin's Ferry, Ohio.

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.

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

B A Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B J Peery Judge Advocate

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

BOARD OF REVIEW NO. 2 12 SEP 1945

CM ETO 13255

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Schwab Gmund, Germany, 3 May 1945.
Private ROSENDO G. GONZALES (38365834), Company "B", 2759th Engineer Combat Battalion	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Rosendo G. Gonzales, Company B, 2759th Engineer Combat Battalion, did at Lengfurt, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Inge Alexander.

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

Specification 1: In that * * * did, at Lengfurt, Germany, on or about 8 April 1945, unlawfully enter the dwelling of Franziska Liebler, with intent to commit a felony, viz rape, therein.

Specification 2: In that * * * did, at Lengfurt, Germany, on or about 8 April 1945, with intent to do her bodily harm, commit an assault upon Franziska Liebler, by cutting her with a dangerous instrument, to wit, a knife.

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The accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification; and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of Charge II and its specifications. Evidence was introduced of two previous convictions, one by summary court-martial for absence without leave for seven days in violation of Article of War 61, and one by special court-martial for willfully applying to his own use government property, value about $25, intended for military use, in violation of Article of War 94. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution may be summarized as follows: About 7 pm on 8 April 1945 in Lengfurt, Germany, the accused, a member of Company B, 2759th Engineer Combat Battalion knocked (R7) on the door of the house of 19-year old Franziska Liebler, occupied by her (R6) and her younger brother, Karl (R13,48). In another portion of the same house, but in a separate apartment lived Mrs. Georgen and her son, Werner Georgen, and daughter (R8-9,46). He was uninvited but Franziska admitted him as he indicated that he was from the Military Police. He immediately went into the kitchen and asked for something to drink. She provided him with some wine. After drinking a little of it, he "went around the table after" her and asked her to sit on his lap. She refused. He talked in English. She could not understand and could only speak German. She called Werner and Mrs. Georgen in. Shortly thereafter all four went across the hall into the kitchen of the apartment of the Georgens (R7-9). There they stayed until 10 pm, during which time they drank wine and looked at photographs the accused showed them. Mrs. Georgen's daughter left about that time for a neighbor's house and the accused left with her to escort her there, but returned within a few minutes (R10,46). He then indicated that Mrs. Georgen and her son and Karl go to bed (R10) and by motions got them out of the Georgen's kitchen, leaving only Franziska (R10). He barricated the door with a chair, blew out the candle light and grabbed Franziska and kissed her. She cried for help (R10). He removed her blouse (R11). She managed to get the chair away from the door. Accused lighted the candle (R15) and opened the door (R11). He held an open pocket knife in his hand. He would not permit the Georgen boy who stood outside the door to enter (R11). He closed the door and blocked it with a chair again and again approached Franziska. He removed the strap of her slip and brazziere (R11). While removing parts of her clothing he cut her with the knife on her left jawbone, right side of her neck, the right cheek, her left arm, her thumb, and back (R11-12). The medical officer who examined

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her on 10 April, following, testified that none of the cuts were serious; that he found one 3/4-inch long on her cheek, two small superficial cuts on her thumb and a finger on her left hand; a cut on the thumb of her right hand; and a superficial cut on her left arm. Hefound no other injuries (R55). In his opinion, the instrument used was not "too sharp or not too much force was used" (R56). Accused then took out his penis, lay on the floor, dragged her down with him and forced her to take it in her hands. She tried to get away and after several attempts succeeded. He indicated that they go to a bedroom. She then led him upstairs to a bedroom already occupied and showed the accused that she slept with Mrs. Georgen. The accused believed that and left the house about 11 pm (R12-13,17). In relating this occurrence to the police on 10 April, she made no mention of the accused dragging her down to the floor (R16).

Shortly after midnight, the accused entered the home of Herr Krauss, adjoing the home of Franziska Liebler, armed with a rifle. He had previously visited that home about 5 pm of 8 April 1945. Herr Krauss admitted him but protested his entry until he indicated that there was an officer outside. Accused then went up to the second floor (R38-39), and entered the bedroom of Frau Inge Alexander, age 46, who had been in bed. As the accused was motioning for Herr Krauss and his daughter to go downstairs, Frau Alexander locked her bedroom door. The accused pounded on the door with his rifle. Fearing that he would shoot through the door and hoping to effect an escape, she opened the door. The accused pushed her back with his rifle toward the bed and appeared very angry. He had previously pointed the rifle at her. She was afraid of the rifle. She sat upon the bed and the accused removed her shoes, jacket, hose and panties. Because of her fear she did not resist. He put the rifle close to the bed, pushed her fully on the bed, got into it with her, spread her legs apart and inserted his penis into her female organ (R25-28). She did not consent but did not resist because of fear of the rifle (R29). She did not assist him in any way (R33).

4. Evidence for the Defense: On 10 April 1945 a medical officer made a physical examination of Frau Inge Alexander. She told the officer that she sustained no wounds or cuts and that "the act" was carried out with a rifle. She was not excited at the time of the examination. Because of her age it was not possible to determine whether she had engaged in sexual intercourse. Her genitals showed no injuries (R57-58). Sergeant F. D. Russo testified that accused was supposed to be on guard duty from 10 pm until midnight on 8 April 1945. He saw him go on his post at 10:15 pm and saw him again at midnight in the room where the accused sleeps (R63-64).

The accused having been fully advised as to his rights as a witness elected to remain silent (R66).

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5. Discussion:

a. Charge I and its Specification (Rape). The accused has been found guilty of raping Inge Alexander. Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent. A penetration of a woman's genitals is sufficient to constitute carnal knowledge. The force involved in the act of penetration is alone sufficient where there is in fact no consent (MCM 1928 par.148b, p.165). Inge Alexander herself provided the uncontradicted evidence of record that the accused did effect a penetration of her genitals without her consent or assistance and that the accused supplied the force to effect the penetration. She did not resist because of her fear of the rifle which he carried and used to intimidate her into submission. Proof of resistance is not necessary if it appears that the female was robbed of her power or will to resist through fear of death or great bodily harm engendered by the accused (CM ETO 10742, Byrd). All of the elements of the offense charged were therefore competently proved.

b. Charge II, Specification 1 (Housebreaking). Housebreaking is defined as unlawfully entering another's building with intent to commit a criminal offense therein (MCM 1928, par.149e, p.169). The two essential elements of the offense are: (1) Unlawful entry and (2) intent at the time of entry to commit the alleged criminal offense therein.

The accused, in the case under discussion, has been found guilty of intending at the time he entered the dwelling of Franziska Liebler to commit rape therein. The evidence shows that he entered her dwelling at 7 pm on the day and at the place alleged, asked for and drank wine, tried to get familiar with her, then went over into the kitchen of a separate apartment of a Mrs. Georgen, sat around there "fraternizing" for over two hours, left the house and then returned to her apartment and then attempted to rape Franziska. From these facts, the court has inferred that at the time he entered the dwelling of Franziska at 7 pm he intended to rape her in her dwelling. Intentions, when not expressed, may be inferred from acts. Usually the intent is inferred to exist at the time of the act. Thus, if "A" shoots and kills "B" it may be inferred that he intended at that time to kill "B". When, however, the act is separated from the required intent by time, such as in this case by three hours, the probative value of the act to show the existence of the intent at a previous time lessens with the length of time. It eventually becomes a matter of speculation.

In the case under discussion the first thing the accused did was to ask for wine. He then tried to get familiar with the girl. He went over to the Georgen apartment and drank wine, showed photographs, and spent there a social evening of over two hours. About 10 o'clock he left the building altogether and returned shortly thereafter - returning to the kitchen of the Georgen apartment. Here was another entry. The details of this entry are meager. The entry was to the home of Georgen's and not that

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of Franziska and was not therefore the entry complained of in the specification. During and following his entry at 7 pm until he departed at or about 10 pm he exhibited no intent to rape Franziska. The court could have inferred from his conduct that he intended to obtain a drink, or to visit socially with the occupants of the house. Instead of selecting either of these motives free of crime, the court selected his conduct in attempting to have sexual relations with the girl after his second entry shortly before eleven o'clock in the Georgen kitchen as his motive for originally entering at seven o'clock. The fact finding body may not pick and choose at random in arriving at its decision in determining intent in such cases. It may infer a criminal intent to exist only when the facts are sufficiently conclusive to exclude all other inferences (CM 218521, Nix, 12 BR 90 (1941); CM 281156 Memorandum for The Judge Advocate General, SPJGS, 27 July 1945; Hammond v. U.S. 127 Fed.2nd, 752 (1942)).

In our opinion the intent to rape, assuming, but no deciding, that it did exist as of the time of the attack between 10 and 11 o'clock, was not shown to exist at 7 o'clock, the time of entry, to the exclusion of all other reasonable intents that might have existed at that time. In view of this conclusion, it is not necessary to pass upon the question of whether the entry was unlawful, or the question of whether the proof of the attempt to rape in the Georgen apartment will sustain an intent to rape in the Liebler apartment. The findings of guilty of the Charge and Specification are not sustained.

c. Specification 2 of Charge II (Assault with intent to do bodily harm with a dangerous weapon). The accused has been found guilty of an assault with intent to do her bodily harm on Franziska Liebler by cutting her with a dangerous instrument, to wit, a knife.

> "Discussion.—Weapons, etc., are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm. The mere fact that a weapon is susceptible of being so used is not enough. Boiling water may be so used as to be a dangerous thing, and a pistol may be used as not to be a dangerous weapon.
>
> "Proof.—(a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm" (MCM, 1928, par.149m, p.180).

The fact that she was cut in numerous places under the circumstances shown was sufficient evidence from which the court could infer that the knife was used in a manner which might have caused great bodily

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harm. Cutting, stabbing or slashing another with a knife has often been held to constitute an assault with intent to do bodily harm with a dangerous weapon in violation of Article of War 93 (CM 252628, Earle, 34 B.R. 111 (1944); CM 252725, Thompson, 34 B.R. 161, (1944); CM 193085, Teindl, 2 B.R. 73 (1930)). The findings of guilty of this Specification of Charge II were therefore supported by sufficient substantial evidence of record.

6. The charge sheet shows the accused to be 21 years and three months of age. Without prior service, he was inducted 15 January 1943 at Fort Sam Houston, Texas.

7. The court was legally constituted and had jurisdiction of the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial, except as noted herein. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specification 1 of Charge II, is legally sufficient to support the remaining findings of guilty and the sentence.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater
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BOARD OF REVIEW NO. 1 2 OCT 1945

CM ETO 13263

U N I T E D S T A T E S	)	80th INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 80, U.S. Army, 26 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 30 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.
	)	
Private WILLIAM F. KELLEY (34763170), Company K, 317th Infantry	)	

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and sentence in part. The record of trial has now been examined by the Board of Review and the Board 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 William F. Kelley, Company K, 317th Infantry, did, in the vicinity of Bratte, France, on or about 30 September 1944 desert the service of the United States, and did remain absent in desertion until he returned to military control at or near Morville Sur Seille, France, on or about 28 October 1944.

Specification 2: In that***did, in the vicinity of Raucourt, France, on or about 8 November 1944 desert the service of the United States, and did remain absent in desertion until he returned to military control at or near Paris, France on or about 13 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 of Specification 1 thereof, and not guilty of Specification 2, but guilty of a substituted specification of absence without leave for the period of desertion alleged. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 30 years and suspended the execution of the dishonorable discharge adjudged 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 proceedings were published in General Court-Martial Orders Number 142, Headquarters 80th Infantry Division, APO 80, U.S. Army, 15 June 1945.

3. a. Specification 1:

The only evidence of the absence alleged consisted of extract copies of morning reports signed by an assistant personnel officer on various dates prior to 12 December 1944. These reports showed accused absent without leave from 30 September 1944 to 28 October 1944. There was testimony to the effect that from 5 August until an undisclosed time, the system used in the regiment concerning morning reports consisted of the forwarding of a memorandum signed by the company commander through official channels to the personnel officer who prepared and signed the originals. In his absence, his assistant signed (R9,12). The Board of Review has heretofore held that prior to the promulgation of Circular 119, European Theater of Operations, 12 December 1944 (SectionIV), neither personnel officers nor their assistants were authorized to sign morning reports in the absence of evidence of a regular course of business, and that reports so signed were not competent evidence (CM ETO 7686, Maggie and Lewandeski; CM ETO 6107, Cottam and Johnson).

These opinions, however, specifically stated that the Knorr case (CM ETO 4691), holding morning reports signed by personnel officers in the regular course of business were admissible under the Federal Statute (Act of 20 June 1936, Ch. 640, sec. 1, 49 stat. 1561, 28 U.S.C.A. sec. 695) was not overruled. The principles of the Knorr case have recently been reaffirmed in CM ETO 10199, Kaminski and CM ETO 16149, Bagley. For detailed discussion of the points involved, reference is made to the cited cases. Regular course of business was fully proved in the case before us, and the reports were therefore competent to establish absence without leave for the period alleged.

There was evidence that on 30 September the company was in a defensive position with "much patrolling being done at night". While accused

was gone there was action, and from the middle of September to the middle of October there was "a complete turnover of men in the company". It is our opinion that from 28 days unexplained and unauthorized absence from a rifle company in combat, the court reasonably could infer under all the circumstances of this case that accused intended to desert the service of the country (CM ETO 9843, McClain; CM ETO 4490, Brothers; CM ETO 1629, O'Donnell; CM 130018 (1919), Dig. Op. JAG, 1912-40, sec. 416(9), p. 269.

b. Specification 2:

Evidence to support the conviction of absence without leave from 8 November 1944 to 13 December 1944 likewise rests upon extract copies of entries in morning reports. The entries of 15 December 1944 and 3 March 1945 were sufficient to establish the unauthorized absence, if competent evidence. The originials thereof were signed by the personnel officer who, by the theater circular above cited, was then authorized to sign them. The entry of 3 March 1945 corrected and changed a prior entry dated 11 November 1944 of missing in action on 8 November to absence without leave on that date (R10; Pros.Exs.B,C,D). The defense counsel moved to strike these exhibits from the record because of "no personal contact * * * between the company commanders and the rear echelon", and because of the delay (R12-13). His motion was denied. The ruling was proper. As recently held with full analysis in companion cases (CM ETO 13303, Sweezy; CM ETO 14362, Campise), that a regimental system existed of compiling and authenticating morning reports based on notes and memoranda forwarded through official channels from the company will not of itself vitiate the reports, for personal knowledge so gained meets the standards required (Cf: CM ETO 10199, Kaminski). And we have also held that morning reports are admissible in evidence, not because of contemporaneousness of entry with event, but because of the duty of a responsible officer to learn and record the true facts (CM ETO 9843, McClain; CM ETO 12951, Quintus). A further point, not raised by the defense, but worthy of note is that the personnel officer has the power to correct entries made prior to the time of his authorization to act as an authenticating officer of morning reports (CM ETO 14362, Campise). The failure of the court to make a separate specific finding of a violation of Article of War 61 as to this Specification was immaterial so far as prejudice to accused's substantial rights is concerned.

4. The charge sheet shows that the accused is 20 years one month of age and was inducted 9 March 1943, at Americus, Georgia. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial

rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

6. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement is prpper (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

/s/ Wm. F. Burrow Judge Advocate

/s/ Edward L. Stevens, Jr. Judge Advocate

/s/ Donald K. Carroll Judge Advocate

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
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BOARD OF REVIEW NO. 1

13 JUL 1945

CM ETO 13269

U N I T E D S T A T E S	)	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private WILLIAM T. ROBINSON (42091228), 4016th Quartermaster Truck Company	)	Trial by GCM, convened at Mannheim, Germany, 24, 25 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
RITER, BURROW and STEVENS, Judge Advocates

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private William T. Robinson, 4016th Quartermaster Truck Company, having received a lawful command from Captain John J. Flynn, his superior officer, to get out of a designated truck without his weapon, did, at or near Heilbronn, Germany, on or about 29 April 1945, willfully disobey the same.

ADDITIONAL CHARGE I: Violation of the 66th Article of War.

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Specification: In that * * * did, at Heilbronn, Germany, on or about 29 April 1945, excite a mutiny in the said 4016th Quartermaster Truck Company by, in the presence of Private James Webb, 4016th Quartermaster Truck Company, and in the hearing of other members of the said company, threatening to get his rifle and shoot Technician Fourth Grade Timothy Bright, 1st cook in the said company, by refusing to obey the lawful order of 2nd Lt. Henry E. Gooding Jr., his superior officer to "come here", saying, "I ain't coming over there", and, "that's the way I talk to an officer" or words to that effect, and upon being ordered in arrest by 2nd Lt. Henry E. Gooding Jr., "Ain't anybody going to put me under arrest; I'll shoot any mother fucker that messes with me," or words to that effect, any by shouting, "I'm going to shoot the whole damn outfit," or words to that effect, and by refusing to obey the lawful order of Captain John J. Flynn, his commanding officer, to get out of a designated truck without his weapon and saying to said Captain Flynn, "No mother fucker is going to get me off this truck," or words to that effect, thereby causing Private James Webb and other soldiers of said 4016th Quartermaster Truck Company concertedly to disregard and defy the lawful orders of their commanding officer to get into certain designated trucks in a convoy with the intent to subvert and override, for the time being, lawful military authority.

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

Specification: In that * * * having received a lawful command from 2nd. Lt. Henry E. Gooding Jr., his superior officer, to "come here," did, at Heilbronn, Germany, on or about 29 April 1945, wilfully disobey the same.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of two previous convictions both by summary court for absences without leave for three days and seven hours respectively, in violation of Article

of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. On 12 April 1945 near Rouen, France, accused and 37 other men newly assigned to the 4016th Quartermaster Truck Company reported for duty with that organization four hours prior to its scheduled departure for Germany. Captain John J. Flynn, the company commander, could not secure order among them, nor account for those present or absent, despite his attempts to do so at five personally conducted roll calls. They cursed, were boisterous, fired shots, said they did not want to go to Germany, and would not step forward individually into formation as the captain called their names. Accused specifically refused to get into formation and stated his disinclination to go to Germany. Captain Flynn informed them he did not want his outfit spoiled by such men and ordered them to return to their old organization. He then requested his battalion commander that they be returned, but was refused. At the time of the company's departure he conducted a sixth roll call, ordering each new man on a separate truck, but when the organization left, the new men congregated on six trucks. The next day the sergeant separated the new men during each halt, but they would again assemble on each departure. For candy, they secured wine from civilian bystanders, two bottles of which Captain Flynn took from them and threw on the rocks. That night in Liege, Belgium, he informed the new men that their actions were "getting very close to being rebellious", and fed them as punishment "C" rations but gave his old men hot "B" rations (R14,19-21).

On 20 April 1945, at Zinzig, Germany, near the mess truck

> "The accused was raising a lot of hell, using a lot of foul language, calling the cook a mother fucker, and that the food was lousy, that they were in a mother fucking outfit. * * * he said 'something ought to be done about the lousy food'. There was a crowd of about 20 or 25 new men. They were there listening to him about 1/2 hour later" (R10).

Captain Flynn then received a report from his first sergeant that accused and some 25 of the new men had absented themselves without leave. Two hours later he received report of their return (R10).

Again at about 1830 hours on 29 April 1945, at Heilbronn, Germany, near the mess truck in the presence of many enlisted men, Captain Flynn and Lieutenant Gooding, the accused was

> "shouting in a loud voice that he had come to the kitchen for chow and that 'mother fucker'as he said, had thrown him a piece of cake and said 'that's all soldier'. He said he was going to get his rifle and shoot that 'mother fucker' and he kept repeating it. * * * At the same time Gooding looked up and ordered him to 'come here'. Robinson looked up and said, 'What do you want'. Lieutenant Gooding replied, 'Soldier, come here'. Robinson said, 'What do you want'. Lieutenant Gooding said, 'That makes no difference what I want, you come here'. He still didn't come. Lieutenant Gooding said, 'Is that the way you act to an officer'. He said, 'That's the way I act to an officer'. Lieutenant Gooding called the first sergeant and said, 'put that man under arrest'. The 1st sergeant came up to Robinson but he had no men to help him so he walked off to get more men. /When the 1st sergeant stepped up to place him under arrest/ he said, 'No mother fucking son-of-a-bitch is going to put his hands on me'" (R24,25, 28).

Captain Flynn ordered a corporal to get enough big men to confine the accused, disarmed a nearby soldier who had a weapon in his hands, and having heard accused say he would "start shooting as soon as he got his mother fucking rifle", ordered the first sergeant to get accused's rifle. Accused, however, mounted a truck and secured his rifle. Captain Flynn twice ordered him off the truck without his rifle and was twice refused, accused saying he would shoot any "mother fucker" who tried to get him off the truck. Captain Flynn then cancelled his order to the corporal for guards, ordered the first sergeant to place all men on trucks and drive around for 45 minutes, and sought help from nearby military police.

Returning at about 1930 hours with three of their noncommissioned officers, Captain Flynn was met by three of his own men who had dismounted from the trucks and told him they wanted to be taken away if accused was. He then ordered accused off the truck but received no answer. The first sergeant entered the truck, removed him, and placed

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him in the military police jeep. The three company men continued their clamor, called the outfit "chicken-shit" and "mother fucking", and refused the captain's order to return to their truck. Captain Flynn then had two of these men put on the jeep, whereupon 20 or 30 others dismounted from the trucks, converged about the jeep and refused his order to get back on their trucks. They said if accused must go to the stockade, they also should go. Accused, who remained silent after the military police arrived, was then driven off with his two companions to the stockade, and was not present during the subsequent events (R10-13,21).

Captain Flynn attempted to arrest the entire remaining group, but his order was disobeyed to the accompaniment of curses and threats. A shot rang out, and the captain, as he testified, "pulled himself together", and disarmed the soldier who had fired. He got most of the group on trucks, which then left on his order. About eight of them surrounded his jeep and cursed and beat him. As he retreated in the vehicle, approximately 30 shots were fired towards him. A soldier in the jeep was wounded in the head. A riot squad of military police returned, and captured seven mutineers still in the area. All were men who reported to the organization 12 April (R13).

There was testimony that accused was sober (R22), that he had been drinking but was not drunk (R26), and that he did not stagger (R28). There was no disorder or disobedience of orders in the company on 29 April before accused's wrongful conduct began (R23,29).

4. For the defense, it was stipulated that absent witnesses would testify that two military police sergeants entered the truck for accused that evening and found him asleep. When awakened, he reached for his carbine, but obeyed their orders not to touch it and accompany them (R30).

Accused, after his rights as a witness were fully explained to him, elected to be sworn as a witness and testified as follows:

He and others of the company began drinking wine in a cellar at about 1500 hours on 29 April. He drank 12 or 14 bottles and did not remember leaving the cellar or any of the events thereafter until the military police awakened him in the truck (R32).

His testimony concerning the night of 12 April was:

> "He [the captain] told us that evidently we were no damn good or we wouldn't have been transferred and that the outfits from which we came were no good. He said that you fellows who don't want to be in the outfit could take off and go any place we wanted to as he didn't want us. About 30 of us put our stuff back on the 3 trucks that were given us by our outfits to bring our stuff and about 30 of us went back to our outfits. 7 or 8 remained" (R33).

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He asserted that Captain Flynn's testimony that the men did not line up and did not comply with his wishes was not truthful (R34).

Of the next night, he testified:

> "At this formation Captain Flynn told us that in view of the fact of the way we acted last night, 'we are having hot chow but you are not getting any hot chow, you are getting C rations', and 'I don't want you men mixing with my men. I don't think you are fit to associate with them'. We did get the C rations" (R33).

Accused specifically denied addressing the group of men on 20 April, but admitted leaving the area (R34).

5. One of the mutineers, as a witness for the court, testified that he, accused and 12 or 15 others drank wine in a cellar during the afternoon of 29 April until 1830 hours; and that accused had to be helped up the stairs, staggered, sang, and acted "differently". He denied hearing any fuss or commotion at the mess truck that evening (R36-38).

6. a. Testimony of the prior mutinous conduct in the company and accused's participation therein on 12 and 20 April was admissible as relevant testimony which enlightened the court as to the causes and circumstances surrounding accused's conduct and was of assistance to it in determining the question of fact whether his actions were the proximate and contributing cause of the ensuing mutiny on 29 April (CM ETO 895, Fred A. Davis, et al; CM 235090, Sipp; 21 B.R. 281,294).

b. Defense's motion to strike Additional Charge I and Specification was properly denied. The convening authority possessed power to determine who should be tried by a general court-martial and also for what offense he should be tried (CM ETO 1554, Pritchard). There was no necessity for further investigation of this Additional Charge. The legality of the practice followed by the staff judge advocate with respect to additional charges is fully established (CM ETO 5155, Carroll and D'Elia; CM ETO 6694, Warnock and authorities therein cited).

7. a. The law of exciting a mutiny is set forth by Winthrop as follows:

> "the exciting * * * of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to the stimulating of others to the resistance etc., actually resorted to. Thus

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> a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them, as - especially - by an officer or noncommissioned officer; by his using, in their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior" (Winthrop's Military Law and Precedents (Reprint, 1920) pp.582-583).

The Manual for Courts-Martial particularly announces that

> "no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities.
>
> Proof.-(a) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States; and (b) acts of the accused tending to cause or excite the certain collective insubordination" (MCM, 1928, pars.136c, p.151).

b. The evidence is clear and decisive that coincident with the arrest of accused and immediately following his transfer to the stockade a full-blown mutiny developed among the men of the company wherein Captain Flynn's authority was temporarily overthrown and nullified. He was subjected to personal indignities by the mutineers and as a concluding stroke was fired upon by some of them. The affair was an exhibition of mob violence coupled with complete defiance of authority. The conduct of the men, as proved, included definite overt acts of mutiny (CM ETO 895, Fred A. Davis, et al; CM ETO 3147, Gayles, et al; CM ETO 3803, Gaddis, et al).

c. Accused's profane and obscene language which included threats of violence to officers and men and his deliberate open defiance of the authority of his superior officers and disobedience of their

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lawful orders in the immediate presence and hearing of other members of the company who were involved in the subsequent disorders formed a matrix of substantial evidence which supports the court's finding that he contributed principally to the subsequent mutiny. With this evidence placed against the proof of his conduct on the two prior occasions, the court was fully justified in concluding that his actions, taken as a whole, were a proximate and moving cause of the mutiny. The fact that there might have been other contributing causes to the mutiny is no defense.

> "It is enough to prove that the conduct of the prisoner was one of the exciting causes of the mutiny" (Winthrop's Military Law and Precedents (Reprint 1920), p.583, n.72 quoting O'Brien, p.298) (Underscoring supplied).

The findings of accused's guilt of the offense of exciting a mutiny were sustained by substantial evidence (CM ETO 3928, Davis; Cf: CM ETO 2729, McCurdy).

8. Accused's willful disobedience of the legal orders of Captain Flynn and Lieutenant Gooding (Charge and Specification and Additional Charge II and Specification) were proved beyond all doubt or contradiction (CM ETO 3147, Gayles, et al., supra; CM ETO 3078, Bonds, et al).

9. Although the conduct of the company commander in failing to suppress the prior mutinies and to cause appropriate punishment to be imposed upon the offenders engaged in such enterprises is probably subject to severe criticism, if not disciplinary action, such shortcomings afford accused neither defense nor palliation.

10. The charge sheet shows accused is 21 years, 11 months of age and was inducted 20 December 1943 at Buffalo, New York, to serve for the duration of the war plus six months. No prior service is shown.

11. 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.

12. The penalty for willful disobedience of a commissioned officer in time of war and for exciting a mutiny is death or such other punishment as a court-martial may direct (AW 64,66). Confinement in a penitentiary is authorized upon conviction of exciting a mutiny (AW 42).

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

29 JUN 1945

CM ETO 13276

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Technician Fifth Grade VIRGLE L. CLOWER (39568162), 495th Ordnance Heavy Automotive Maintenance Company, and Private KENNETH A. WESTBROOK (14122343) 3254th Ordnance Base Depot Company	) Trial by GCM, convened at Paris, France, 29 May 1945. Sentence as to each accused: Dishonorable discharge (suspended as to CLOWER), total forfeitures and confinement at hard labor, CLOWER for two years, WESTBROOK for five years. Places of confinement: CLOWER, Loire Disciplinary Training Center, Le Mans, France; WESTBROOK, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CLOWER

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

Specification: In that Technician Fifth Grade Virgle L. CLOWER, 495th Ordnance Heavy Automotive Maintenance Company, European Theater of Operations, United States Army, did, in conjunction with Private Kenneth A. WESTBROOK, United States Army, at Fontenay-sous-Bois, France, on or about 19 April 1945,

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wrongfully dispose of one hundred (100) gallons of gasoline, property of the United States, by sale, thereby diverting vital war supplies from use in military operations against the enemy during a critical period of combat operations.

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

Specification: In that Technician Fifth Grade Virgle L. CLOWER, 495th Ordnance Heavy Automotive Maintenance Company, European Theater of Operations, United States Army, did, in conjunction with Private Kenneth A. WESTBROOK, United States Army, on or about 19 April 1945, wrongfully and willfully, and without proper authority apply to his own use and benefit, a 3/4-ton truck, valued in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

WESTBROOK

Identical charges and specifications, with appropriate transposition of names.

3. In the opinion of the Board of Review the record of trial is legally sufficient to support so much of the findings of guilty of each accused of Charge I and Specification preferred against him as involves the finding that each accused did at the time and place alleged wrongfully and unlawfully dispose of 100 gallons of gasoline property of the United States, furnished and intended for the military service thereof, of a value of $16.18 in violation of the 94th Article of War (CM ETO 6226, Ealy; CM ETO 7506, Hardin; CM ETO 8556, Garrison), legally sufficient to support the findings of guilty of each accused of Charge II and Specification preferred against him (CM ETO 9288, Mills; CM ETO 11936, Tharpe et al) and legally sufficient to support the sentences.

B. Franklin Riter Judge Advocate

Wm. T. Sumner Judge Advocate

Edward C. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

20 AUG 1945

CM ETO 13279

U N I T E D S T A T E S	) SEINE SECTION, COMMUNICATIONS ZONE, UNITED STATES FORCES, EUROPEAN THEATER
v.	)
Staff Sergeant JOHN TIELEMANS (32899855), Technicians Fifth Grade, NICHOLAS J. TANELLA (32895971) and BEN HEFTER (39716554) and Privates HENRY R. ZYWIECKI (31422685), STANLEY MORESCHI (36712267) and OSCAR T. KOEHN (35923526), all of Company A, 716th Railway Operating Battalion	) Trial by GCM, convened at Paris, France, 2, 3 February 1945. Sentence as to each accused: (suspended in toto as to HEFTER, ZYWIECKI, MORESCHI and KOEHN) Dishonorable discharge, total forfeitures and confinement at hard labor, TIELEMANS, 15 years, TANELLA, 15 years, HEFTER, 8 years, ZYWIECKI, 5 years, MORESCHI, 10 years, KOEHN, 5 years. TIELEMANS and TANELLA, Eastern Branch United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

SPECIFICATION 1: In that Technician Fifth Grade Ben Hefter, Private Stanley Moreschi, Technician Fifth Grade Nicholas J. Tanella and Staff Sergeant John Tielemans, all of Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, at or near Versailles, France, and at or near Paris, France, and at various and sundry places between said places, between 1 September 1944 and 30 November 1944, jointly and in conjunction with each other, and other members of 716th Railway Operating Battalion, 724th Railway Operating Battalion and other railway operating personnel, agree and conspire to

defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint, and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were enroute to military forces engaging the enemy, and to other military forces of the United States, during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit.

Specification 2: In that Private Stanley Moreschi, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Paris, France, between 1 September 1944 and 30 September 1944, wrongfully dispose of sixty (60) cartons of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 3: In that Private Stanley Moreschi, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, on or about 15 October 1944, wrongfully dispose of forty (40) pounds of coffee, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Specification 4: In that Technician Fifth Grade Ben Hefter, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 5 November 1944, wrongfully dispose of thirty (30) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 5: (Disapproved by reviewing authority).

Specification 6: In that Technician Fifth Grade Ben Hefter, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 18 November 1944, wrongfully dispose of twenty (20) pounds of coffee, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Specification 7: In that Technician Fifth Grade Nicholas J. Tanella, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, on or about 10 September 1944, wrongfully dispose of five hundred (500) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 8: In that Technician Fifth Grade Nicholas J. Tanella, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, on or about 22 September 1944, wrongfully dispose of five hundred (500) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 9: In that Staff Sergeant John Tielemans, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, on or about 12 September 1944, wrongfully dispose of five hundred (500) packages of cigarettes, property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 10: In that Staff Sergeant John Tielemans, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Dreux, France, on or about 20 September 1944, wrongfully dispose of five hundred (500) packages of cigarettes, property of the United

States and intended for use in the military service thereof thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations.

Specification 11: In that Private Oscar T. Koehn, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, on or about 5 November 1944, wrongfully dispose of three (3) case of 10 in 1 rations, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Specification 12: In that Private Henry R. Zywiecki, Company A, 716th Railway Operating Battalion, European Theater of Operations, United States Army, did, at or near Versailles, France, between 1 November 1944 and 30 November 1944, wrongfully dispose of three (3) cases of 10 in 1 rations, property of the United States and intended for use in the military service thereof, thereby diverting vital food supplies from use in the theater of operations and contributing to a shortage of food supplies during a critical period of combat operations.

Tielemans, Tanella, Hefter and Moreschi each pleaded not guilty to the Charge and specifications preferred respectively against him. Zywiecki and Koehn each pleaded guilty to the Charge and specifications preferred against him. Tielemans was found guilty of Specifications1, 9 and 10; Tanella of Specifications 1, 7 and 8; Hefter of Specifications 1, 4 and 6 and of Specification 5, except the words "and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces during a critical period of combat operations" substituting therefor the words "received by him for his personal use", of the excepted words not guilty, of the substituted words guilty; Zywiecki of Specification 12; Moreschi of Specifications 1, 2 and 3, and Koehn of Specification 11. No evidence of previous convictions was introduced against any of the accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, Tielemans and Tanella each for 35 years, Hefter for 20 years, Zywiecki for five years, Moreschi for 25 years and Koehn for five years. The reviewing authority, as to Tielemans and Tanella, approved only so much of the sentences as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor each for 15 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each of the said accused, and forwarded the record of trial for action pursuant to Article of War 50½; as to Hefter, disapproved the findings of guilty of Specification 5, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight years, and suspended the execution of the sentence; as to

Zywiecki, approved the sentence but suspended the execution thereof; as to Moreschi, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 10 years but suspended the execution thereof; and as to Koehn approved the sentence but suspended the execution thereof.

The proceedings as to Hefter, Zywiecki, Moreschi, and Koehn were published in General Court Martial Orders Number 559, Headquarters, Seine Section, Communications Zone, European Theater of Operations, 31 May 1945.

3. The findings of guilty of accused Zywiecki and Koehn are based upon their pleas of guilty and their confessions in open court. As to accused Hefter and Moreschi, competent, substantial evidence supported the findings of guilty of each accused (Hefter: Specification 1,4 and 6; Moreschi: Specifications 1, 2 and 3). The pretrial extra-judicial statements of Hefter (R125; Pros. Ex. 6) and Moreschi (R127; Pros. Ex.7; R128; Pros.Ex.8) were admissible in evidence beyond question. The record of trial is legally sufficient to support the findings of guilty and the sentences of accused Hefter, Zywiecki, Moreschi and Koehn (CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al; CM ETO 12203, Bruce et al; CM ETO 12303, Jennings et al).

4. On the assumption that the pretrial extra-judicial statements of Tielemans (R86; Pros.Ex.2) and Tanella (R120; Pros.Ex.4) were admissible in evidence, the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. The authorities cited in the preceding paragraph support such conclusion. However, the validity of Tielemans' and Tanella's convictions depend upon the admissibility in evidence of their statements. If they were erroneously considered by the court the findings of guilty and the sentences as to said accused must be set aside, as the remaining evidence of guilt is not compelling (CM ETO 1201, Pheil, and authorities therein cited). It is necessary therefore, to consider whether there is substantial evidence in the record of trial which supports the court's decision that they were voluntary statements of said accused or whether the contrary is true and they were the products of compulsion and duress visited upon them or of promises of rewards or immunity made by agents of the Criminal Investigation Division of the Office of the Provost Marshal General.

Tielemans' statement (Pros. Ex.2) is dated 6 December 1944 and was obtained from him by Agent S.T. Michaelson at the Caserne Mortier (Seine Base Prison), Paris, on said date while Tielemans was in confinement. Likewise Tanella's statement (Pros. Ex.4) is dated 6 December 1944 and was obtained from him by Michaelson at the Caserne Mortier in Paris on said date while Tanella was also in confinement. The evidence showed that Tielemans and Tanella were present in the same room at the same time when interviewed by Michaelson, and there is a strong implication that the investigation, at least partially, was a joint one. Michaelson wrote the statements in long hand after the interviews and each accused then signed and swore to his statement. Tanella actually executed his statement prior to the time Tielemans signed and made oath to his statement.

Widespread thefts of vital and necessary food supplies and rations, owned by the United States and furnished and intended for the use by combat soldiers on the battle lines and other troops in the European Theater of Operations,

from railroad trains enroute from the Normandy beach-heads to Paris occurred in the late summer and early autumn of 1944. The facts and circumstances of the looting and diversion of supplies are set forth in detail, and are discussed in the holding of the Board of Review in CM ETO 8234, Young et al, supra, to which reference is hereby made. As a result of undercover and secret investigations, the arrest of suspected soldiers and particularly those who were members of the 716th and 724th Railway Operating Battalions was determined upon by the proper military authorities. In the execution of such plan the military police on 25 and 26 November 1944 made the arrest of about 500 soldiers (R91) who were suspected of the thefts of the food supplies and rations from the railroad trains and unlawful disposition of same. As the men were arrested they were taken to the Hotel Montcalm in Paris where they were held in custody for several days. During such time they were interviewed and investigated by Criminal Investigation Division agents who numbered about thirty(R91). Tielemans and Tanella were both taken to the hotel on 25 November where they remained under restraint until 6 December when they were removed to the Caserne Mortier where they were confined until time of trial.

The evidence presented by the defense intended to show that the statements of the two accused were not their free and voluntary acts and prosecution's evidence in opposition thereto are directed at two separate episodes at different times and places, but it is asserted by the defense that the evidence in its cumulative effect showed that each of the confessions were obtained by extra legal methods and were not voluntary.

EVENTS AT HOTEL MONTCALM

Tielemans

DEFENSE'S EVIDENCE: Tielemans on 3 December gave his first statement (R60; Pros. Ex.1) to an agent wherein he denied his guilt of theft and unlawful disposition of government property. As a witness, Tielemans asserted this statement was true. After making this statement, Tielemans testified, he was informed by the agents that he would not be released until he made another one (R67). When he informed one of the agents that he was from New York and was a supply sergeant the agent stated he was a "damn crook even before you start talking" and that five soldiers had informed him (the agent) that they had given Tielemans cigarettes for clothing and shoes (R68).

According to Tielemans, although the agent attempted to secure his admission of the truth of this accusation, he steadfastly denied the charge (R68). On the afternoon of 3 December, while Tielemans was being further interrogated by the agents, one of them "came over and swung at me and knocked me against the wall" (R68,73) and another agent exclaimed, "Throw him down in the hole. We'll give him another workout later". He was placed in another room and the guard was instructed to allow no one to talk to him. Michaelson, who was at the hotel, asked Tielemans concerning the assault by the agent and upon being informed of the details of the episode said such action was not necessary and he would see that Tielemans was not called again.(R68). Tielemans was not questioned further at the hotel and was not struck thereafter (R73). Three soldiers, who were held for investigation, testified that from a window across the area way or court of the hotel they saw Tielemans fall from a chair. One of the witnesses stated he saw an agent strike at Tielemans but did not see the blow reach him. The two other witnesses saw the agent strike Tielemans on the left side of his face and one of them actually saw him arise from the floor (R76,77,80,82).

PROSECUTION'S EVIDENCE: Michaelson testified no suspect or group of suspects

held at the Hotel Montcalm was discriminated against on the basis of having signed or not signed a confession. No punishment was imposed for failure to give a statement (R116-117). Michaelson further asserted that he did not remember any discussion with Tielemans with respect to his being from New York and a supply sergeant and thus bound to be in trouble (R65). While Michaelson interrogated Tielemans at the hotel several times on or after 25 November, he never struck him nor was he present when he was struck. Tielemans showed no bruises or other signs of being struck (R84). The agent admitted that Tielemans may have complained to him of harsh treatment. "I am not saying that he didn't; I'm not saying that he did" (R84), but he heard a rumor about such fact (R65).

Tanella

DEFENSE'S EVIDENCE: Tanella testified that he made a statement to the agents on 26 November at Hotel Montcalm in which he denied guilt. This statement was true. An agent accused Tanella of being a "damn liar" with respect to an assertion in his first statement (26 November) to the effect that he had found money (80,000 francs) in an isolated box car in Versailles and accused him of looting. The agent asked him if he knew what perjury was and upon Tanella answering in the negative, stated that if he (Tanella) signed the first statement five or ten years would be automatically added to his sentence and the agent would personally see that such result followed (R93,94). The agent expressed incredibility as to the amount Tanella stated he won in gambling and a major who was present declared his disbelief of his statement that he found 80,000 francs. An agent said, "Throw him down in the hole" (R95), and there he was placed for 48 hours (R94,95). The "hole" consisted of three rooms in the basement of the hotel, which had no windows and there was no heat. The "hole" was used as a storage for furniture. It was crowded because it was too small to contain all of the suspects. Smoking made the air foul. The only drinking water was brought in a bottle by a military policeman. It was intended for a man afflicted with venereal disease but all of the men were compelled to drink from the bottle. Only one meal was served Tanella during that period - "C" rations and a cup of coffee (R95).

After 48 hours Tanella was brought from the "hole" and given a hot meal at a casual mess in the vicinity of the hotel (R95). He was then placed in a room on the second floor of the hotel. There was a guard in the hall who took the mattresses from the men who had made no statements and would not allow them to sleep, nor did the guards allow such men to sit down. Tanella did not sleep that night. Only men who had signed statements were given mattresses and allowed to sleep (R96). Tanella testified that he was "scared" as a result of being in the "hole". An agent named Johnson, informed him that if he signed a statement he would be released and accordingly he signed one on 29 November (which was not introduced in evidence) "to cover up for something else" (R98, 102). However, Tanella was not released, but was taken to Caserne Mortier (R98). The statement of 29 November was false - "it was made up" (R93-94). The first statement of 26 November was destroyed when he gave the second statement (R102). Two other soldiers who were held at Hotel Montcalm at the time Tanella was in custody corroborated Tanella's description of the "hole" (R107-110). Likewise Tanella's testimony with respect to the action of the agents in preventing men from sleeping unless they made statements received support by the testimony of these soldiers (R110-114).

PROSECUTION'S EVIDENCE: Michaelson testified that on the night of 25 November, about 300 men were brought to Hotel Montcalm for the purpose of questioning. There was no heat in the hotel* and its capacity was limited. The cellar was warmer than the upper floors of the hotel. It was essential that the suspects be separated, and the agents in conducting the interviews required separate rooms. The men were not sent to the cellar as punishment, but were confined there temporarily as a matter of necessity. Their presence in the cellar was not related to the fact that they had or had not made statements. Michaelson thought the men were fed as often as the agents. "C" rations and coffee were furnished on several occasions and there was no discrimination practiced against men who refused to give statements (R116-117). One of the military police who acted as guard at the hotel testified that while the guards kept the men under close surveillance the men were not awakened from their sleep without reason, but only for the purpose of interrogating them (R109). Agent Correri testified "Those men never stayed in the basement over night" (R124).

EVENTS AT CASERNE MORTIER

Tielemans

DEFENSE'S EVIDENCE: Tielemans testified that he was removed to Caserne Mortier (Seine Base Prison) and the next time he was questioned was on 6 December when Michaelson came to see him. A soldier by the name of Raubolt had stated to Michaelson and other agents that he had given cigarettes and candy to Tielemans in exchange for issue clothing. This statement was absolutely untrue and Tielemans demanded that Raubolt correct such assertion. Michaelson said to Tielemans with respect to this accusation: "Yokels like that (referring to Raubolt) will hang you making such statements." Tielemans had also admitted to Michaelson that he had drawn clothing for the men of his company on improper requisitions. Michaelson said to him "that would hang you or give you fifty years if they ever put that sentence to you" (R68). This statement was in the form of a threat (R73). Michaelson further said to Tielemans that he

> "would get a little bit more of the medicine I got at the hotel because he couldn't watch out for me down there. He said while he's in the hotel, nothing would happen but he wasn't there" (R69).

However, Michaelson made Tielemans believe that he was taking care of him (R69).

Michaelson said to Tielemans that a case of cigarettes was worth $22.50 and that

> "if you make out a statement for two cases of cigarettes that's $45.00. You would be tried in court and you would probably get one to six months, instead of letting them find out about the clothing you issued out" (R69).

* In the Autumn and early winter of 1944 the fuel situation in Paris was extremely precarious. It was in December before the majority of the billets of the American soldiers received heat and many of the billets were unheated all winter. The civilian population suffered severely during the winter and the fuel ration permitted practically no heating of living apartments and was severely restricted for cooking purposes. Theaters, cafes and auditoriums were never heated. The Board of Review takes judicial notice of these notorious facts.

Michaelson then constructed the statement (Pros. Ex.2).

> "to make it fit with the amount of money I had and the amount of money I had in my possession. He made out the entire statement. He figured it out on paper" (R69).

Tielemans did not dictate the statement to Michaelson but he signed it because:

> "I had known I had improper requisitions. I knew I had drawn clothing out of the different depots I wasn't supposed to get. I figured if they wanted me to sign the statement, I would sign it for cigarettes. I never went near the place for cigarettes (R69) * * * I wasn't afraid, I figured I was telling something for our own good" (R71).

The accused asserted that the reference to the cigarettes in his statement to Michaelson of 6 December (Pros. Ex.2) was false (R70).

PROSECUTION'S EVIDENCE: Michaelson testified that he warned Tielemans of his rights under the 24th Article of War before securing the statement of 6 December (Pros. Ex.2); that the accused seemed to understand the warning; that he did not threaten him or use compulsion upon him and Tielemans gave the statement voluntarily (R60,61,86). Michaelson admitted that the statement referred to the exact amount of francs which were in the accused's possession at the time of his arrest (R61). Tielemans and Tanella were "practically inseparable" as the latter was the former's assistant.

Michaelson stated he was on very friendly terms with both accused and addressed them by their Christian names of "John" and "Nick" (R62). He saw and talked with them at the Caserne Mortier on the evening of 6 December (R61). Tielemans solicited Michaelson's assistance in "straightening out" the charge made by the soldier, Raubolt, that he had given cigarettes to Tielemans in exchange for property issued to him. Tielemans and Tanella requested Michaelson that Raubolt be brought into the room for the purpose of securing a correct statement from him (R62). This was done (R65) and Raubolt repudiated his former accusation against Tielemans (R66).

In discussing the theft of government property, Tielemans informed Michaelson that he and Tanella each "got two cases" of cigarettes. Michaelson asked the amount of money Tielemans received on sale of same. Upon being informed by Tielemans that he had received 125 to 150 francs per package, Michaelson informed him that a case of cigarettes cost the United States $20 or $25.00 (R63-64). The agent wrote Tielemans statement as the latter gave it in response to questions. Michaelson didn't believe he informed either Tielemans or Tanella they would probably be tried by a special court and would not even lose their rank (R64). He didn't remember the remark about "yokels", but might have said it (R66). He denied that he suggested to Tielemans that he "might get 50 years" for something else he had confessed if he did not sign the confession (Pros.Ex.2). but he admitted the accused informed him concerning the clothing requisitions (R86). Further, Michaelson denied that he made representations to Tielemans concerning a sentence of one to six months confinement for the disposal of cigarettes and 50 years confinement for other offenses (R85).

TANELLA

DEFENSES EVIDENCE: Tanella testified that his statement (Pros.Ex.4) secured by Michaelson at Caserne Mortier on the evening of 6 December was false (R97). After Raubolt had corrected his statement eliminating Tanella's and Tielemans' names therefrom, Tanella informed Michaelson "what happened in the 'hole'", and that he was "scared", Michaelson said

> "he couldn't release me, but he could-- he'll fix a statement up stating that I didn't steal the stuff and so that it would be petty larceny, and that's the statement he made there, sir" (R98) " * * He said 'the most you can get for two cases of that is $22.50 each. That amounts to less than $50.00;anything under is petty larceny" (R99).

He further informed Tanella that the maximum punishment would be six months confinement which would probably "be cut down to two months by the reviewing board" and by good behaviour accused would be back in his outfit in 30 days with his rating. The agent mentioned the fact that Tielemans and Tanella had wrongfully drawn clothing at Reims. He further said that Raubolt was "just the kind of yokels that could hang" Tielemans and Tanella (R99,101). Tanella was afraid of the treatment he received in the "hole" and of the statement "about getting fifty years for clothing" and he thought he was getting a reward for signing the statement. He also made the statement "to cover up for selling guns and making ash-trays to GIs" (R101). He admitted that he had never been beaten, except one of the guards said "if they leave him in the room with us alone he would make all of us talk one at a time" (R104).

PROSECUTION'S EVIDENCE: With respect to Tanella, the agent, Michaelson, asserted that this accused gave his statement (Pros. Ex.4) at the Caserne Mortier on 6 December after timely warning; that it was voluntarily given and that Tanella was not threatened and no promise of reward or immunity was made to him. Accused dictated it to the agent who wrote it , and it was then read to and by Tanella. It was obtained immediately prior to Tielemans' statement (Pros. Ex.2) and both accused were then present in the room (R88,115). Michaelson did not know Tanella before that night (R91). The accused desired to make a new statement after Raubolt retracted the accusation against Tielemans and Tanella. The latter said to Michaelson "I took about two cases of cigarettes individually" (R89). Michaelson admitted that Tielemans' (Pros. Ex.2) and Tanella's (Pros. Ex 4) statements were practically identical. He explained "Tielemans' story is in substance the same as Tanella's statement". Tanella informed Michaelson he received 125-150 francs per package for the cigarettes and then Michaelson "figured out what it amounted to and what it came to in dollars". Michaelson denied he stated to Tanella that the alleged drawing of clothing was a bad thing and he might receive a long sentence for the offense (R90). Michaelson testified that in his opinion

> "the taking of the cigarettes was not particularly such a grievous thing on the part of these boys because some of them fell into it" (R91).

He denied, however, that he promised Tanella that if he confessed he would obtain a lighter sentence, and also denied that he stated that the taking of two boxes of cigarettes would only be petty larceny (R115). He didn't think he told Tanella or others that the taking of the boxes of cigarettes was not a grievous thing (R91). and

he didn't believe he informed Tanella that he would be tried by a special court. He denied positively that he told Tanella that he probably would not lose his rank (R64).

5. Of grave importance in consideration of the validity of the sentences of Tielemans and Tanella is the question whether the admission in evidence of their extra-judicial statements, secured under the circumstances hereinabove summarized, so vitiated the legality of the trial as to constitute a violation of the due process of law clause of the Fifth Amendment to the Federal Constitution.

> "The rule is basic that the guarantee of due process of law in the Fifth Amendment to the United States Constitution extends to persons on trial before courts-martial (Grafton v. United States, 206 U.S. 333, 51 L.Ed. 1084 (1907); Sanford v. Robbins (C.C.A.5th 1940), 115 F(2nd) 435; Schita v. King (C.C.A.8th 1943),133 F (2nd) 283; United States v. Hiatt (C.C.A. 3rd 1944), 141 F (2nd) 664; and other authorities cited in CM ETO 4564, Woods). It is incumbent upon the Board of Review, as well as all other military justice authorities, to insure that every accused before a court martial received a fair trial"(CM ETO 13222, Howard).

The Board of Review will examine a record of trial to discover whether an accused's constitutional rights have been violated (CM ETO 567, Radloff, II Bull JAG 429; CM ETO 2297, Johnson and Loper; CM ETO 4564, Woods;CM ETO 9128, Houtchins and Bailey; CM ETO 13222, Howard, supra).

The Federal civil courts upon habeas corpus proceedings will undo convictions by courts-martial when violation of an accused's constitutional rights is shown or where the proceedings disclose the lack of "due process of law" as guaranteed by the Fifth Amendment (see authorities cited supra). Undoubtedly a conviction based upon a confession where the evidence is clear and uncontradicted that it was obtained by force and compulsion would be nullified for the reason that the proceedings would represent a departure from the "fundamental principles of liberty and justice" (Hebert v. Louisiana, 272 U.S. 312, 316, 71 L Ed. 270, 273)(1926), which are indigenous in our judicial process (Boyd v. United States, 116 U.S. 616, 29 L.Ed.746 (1886))

While a court-martial is not a part of the judicial branch of the government, but is an agency of the executive, it is a legally constituted court and

> "Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations, which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest , under like circumstances" (Ex Parte Reed, 100 US 13,23; 25 L. Ed.538,539 (1879).

See also Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838 (1858); Grafton v. United States, 206 U.S. 333, 51 L. Ed. 1084 (1907)

It is therefore consistent and logical to believe that the Federal civil courts, in examining into the regularity of a trial before a court-martial in the light of the due process clause of the Fifth Amendment, would apply the same rules as are applied in the examination of proceedings of State courts where the due process clause of the Fourteenth Amendment is called into issue. This conclusion if fortified by the fact that both State courts and courts-martial are independent of the Federal judicial system and the right and authority of the Federal civil courts to examine into the regularity of their proceedings are premised among other grounds upon the presence of a question involving the violation of a Federal constitutional right of an accused.

With respect to alleged involuntary confessions of accused convicted in State courts, the Supreme Court of the United States has spoken as follows:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession.
>
> To extort testimony from a defendent by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession which is used as evidence in the courtroom.
>
> * * *
>
> Where the claim is that the prisoner's statement has been procured by such means we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury or both. If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.

There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.

Here judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process" (Lisenba v. California, 314 U.S.219, 236-238), 86L. Ed.166, 180,181 (1941) (Underscoring supplied)

"The federal question presented is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of due process clause of the Fourteenth Amendment, which requires that state criminal proceedings 'shall be consistent with the fundamental principles of liberty and justice'.

* * *

When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanourof the witnesses but the legal duty is upon them to make the decision.

* * *

Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of facts is left the determination of the truth or error of the testimony ofprisoner and official alike. It is beyond question that if the triers of fact accepted

as true the evidence of the immediate events at McAlester, which were detailed by Warden Dunn and the other witnesses, the verdict would be that the confession was voluntary, so that the petitioner's case rests upon the theory that the McAlester confession was the unavoidable outgrowth of the events at Hugo.

* * *

The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice', and in a way that 'necessarily prevents a fair trial'. * * * A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but beaause declarations procured by torture are not premises from which a civilized forum will infer guilt. The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession. We cannot say that an inference of guilt based in part upon Lyons' McAlester confession is so illegical and unreasonable as to deny the petitioner a fair trial" (Lyons v. Oklahoma-U.S.-,64 Sup. CT. 1208, 1212-1214, Adv. Sheet July 1, 1944, No.16) (Underscoring supplied)

(Cf: Brown v. Mississippi, 297 U.S. 278, 80 L.Ed 682 (1936) Chambers v. Florida, 309 U.S. 227, 60 S.CT.472, 84, L.Ed. 716(1940) Ashcraft v. Tennessee, 322 U.S.143, 64 S. CT.921, 88 L.Ed. 1192 (1944).

As the first step in the process of determining whether Tielemans' and Tanella's extra-judicial statements were obtained as the result of coercive treatment, the evidence of the facts and circumstances surrounding their obtention must be examined for the purpose of deciding whether

"There is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts" (Lyons v. Oklahoma, supra).

If it be concluded that the evidence created an issue of fact whether coercive acts occurred which resulted in the obtention of the confession, or if the total evidence permits the inference of non-coercion as logically and sequentially as the inference of coercion, the Board of Review will not substitute its views or conclusions for those of the court but will accept the findings of the court as conclusive and binding, (CM ETO 15843, Dickerson). Oppositely if there is exhibited by uncontradicted evidence a situation.

"So inherently coercive that its very existence

is irreconcilable with the possession of mental freedom" (Ashcraft v. Tennessee, supra)

by Tielemans and Tanella, the Board of Review is under the solemn obligation to declare that conclusion notwithstanding the fact that the court in the trial of this case made an opposite finding.

The evidence is clear that on the occasion of the interview of Tielemans and Tanella by Michaelson, the agent of the Criminal Investigation Division, on the evening of 6 December 1944 at the Caserne Mortier, where they had been in confinement since their removal from the Hotel Montcalm, the two accused were primarily concerned with the accusation against them made by the soldier, Raubolt. Tielemans as the supply sergeant of his company and Tanella, as his assistant, had been accused by Raubolt of accepting candy and cigarettes from the members of the company in exchange for clothing. The two accused vigorously denied this charge. When Michaelson appeared they insisted that he obtain Raubolt's retraction. Raubolt was brought before the accused and under Michaelson's supervision he repudiated this accusation. Michaelson in his testimony corroborates the accuseds' assertion on this aspect of the evidence.

It is also beyond dispute that Michaelson had learned from Tielemans that the latter was involved in irregular practices in the requisition of clothing for the company and that Tanella was equally involved in such acts.

Michaelson testified he was on friendly terms with accused and addressed them by their Christian names of "John" and "Nick". His action in securing Raubolt's repudiation of his charge against them was a gratuitous act which carried the definite implications of sympathy and friendship. As relevant to Michaelson's method of approach to the two accused at the time of this interview, another facet of the evidence is highly illuminative. While at the Hotel Montcalm Tielemans had been struck in the face by an unidentified investigator. This fact was proved beyond dispute. The prosecution did not attempt to disprove it. Michaelson admitted he had heard rumors of the affair, and he refused to deny that Tielemans had informed him that he had been abused "I am not saying that he didn't; I am not saying that he did". Tielemans testified (and this assertion is undenied) that Michaelson declared that such treatment was not necessary and that thereafter he (Tielemans) would not be questioned. Subsequently Tielemans was neither molested physically nor was he interrogated until Michaelson came to see him on the evening of 6 December.

The evidence is convincing that Tielemans believed Michaelson had intervened and prevented further mistreatment by other agents at the Hotel Montcalm and both accused had seen Michaelson secure from Raubolt a withdrawal of his accusation. There was therefore genuine substance to Tielemans' assertion that he believed Michaelson was "taking care" of him. Tanella, due to his close association with Tielemans, accepted the latter's belief as his own. Michaelson unconsciously displayed his attitude when he testified that in his opinion

> "the taking of the cigarettes was not particularly such a grievous thing on the part of these boys because some of them fell into it" (R91).

Whether he actually informed accused, "Yokels like that /referring to Raubolt/ will hang you making such statements", or "that /referring to the use of improper clothing requisitions/ would hang you or give you fifty years if they ever put that sentence to you" are really immaterial matters in view of the overall evidence that he had succeeded in encouraging the beliefs by accused that not only was he not unfriendly to them, but also that he was sympathetic and understanding as to the situation which confronted them. The evidence definitely implies that Michaelson and the accused did not deal at "arms length", but that the agent had established a quasi fiduciary relationship with them. It was in this role that Michaelson conducted his interview with accused.

It is clear from Michaelson's version of the interview that followed that he engaged in a process of computing values of cigarettes and determining the gravity of the offenses with which accused could be charged. He admitted that Tielemans' statement referred to the exact amount of francs which were in the latter's possession at the time of his arrest, and he declared both Tielemans and Tanella stated they received 125-150 francs per package of cigarettes and that they each took two cases of cigarettes. He further admitted that both Tanella's and Tielemans' statement were practically identical and explained, "Tielemans' story is in substance the same as Tanella's statement". His testimony then became equivocal. He "didn't believe" he informed either of accused they would be tried by special court and would not even lose their rank; he didn't remember the remark about "yokels" but might have said it; and he didn't think he told Tanella or others that the taking of two boxes of cigarettes was not a grievous thing.

An examination of Tielemans' statement (Pros. Ex.2) shows the following interesting and significant coincidence. Tielemans accounted for his cash funds as follows:

Computation of Total Cash

Amount remitted Mrs. Tielemans by postal orders	$3400.00
Postal orders in Tielemans' possession	1000.00
French francs (16086) in Tielemans' possession on arrest	321.72
TOTAL CASH	$4721.72

Sources of Cash:	
Funds held by Tielemans on arrival in France	$1900.00
Proceeds of sale of two cases of cigarettes ($1375 per case)	2750.00
TOTAL	$4650.00

Tielemans' assertion that Michaelson made the statement:

> "fit with the amount of money I had, and the amount of money I had in my possession. He made out the entire statement. He figured it out on paper" (R69). (Underscoring supplied)

is therefore corroborated by the recitals contained in the statement. Such intrinsic evidence gives rise to the strong suspicion that the statement was the result of a bargain. Michaelson obtained a statement and thereby was able to show results for his efforts. Tielemans confessed to an offense calling for (as he believed) a special court sentence and he also hoped he had "side-tracked" charges for misuse of clothing requisitions. Tanella's statement and situation were identical with that of Tielemans. Michaelson admitted with respect to Tanella's statement that "he figured it out what it amounted to and what it came to in dollars".

Considered and painstaking analysis of the testimony in this case with respect to the obtention of the extra-judicial statements from the accused by Michaelson compels the Board of Review to conclude that in its ultimate reach it showed without contradiction that Michaelson obtained the confessions by first obscuring his real purpose with the mask of friendship, and thereby gained the confidence of the accused. Having gained this advantage he used (a) Raubolt's accusation (although repudiated by Raubolt) and (b) Tielemans' and Tanella's admitted misuse of clothing requisitions as the means of pressing from accused the desired confessions concerning the theft and wrongful disposition of the cigarettes. The inference from these facts is almost irresistable that Michaelson did not concern himself with the extent of the criminality of the accused (if in truth there were criminality) nor with the crucial fact whether the accused told the truth in their statements so long as he received some kind of an inculpatory statement from them pertaining to cigarettes. He was perfectly willing to bargain with them if thereby he could attain his purpose. The ultimate question of accuseds' innocence or guilt is subordinated to the major one presented for consideration. Can it be judicially declared that the extra-judicial statements were free from compulsion and coercion so that their use to secure the convictions of accused did not infect the trial with "fundamental unfairness which is at war with due process" of law as guaranteed by the Fifth Amendment?

In considering the circumstances surrounding the obtention of the confessions, the Board of Review has elected to disregard the transactions and events at Hotel Montcalm which preceded their procurement by several days. In this treatment of the evidence the prosecution has been favored. Those prior episodes may or may not have influenced the events at the Caserne Mortier. As to that issue the Board of Review will resolve the same against accused and proceed on the premise that they were too remote to have any vital effect upon accused notwithstanding their statements otherwise. It is Michaelson and the events at the Caserne Mortier when the confessions were obtained which have concerned the Board of Review and upon which it elects to pass judgment.

The instant case does not follow the pattern of cruelty, violence and brutality of the Brown, Chambers and Ashcraft cases which was denounced by the Supreme Court, but in the opinion of the Board of Review there is indisputably exhibited in the instant case compulsion and coercion in a most subtle and poisonous form. Compulsion or coercion in whatever form or shape it may be exercised renders a confession involuntary. Whether it be by direct application of physical violence or through a long course of inquisitional presecution which eventually breaks the will of the suspect or whether it is applied by subtle or concealed means whereby the accused

is put in fear and his will subjugated to the wishes of his inquisitor, the result upon the judicial process is the same. With perfect assurance it may be asserted that fear engendered in an accused through non-violent means may be as effective in producing desired results as the worst form of physical brutality. As to some individuals it may amount to a form of torture more cataclysmic in its affect than bodily violence.

The following quotation is particularly applicable to the confessions here involved:

> "When all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary, overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind" (Bram v. United States, 168 U.S. 532,562, 42 L. Ed.568,580 (1897).

Michaelson's insidious conduct when placed against the background of the conditions and circumstances under which the accused gave their confessions can produce but one reaction upon the mind of an unbiased person. The confessions were obtained not as the voluntary acts of accused, but as a result of the manipulation by Michaelson of a series of events in such manner as to offer the accused no escape from their involvement except to agree to confessions formulated and devised by Michaelson. It would be a misuse of the terms to characterize them as voluntary, free-will offerings. The truth or falsity of the confessions and the guilt or innocence of accused are insignificant matters as compared with the necessity of keeping the military judicial process free from suspicion. Convictions cannot be sustained which are dependent upon confessions when the confessions were obtained by the means contrived and used by Michaelson in the instant case. The Board of Review is of the opinion that the extra judicial confessions of the accused were inadmissible in evidence and, therefore, the record of trial is legally insufficient to sustain the findings of guilty of accused Tielemans and Tanella.

6. The charge sheets show the service of the several accused as follows:

ACCUSED.	AGE	INDUCTED DATE	INDUCTED PLACE
Tielemans	31 years 11 mos.	29 April 1943	New York City, N.Y.
Tanella	20 years 7 mos.	24 April 1943	New York City, N.Y.
Hefter	32 years 3 mos.	11 November 1943.	Los Angeles, Calif.
Zywiecki	34 years 1 mo.	29 September 1943.	Boston, Mass.
Moreschi	23 years 9 mos.	23 November 1942.	Chicago, Ill.
Koehn	39 years	8 December 1943	Cleveland, Ohio.

Each accused was inducted to serve for the duration of the war plus six months.

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and the service period of each is governed by the Service Extension Act of 1941. No prior service of any of the accused is shown.

7. The court was legally constituted and had jurisdiction of the persons and offenses. As to accused Hefter, Zywiecki, Moreschi and Koehn no error injuriously affecting the substantial rights of said 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 of said accused to support the findings of guilty and the sentences as approved.

For the reasons herein above stated, the Board of Review is of the opinion that the record of trial is legally insufficient as to accused Tielemans and Tanella to support the findings of guilty and the sentences as approved.

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

6 SEP 1945

CM ETO 13285

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private LLOYD G. FAUGHT (36361054), 78th Battalion, 18th Reinforcement Depot	Trial by GCM, convened at Seine Section, Paris, France, 12 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. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

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

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

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

Specification. In that Private Lloyd G. Faught, 78th Battalion, 18th Reinforcement Depot, European Theater of Operations, United States Army, did, at his organization, on or about 26 November 1944, desert the service of the United States and did remain absent in desertion until he came under military control at Paris, France, on or about 20 February 1945.

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

Specification. In that * * * did, at Paris, France, on or about 20 February 1945, with intent to do bodily harm, commit an assault upon Sergeant Booker T. Mills, Company A, 787th Military Police Battalion, Seine Section, Com Z, European Theater of Operations, United States Army, by shooting at him with a dangerous weapon, to wit a U.S. Army .45 caliber automatic 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 both charges and their specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I as finds the accused guilty of deserting the service of the United States on or about 15 December 1944 and remaining absent in desertion until apprehended on 20 February 1945, 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 prosecution's evidence was not disputed that on 20 February 1945 in Paris, France, accused was approached by a military police sergeant and asked for his pass. Accused produced a trip ticket. The sergeant observed it was dated 1944 and was not satisfied. Accused requested permission to give some sandwiches to his "girl friend", who worked at a nearby cafe. The sergeant accompanied him to the cafe but the girl sought was not present. After waiting 20 or 30 minutes, the sergeant informed him they had to go. Accused then asked permission to leave the package and a message with the bartender. While the sergeant stood outside, accused entered the cafe, and ran up a flight of stairs. The sergeant followed. From the third floor accused fired seven shots in the sergeant's direction, the first striking the wall near him. The sergeant fired two shots in return. Accused having emptied his pistol, the sergeant advised him to throw out his weapon and come out with his hands up. Accused complied (R6-17). Later accused was interviewed by an agent of the Criminal Investigation Division and voluntarily signed a confession in which he admitted his apprehension after resistance

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as above described and his absence without leave from his organization from 15 December 1944 until the date of his apprehension (R17-20; Pros.Ex.2).

An extract copy of the morning report of accused's organization, signed by the personnel officer, showing accused "AWOL as of 0800 hrs 26 Nov 44", was received in evidence over the objection of the defense (R5-6; Pros.Ex.1).

4. After his rights were explained, accused elected to remain silent (R21) and no evidence was offered in his behalf.

5. The extract copy of the morning report was improperly admitted over objection of the defense. It was signed by the personnel officer, who had no authority on the date in question to sign a company morning report (1st Ind., CM ETO 9271, Cockerham). However, no substantial right of accused was injuriously affected thereby since the reviewing authority's action modified the findings of guilty of desertion as to the date of his initial absence from 26 November 1944 to 15 December 1944, the latter date being correct according to accused's voluntary confession. The facts shown by the evidence -- an American soldier in Paris without authority, attempting to escape with the assistance of a civilian girl and firing seven shots from a government 45 pistol at the military police sergeant, are sufficient to show an unauthorized status, i.e., absence without authority from his proper place of duty, and thus a sufficient basis for acceptance of his confession. The evidence supports the court's findings of guilty of Charge I and Specification (CM ETO 1629, O'Donnell; CM ETO 952, Mosser) and of Charge II and Specification (CM ETO 1585, Houseworth; CM ETO 3366, Kennedy).

6. The charge sheet shows that accused is 24 years of age and was inducted July 1942 at Camp Grant, Illinois. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized for desertion in time of war by Article of War 42

and for assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Levey Jr Judge Advocate

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

BOARD OF REVIEW NO. 3

12 JUL 1945

CM ETO 13286

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, 24 May 1945.
Privates MIKE A. URIBE (39288076) and JAMES A. WATERFIELD (13017155), both of Troop C, 44th Cavalry Reconnaissance Squadron (Mechanized)	Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

URIBE

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

Specification 1: In that Private Mike A Uribe, Troop "C", 44th Cavalry Reconnaissance Squadron (Mechanized), did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany, on or about 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ursula Helm, German Civilian.

Specification 2: In that * * * did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany, on or about 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ida Ernst, German Civilian.

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

Specification: In that * * * did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany, on or about 12 April 1945, wrongfully and unlawfully enter the dwelling of Otto Ernst at Grossburgwedel, 136, Hanover, Germany, with intent to commit criminal offenses, to wit, rape, assault, and robbery, therein.

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

Specification 1: (Disapproved by Reviewing Authority)

Specification 2: In that * * * did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany, on or about 12 April 1945, wrongfully enter the home of German civilians, did therein wrongfully threaten the civilian occupants with show of arms, and did therein wrongfully have sexual intercourse with Ursula Helm, and Ida Ernst, German civilians, to the scandal and disgrace of the military service.

WATERFIELD

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

Specification: In that Private James A. Waterfield, Troop "C", 44th Cavalry Reconnaissance Squadron (Mechanized), did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany on or about 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ursula Helm, German Civilian.

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

Specification: In that * * * did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany, on or about 12 April 1945, unlawfully enter the dwelling of Otto Ernst at Grossburgwedel, 136, Hanover, Germany, with intent to commit criminal offenses, to wit, rape and assault, therein.

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CONFIDENTIAL

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

Specification: In that * * * did, at or near Grossburgwedel, Kreis Burgdorf, Province of Hanover, Germany, on or about 12 April 1945, wrongfully enter the home of German civilians, did therein wrongfully threaten the civilian occupants with show of arms, and did therein wrongfully have sexual intercourse with Ursula Helm, a German civilian, to the scandal and disgrace of the military service.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the time each vote was taken concurring, each was found guilty of all charges and specifications pertaining to him. Evidence was introduced of two previous convictions of accused Waterfield, one by special court-martial for being disorderly in uniform in a public place in violation of Article of War 58 (sic), the other by summary court for two days' absence without leave in violation of Article of War 61. No evidence was introduced of previous convictions of accused Uribe. All members of the court present at the time each 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 rest of his natural life. The reviewing authority disapproved the findings of guilty of Specification 1, Charge III, as to accused Uribe, approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

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

At about 0300 hours 12 April 1945 the two accused entered the dwelling of Otto Ernst, a German civilian, at Grossburgwedel, 136, Hanover, Germany (R9). Other American soldiers - but neither accused - were billeted in a portion of the same house (R15,19,23, 39). Ernst, his wife and two female refugees occupied two connecting bedrooms, only one of which had an entrance into the hallway, so that it was necessary to pass through that - hereinafter referred to as the first - bedroom in order to go from the hall to the second. Ursula Helm, aged 17, was sleeping in the first bedroom, Mr. and Mrs. Ernst and Margaretta Boortz, a 62 year old refugee, in the second (R9,11-12,23). Upon entering the house, accused knocked on the door of the first bedroom and Ernst opened it (R10,23). Accused had a

flashlight and a pistol. They pushed Mr. and Mrs. Ernst into the second bedroom and pointed the pistol at them (R10,23-24,44). Uribe got into bed with Ursula, tore off her nightshirt, and proceeded to have intercourse with her. She submitted through fear, explaining that the soldiers were "handling the pistol pretty freely" (R45). She called to Ernst once for help (R28,45). Then Waterfield, who had taken the pistol, put his hand over her mouth (R46).

Uribe stayed for about an hour in Ursula's bed (R47). Part of this time Waterfield was in the second bedroom pointing the pistol at the occupants who were in their beds (23-24,30-31,38-40). When Uribe rose from Ursula's bed he took the pistol from Waterfield and went into the second bedroom (R49). There, pointing the pistol and making menacing gestures with a razor, he caused Ernst to get into bed with Boortz while he proceeded to have sexual intercourse with Mrs. Ernst after requiring her to remove all of her clothing. She submitted only through fear (12-14,24,33-34,40-41).

In the meantime Waterfield got into bed with Ursula and had sexual intercourse with her at least three times. She did not consent but was too frightened to resist (R46-48). While Waterfield was in bed with Ursula, Uribe brought Mrs. Ernst into the first bedroom. She was entirely naked. Ursula at that time was moaning. The two others got into bed with Ursula and Waterfield, engaged in an act of sexual intercourse there, then returned to the second bedroom where, after a third act, Uribe fell asleep on top of Mrs. Ernst (R14-15, 26-27,37,41,50-51).

A neighbor woman came into the second bedroom to rouse Mrs. Ernst at 7:00 o'clock. When she left, Waterfield entered and woke Uribe who was still sleeping on top of Mrs. Ernst (R16,28). The two soldiers picked up the pistol which was lying on the bed and took their departure, leaving behind them a razor, a jacket and a notebook (16,20,21,28,37).

At about 8:00 o'clock the same morning, accused's troop commander, acting on information received, visited the Ernst residence and saw bloodstains on the sheets in the first bedroom (R51,53). A medical examination of Ursula at 9:00 o'clock the same morning revealed a recently ruptured hymen as well as blood, abrasions and tenderness about the vagina. If the rupture of the hymen was caused by sexual intercourse as it appeared to be, it was the first time Ursula had experienced it (R59-61). Both accused made pre-trial sworn statements admitting intercourse, Waterfield with Ursula, Uribe with Ursula and Mrs. Ernst, also that Waterfield "chased the old man and woman" from Ursula's room. Aside from this "chasing"

there is no suggestion in these statements of force, threats or lack of consent. Waterfield's statement represents that he was drunk an hour before he entered the Ernst residence; Uribe's that he had been drinking some on the night in question (R54-59; Pros. Exs.1 and 2).

4. After their rights were explained to them, Uribe elected to remain silent (R70); Waterfield testified, under oath, substantially as follows:

Accused entered a hallway of the Ernst house and knocked at an inside door which was opened by Mr. and Mrs. Ernst. They asked for cognac and Ernst indicated that he had none. Waterfield then saw Ursula sitting up in bed and asked Ernst if they could sleep with her. Ernst made no reply, the girl lay down, and Uribe said, "I'll go first". Waterfield conducted the Ernsts into the second bedroom (R63). He had no pistol, but observed one in Uribe's holster. He remained with the Ernsts and Boortz in the second bedroom smoking until Uribe came in and took the flashlight (R64-65). Then he got into bed with Ursula and had intercourse with her. She did not resist but silently cooperated (R65,67). At one time Uribe and Mrs. Ernst got into bed with them and Uribe remarked that Mrs. Ernst really knew how to do it. He - Waterfield - fell asleep. When he awoke it was dark and he called Uribe. Mrs. Ernst replied from the second bedroom, "Comrade schlaffen" (R65). After this, he again had intercourse with Ursula. This time she got on top of him and inserted his penis in her vagina. While they were thus engaged, a neighbor entered, conversed with Mrs. Ernst in the next room and departed. Having completed his final act of intercourse with Ursula, Waterfield rose and awakened Uribe, whose pistol accused found on the bed. It was then "around seven thirty or a quarter to eight". He did not see Uribe with a razor in his hand that evening, but knew he had one in his pocket. He had been drinking from noon to midnight and Uribe was in a drunken condition (R66). He did not hear Ursula call for help at any time nor did he ever put his hand over her mouth (R65,67-68).

5. Accused were convicted of rape in violation of Article of War 92, housebreaking in violation of Article of War 93 and wrongfully entering the home of German civilians, wrongfully threatening the civilian occupants with show of arms and wrongful sexual intercourse therein in violation of Article of War 96.

Despite the fact that accused knocked at an inside door after entering the house without authority, there is substantial evidence that, by threatening with the pistol, they put the occupants in fear of their lives, and that the fear so induced, of death or great bodily harm, caused Ursula to submit to sexual intercourse with both accused, and Mrs. Ernst to submit to sexual

intercourse with Uribe.

> "Consent, however reluctant, negatives rape; but where the woman * * * ceases resistance under fear of death or other great bodily harm (such fear being gaged by her own capacity), the consummated act is rape (Wharton's Criminal Law (12th Ed. 1932) sec.701, p.942).

The supineness exhibited by the German civilians during the four or five hours that the accused remained so offensively in their midst is doubtlessly attributable to the psychology of the vanquished. But where, as the witnesses for the prosecution testified in this case, accused threatened the prosecutrices and other occupants of the invaded household with a deadly weapon in such a manner as to indicate an intention to complete their purpose in defiance of all resistance, an inference that such intention existed may not be reasonably regarded as unsupported by substantial evidence (Cf: CM ETO 9301, Flackman). The record of trial sustains the findings of guilty of rape in violation of Article of War 92.

The uncontradicted evidence shows unlawful entry as alleged in the Specification, Charge II, as to each accused. The facts and circumstances shown indicate that their intent was as alleged. Thus the findings of guilty of housebreaking are sustained.

The scandalous conduct charged in violation of Article of War 96 is all part and parcel of the more serious offenses of which accused were also found guilty. In view of the lack of resistance and repeated acts of intercourse shown, it may well be that, when the charges were drawn and referred for trial, sufficient doubt existed as to the facts and the law to warrant charging the offenses also in a less serious aspect. In any event, since the sentence is well within the maximum limit of the more serious offenses involved, no prejudice is shown.

6. The charge sheet shows that accused Uribe is 21 years and one month of age and that he was inducted at Los Angeles, California, 10 March 1943; that accused Waterfield is 23 years and five months of age and that he enlisted at Richmond, Virginia, 10 August 1940. No prior service is shown for either.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuricusly affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as modified, and 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 USC 457,567), and upon conviction of housebreaking by Article of War 42 and section 22-1801 (6:55) District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Lewis Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

14 JUL 1945

CM ETO 13292

U N I T E D S T A T E S	95TH INFANTRY DIVISION
v.	Trial by GCM, convened at Ludinghausen, Germany, 11 June 1945.
Private PAUL KAZSIMIR (13010356), Company A, 378th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Private Paul Kazsimir, Company "A", 378th Infantry, did without proper leave, absent himself from his station at Detachment 48 Ground Force Reinforcement Command at or near Metz, France, from about 27 December 1944 to about 5 January 1945.

Specification 2: In that * * * did, without proper leave absent himself from his organization while enroute from Hozmuhle, Germany to Bertogne, Belgium, from on or about 30 January 1945 to 2 February 1945.

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

Specification: In that * * * having been duly placed in arrest by First Lieutenant Herbert A. Franck, Company "A", 378th Infantry, at or near Heure le Romain, Belgium, on or about 14 February 1945, did, at or near Heure le Romain, Belgium, on or about 14 February 1945, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * * did at or near Heure le Romain, Belgium, on or about 14 February 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with an armed enemy, and did remain absent in desertion until he was apprehended at Brussels, Belgium on or about 13 April 1945.

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

3. Competent evidence establishes the commission by the accused of the offenses charged under Charges I and II and their specifications, and he pleaded guilty thereto. The evidence concerning them will not be set out.

Accused came to Company A, 378th Infantry about 13 January 1945 and was assigned as a rifleman to the first platoon (R10,18,20). On 14 February the company was on an alert status to be ready to move (R13,21) and duffle bags were turned in so they would be ready to go. They moved in the line on the 15th where they stayed in contact with the enemy for approximately a week and sustained casualties (R13,31). An extract copy of the morning report of Company A, 378th Infantry, as pertains to accused on 15 February 1945 was admitted in evidence (Pros. Ex.G) and also that of 21 February 1945 (Pros.Ex.H). Exhibit "G" shows accused "From apprehension by Military authorities on 2 Feb 45 at Montmedy, France to dy 1100 on 14 Feb.45 * * *" and Exhibit "H" shows accused "Dy 745 to AWOL 2000 on 14 Feb 45" (R15). An armed guard returned accused to the company on 14 February 1945 about 1800 hours and he was placed in arrest in quarters. Between nine and ten o'clock that night he was reported missing (R19,20,21,30). He had been cleaning his weapon earlier in the evening, in a room occupied with others of his squad who were making preparations for the move in the morning, and there was conversation close to accused of the coming move (R32-33). Shortly after this talk, accused was missed and, although an immediate search of the buildings and town was made, accused was not thereafter seen in the company (R19,21,30,34).

Accused, after due warning made a sworn statement to the officer investigating the charges against him which statement with accused's express consent, was admitted in evidence (Pros.Ex.I)(R37). In this statement accused says

> "When I was returned to the company 14 February 1945, I knew I was under guard but did not know I was under arrest. When I left on the 14 February 1945 there was no guard on me. I left because I couldn't get along with the C.O. I,

asked for medical help for my head and he wouldn't listen to me. I was subject to headaches and dizziness. I expected to come back. I didn't know when but I knew I would come back sometime. I also couldn't stand combat conditions which almost drove me 'nuts' so I didn't know what I was doing at that time. I was apprehended 13 April 1945 at Brussels, Belgium".

4. The only defense of accused was an unsworn statement made through his counsel after his rights as a witness had been explained to him. This statement was to the effect that about a week prior to 13 April in Brussels, Belgium, he attempted to turn himself in to the military police and they refused to take him (R38).

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

The evidence is clear and convincing that accused on the night of 14 February 1945, while under arrest in quarters, became fully informed of his organization's expected and imminent move up to the front lines and almost at once disappeared from his place of duty and was not again seen until apprehended two months later at a place distant from his company which had moved into the line of combat and had sustained casualties. His absence was unauthorized. His actions were clearly a violation of Article of War 58 (CM ETO 6549, Festa).

6. The charge sheet shows accused to be 24 years 11 months of age. Without prior service, he enlisted 28 August 1940, at Pittsburg, Pennsylvania.

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.

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 proper (AW 42; Cir.210, WD, 14 September 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

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

BOARD OF REVIEW NO. 2

14 JUL 1945

CM ETO 13296

U N I T E D S T A T E S	7TH ARMORED DIVISION
v.	Trial by GCM, convened at APO 257, U. S. Army, 20 April 1945. Sentence: To be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Captain ELTON G. WRIGHT (O-1011036), Headquarters 7th Armored Division Trains	

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

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Elton G. Wright, Headquarters 7th Armored Division Trains, was, at Jayhawk VII Corps North Bridge Heavy Treadway, Rolandseck, Germany, on or about 25 March 1945, found drunk on duty as Staff Officer (S-3).

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(272)

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 when 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 six months. The reviewing authority, the Commanding General, 7th Armored Division, approved the sentence, stating that although the sentence was grossly inadequate it was approved in order that the accused may not wholly escape punishment, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, commenting that the punishment was wholly inadequate for the grave military offense of which this officer was found guilty and that the meager punishment imposed in this case reflects no credit upon the court's conception of its responsibility, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 24 March 1945 accused was a captain, 7th Armored Division Trains, and serving as S-3 officer of his battalion while stationed near Mullinghoven, Germany (R6-9). As his organization was scheduled to move forward to a new area, he was given an assignment to move out in advance and instructed to post road guides on the route leading from Mullinghoven to Rheinbreitbach, across the Rhine River, south of Bonn, Germany. He was also directed to place himself (at the Jayhawk VII Corps North Bridge Heavy Treadway, crossing the Rhine near Rolandseck) to meet the convoy arriving there and to assist in checking the troops and moving them across the river (R7,8).

At about 0130 hours the next morning, 25 March 1945, Major Billy M. Skillman, the executive officer of accused's organization, arrived at the bridge and found accused sitting in a chair asleep. He shook him two or three times but was unable to arouse him. After sending for Colonel A. J. Adams, who was only a short distance away, he succeeded in awakening accused, who, when he arose from the chair, "almost fell down" (R7). Colonel Adams questioned him to determine his condition of sobriety or intoxication (R7,9). Accused's answers to some of the questions concerning his duties were "incorrect". His voice was not normal and, when asked to walk a few paces, "didn't stagger" but "did waver" (R7). The odor of alcohol was detected on his breath. Both Colonel Adams and Major Skillman expressed their

opinion that accused was "drunk" and "intoxicated" (R7,8). He did not have full use of his mental and physical faculties and he was on duty while in this condition (R7,8,9).

4. The record does not disclose that accused was advised of his rights as a witness or that he was afforded an opportunity to testify. However, at the time he pleaded guilty to the Charge and Specification, the meaning and effect of such plea was explained to him and the accused stated that he desired his plea of guilty to stand (R5,10).

The defense produced only one witness, Lieutenant Colonel Emerson M. McDermott, the Division Signal Officer, who testified that accused's work as a tank battalion communications officer from March to December 1944 was "Excellent" and that, by reason of his technical knowledge of frequency modulation radio, he considered him "one of the best" qualified officers in this field of service. He recommended his retention in the service (R10,11).

5. Competent uncontradicted evidence, in addition to the plea of guilty, establishes accused's guilt of the offense of being drunk on duty in violation of Article of War 85, as charged. Such article provides in part 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" (AW 85).

The evidence shows that accused was a staff officer, being the S-3 of his organization, and that he was given an important mission to perform in connection with the forward movement of his division across the Rhine River in enemy territory. Detailed plans had been made for this operation and senior officers of the battalion were engaged in working throughout the night in its execution. Accused had a duty to perform and was "on duty" within the meaning of Article of War 85. It has been held by decisions and established by custom and usage in the service that all members of a command may properly be considered as continuously on duty during time of war and while in a region of active hostilities (MCM, 1928, par.145, p.159; CM 230201, II Bull. JAG 142 (1943); CM 222739, I Bull. JAG 105 (1942); CM ETO 3577, Teufel; CM ETO 4184, Heil; CM ETO 4619, Traub; see also Winthrop's Military Law and Precedents (Reprint, 1920) p.614). His conduct and demeanor, the odor of alcohol upon his breath, the unsteadiness of his walk, the incorrect answering of questions concerning the performance of his duty and his difficulty in orienting himself, support the findings

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of the court that accused was drunk at the time and place and under the circumstances charged. Winthrop states that, in time of war, the offense is complete when an accused has rendered himself, by intoxication, "more or less" incompetent for duty and that a "lesser degree of intoxication" may be held sufficient to constitute the offense of drunk on duty under the 85th Article of War (Winthrop's Military Law and Precedents (Reprint, 1920) pp.612-613). Furthermore, the finding of the degree or extent of accused's intoxication was essentially a question of fact for the court and it's determination, where supported by substantial evidence, and will not be disturbed by the Board of Review on appellate review (CM ETO 5561, Holden and Spencer; CM ETO 9611, Prairiechief).

5. The charge sheet shows that accused is 24 years of age and enlisted 16 May 1939 at Fort McClellan, Alabama. He was initially assigned to the 29th Infantry Division and subsequently transferred to the 2nd, 6th and 7th Armored Divisions. He was commissioned an officer 13 June 1943.

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

7. Dismissal and confinement at hard labor is authorized punishment for an officer for violation of the 85th Article of War. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain ELTON G. WRIGHT (O-1011036), Headquarters 7th Armored Division Trains, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 13296. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13296).

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

(Sentence ordered executed. GCMO 283, ETO, 20 July 1945).

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

BOARD OF REVIEW NO. 1

29 SEP 1945

CM ETO 13303

UNITED STATES	80TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 80, U. S. Army, 2 June 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.
Private EVERETT SWEEZY (38393966), Headquarters Company, First Battalion, 318th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Everett Sweezy, Headquarters Company, First Battalion, 318th Infantry, did, in the vicinity of Juville, France, on or about 10 November 1944, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Wiera, Germany, on or about 12 April 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence and ordered it exe-

cuted but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 143, Headquarters 80th Infantry Division, APO 80, U. S. Army, 16 June 1945.

3. Prosecution Evidence:

Accused was an ammunition bearer in an infantry battalion, which attacked Nomeny, France on 8 November 1944. He was last seen in his company on 9 November, and was not present therein until 12 April 1945 (R7-10). Search of regimental aid station records and those of the attached medical company, showed no record of treatment or evacuation of accused from 9 to 20 November (R18,19). An extract copy of the company morning reports of 4 and 15 April 1945, introduced in evidence without objection showed accused,

"Fr MIA 10 Nov 44 to AWOL as of 10 Nov 44"

and further showed his return to military control on 12 April 1945 (R7-8; Pros.Ex.A). It was stipulated that morning reports in the division were prepared and signed by the regimental personnel officer on the basis of memoranda signed by the company commander and forwarded to the personnel office through official channels (R19).

4. Defense Evidence:

The accused, after his rights as a witness were fully explained to him, elected to make the following unsworn statement through counsel (R17-18):

> "I am 22 years of age. I was inducted into the Army December 19, 1942. I joined the 80th Division in April 1944. I always tried my best to be a good soldier. I was hit in the back on St. Genevieve Hill about the middle of September - I was awarded the Puple Heart. I was sent to the hospital for that wound. When the Medics sent me back to duty, my back was still draining. I was in misery all the time. I could not sleep or rest. I have always had trouble with my feet. Sometimes, when it is wet and cold, my feet swell up and become very painful. I have been to the Medics many times, but nothing that they did ever helped my feet. On rainy or cold days, my back still hurts a great deal. If I have done wrong, I will be grateful for a chance to redeem myself" (R18).

Evidence was adduced that accused was wounded in the back by mortar fire in action 15 September 1944 at St. Genevieve, France, for which he was hospitalized

and awarded the Purple Heart; that theretofore, according to the testimony of an officer and enlisted men, he had been an excellent combat soldier; and that thereafter when he returned to the company, he was a different man - nervous, always complaining of his back, "cracked up", and apt to go "to pieces" when he heard noise (R9-15). Such a condition was not uncommon among wounded men returned to action (R12). Accused had to be returned to the aid station three or four times to have pus drained from his back (R15), and sometimes he sat on his knees in water because his back hurt him too badly to stand (R16). On 10 November he was seen in front of the aid station awaiting medical attention with his feet so swollen he was unable to put on his shoes (R17).

5. The delay in making the correctional entry of the morning report of 4 April 1945, obviously the result of accused's status having been erroneously carried as missing in action, did not render the evidence incompetent(CM ETO 9843, McClain; CM ETO 12951, Quintus; CM ETO 13199, Golej). Since the date the entry was made was subsequent to 12 December 1944, the personnel officer was authorized to sign the original reports (CM ETO 6107, Cottam and Johnson; CM ETO 7686, Maggie and Lewandoski; CM ETO 14362, Campise), and the source of the permanent record as an official writing based on signed memoranda forwarded through official channels in the organization was appropriate (CM ETO 10199, Kaminski; CM ETO 14362, Campise). Absence without leave for the period alleged was therefore established. The defense evidence presented many strong mitigating factors, which must be considered by the Clemency Board, but the evidence was only mitigating. The accused should not have left his organization though conditions were hard, and his health much impaired; it was his duty on 10 November to remain at least at the medical installation and thereafter it was his duty on every succeeding day to surrender to the nearest military authority. From his failure to do so and his long absence of five months in an active theater of operations, the intent to desert the service of the country, for whatever personal reason, was properly inferred (CM ETO 1629, O'Donnell; CM ETO 12470, Mayo; CM ETO 9843, McClain; CM ETO 8448, Tracy).

6. The charge sheet shows that the accused is 22 years seven months of age and was inducted 19 December 1942 to serve for the duration of the war plus six months. He had no prior service.

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

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

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of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement is authorized (Ltr., Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

Wm. F. Swinson 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. 1

22 SEP 1945

CM ETO 13317

U N I T E D S T A T E S	) 3RD ARMORED DIVISION
v.	) Trial by GCM, convened at Stolberg, Germany, 14, 15 and 27 April 1945.
Staff Sergeant HARRY B. PARKER (6655324), Sergeant MAURICE L. RYAN (33889764), and Private First Class LEO MASON (38607964), all of Company E, 36th Armored Infantry Regiment	) Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Staff Sergeant Harry B. Parker, Sergeant Maurice L. Ryan, and Private First Class Leo Mason, all of Company E, 36th Armored Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Stolberg, Germany, on or about 14 February 1945, forcibly and feloniously, against her will, have carnal knowledge of Bernadine Heeren, living at 30a, Burgstrasse, Stolberg.

and

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

for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 14 February 1945, the victim, Bernadine Heeren, a 26 year old single woman of German nationality, resided with her mother at 30a Burgstrasse, Stolberg, Germany (R6,7,37,42,46). The only other residents in their dwelling were a Mrs. Klein, her daughter Kathe, and a small baby (R7,21,37,50).

Shortly before 2300 hours on that day an outer door of the Heeren home was forced open and two American soldiers came up the stairs to the kitchen. They told the victim and her mother that they were looking for American soldiers. Both held pistols and flashlights in their hands (R8,38). A third soldier joined them, claiming he was a military police officer (R8,9). Disputing the word of the women that no American soldiers were in the house, the third soldier forced the victim to accompany him upstairs to search the attic (R9,10).

When they entered a room in the attic, he pushed her into the corner and embraced her (R10,11). She repulsed his amorous advances and struggled to escape (R11,12,15,27). The professed officer thereupon summoned one of his two companions who were below in the kitchen guarding the mother (R15,16,39,40,43,44). They pushed and shoved the victim to the floor, wedging her in a narrow space between a cupboard and a laundry tub (R18,34). The two soldiers then raped her, each taking his turn at holding her legs apart while the other had intercourse (R16,18,28,30). One then went below to relieve the guard, who came upstairs to take his turn ravishing the victim while the remaining soldier held her fast (R18, 29,39,40). When he was through, the alleged officer had intercourse with her a second time (R19). In each case the male organ of the soldier involved entered her body (R16,18,19,32).

During the entire affair which lasted about an hour, the victim struggled and kicked (R16,19,26,30,32,40). Her pants were torn and were subsequently found to be stained with semen (R16,17,48,49;Pros.Ex.A). She was in fear of her life because the attackers were armed (R17,33,34). She did not scream because she was held by the throat and was afraid of being choked (R29,33,34). She was unable to move her arms and legs freely because of the narrow space and because some one was always holding her legs tightly (R28,29,31,34). A physical examination of the victim on 16 February was negative with respect to any evidence of rape, the victim admitting that she had had intercourse prior to this attack (R58,59).

When the alleged officer completed his second act of intercourse, the victim and the two soldiers left the attic. As they were descending the stairs, one grabbed her arm and tried to get her to return to the attic. Rebelling at the thought, she called to her mother to call for the military police. The soldiers tried to clamp their hands over her mouth but she

managed to get away and continued to scream and the soldiers ran away (R19,20). It was then about 0030 hours (R21,42).

One other resident of this dwelling testified that she heard the noise occasioned when strangers were in the dwelling that night from 2300 hours to 0015 hours, and also that she heard the victim and her mother call for the military police (R50-53).

As to the identity of these three soldiers, the victim claimed that "a small light by the kitchen door" was "enough to vaguely light up the face of the third soldier", the one sho professed to be an officer (R10,12). She saw it "sharply enough to always be able to recognize it again" (R24). While in the attic she twisted his arm to throw the light of his flashlight on his face so that she might be able to recognize it again (R12,24). She identified him at the trial as the accused, Sergeant Ryan (R14). Two or three days after the attack she identified him at a lineup (R12,26,27). The victim admitted that she could not identify the first two soldiers who entered the house (R12,24,27). She knew none of the accused prior to this incident (R75).

The day following the incident the victim's mother recognized one of the two soldiers who first entered her home and had him brought in by the military police. When asked at the trial to point out these two soldiers, the record shows "These two (putting hand on both of them)" (R38). These were the two who stayed with her in the kitchen when the third soldier went upstairs with the daughter, and who later took turns guarding her (R39,40,44,46). At the trial she identified Private First Class Mason as the one who clapped his hand over her mouth when her daughter shouted to her to call the military police (R43-45). The mother did not see and could not identify the "third man" who first went upstairs with her daughter (R39,40,45). The illumination in the kitchen consisted of a "very small oil lamp with a tiny flame" giving off a dim light (R10, 24,44). It was completely dark in the attic and hallway (R9,24).

All of the accused were in the same squad of the second platoon, Company E, 36th Infantry (R100). Their billet was approximately 4/10ths of a mile from the home of the victim (R72).

4. After they were advised of their rights, each accused elected to be sworn and testify in his own behalf (R93,94). In substance each testified that a party of five enlisted men, including the three accused, went to an early show which started at 1800, returning to their barracks about 2000. They remained there the rest of the evening, drinking a little cognac, writing letters, talking, visiting, and bathing. They retired between 2230 and 2330. They all denied that they were in the victim's home that evening (R94-103).

The accused, Parker, testified that he woke up at 0145 hours to go on guard from 0200 to 0300, and that the accused, Ryan, was on guard from 0300 to 0400 (R102).

The testimony of five other enlisted men who lived in the same billet with the accused corroborated their version of their activities that evening and their presence in the billet as late as 2230 hours to 2400 hours, when these witnesses retired (R78,80-91).

A sergeant who was on guard from 2200 to 2300 at the front door of the building where accused's company was billeted testified that the only accused whom he saw leave the building during that period was Parker who was outside the building for a few minutes relieving himself (R60,63,65). He asserted that it would be difficult for anyone to leave by the rear door without the guard hearing because the door was locked and when the bolt was drawn it made a noise (R65). Two other witnesses likewise testified that a guard at the front entrance would know when anyone left by the rear door (R79,86).

It was stipulated that if Private First Class Jennings were present, he would testify that he was on guard at the entrance to the building of the 2nd platoon on the night of 14 February between 2300 and 2400 hours and did not recall seeing the accused Parker or Ryan either enter or leave the building (R91). Similarly it was stipulated that if Private Ciupek were present, he would testify that he was on guard from 2400 to 0100 hours and did not recall seeing any of the three accused enter or leave the building (R91).

5. To rebut the defense that the accused were present in their billet after 2000 hours, the prosecution properly offered the testimony of a 67 year old woman, Elizabeth Hammer, who shared a dwelling at 46 Vogelsangstrasse (R69). This dwelling (which will be referred to as the Frantzen home) was located some 370 steps or 2½ minutes walk from the victim's home at 30a Burgstrasse (R71,72). She testified that at 2140 hours she heard shots fired, a door was kicked in, and three soldiers entered her room. The soldiers stayed in her house one half hour (R70). She identified Ryan as one of the three intruders (R69).

Frau Hammer claimed that she accompanied Sergeant Ryan to another part of the same dwelling occupied by a Bengel family "and one named Frantzen who had received a bullet in the leg" (R70,71). A defense witness, Frau Bengel, corroborated the fact that Frau Hammer and an American soldier, as well as "Frantzen" were in her home that evening. At the trial, Frau Bengel could not identify any of the accused although she had previously identified a soldier at an army stockade and was able to describe his appearance (R73).

The Division Inspector-General was permitted to read without objection the content of a ballistic's report which he had incorporated into his own official report of his investigation into the alleged rape (R106). This report stated:

> "The ballistic tests performed by the 27th MP CI Detachment establishing the fact that the P-38 pistol owned by Pfc Mason did fire the projectiles found in the home of Servatius Frantzen, 46 Vogelsangstrasse, Stolberg. Pfc Mason stated that he did own a P-38 pistol on the night of 14 February, but that it was left in his barracks bag, which he shared with him by Pfc Holman. Pfc Mason was wearing the P-38 pistol when he was picked up on 15 February by the MP's for questioning, at which time the P-38 pistol No. 4880 was taken as an exhibit".

Mason,
The accused thereafter testified that he owned a P-38 pistol and that he was carrying it on 15 February, but denied that he carried it on the night of 14 February (R107,108).

6. We assume for the purposes of this case that the prosecutrix was raped by three American soldiers and we consider solely the issue of the identify of accused as the perpetrators of this crime. Ryan was identified by the prosecutrix and Parker and Mason by her mother, as the rapists. They countered with the defense of alibi, namely, that they were together all that evening, first at a moving picture show and later at their billet. To rebut this testimony the prosecution introduced evidence that at about 2140 hours, three American soldiers broke into the Frantzen home a short distance from the prosecutrix' residence, and that Ryan was one of them. The prosecution, however, was not content to rest its case there. It produced the Inspector General of the division as a witness and had him read into the record a ballistics report of unknown authorship. This report stated that the bullets which were fired in the Frantzen home came from a P-38 owned by accused Mason.

This report was incompetent as hearsay and the failure of the defense to object thereto was not a waiver of its rights (MCM, 1928, par. 126c, p.137). It remains to be seen whether its introduction substantially prejudiced the rights of accused (AW 37; Cf: CM ETO 7867, Westfield).

Prior to the introduction of this report the issue before the court was simple, viz., which group of witnesses were to be believed, the prosecution's or the defense's. Both could not be right. Either accused were at large on the streets of Stolberg or they were in their billet. The credibility of the prosecution witnesses was subject to attack not only because they were Germans and might, therefore, be prejudiced against accused but also, at least in the case of the Heerens, because their

opportunities to observe were not of the best. The credibility of the defense witnesses might similarly be impugned. They might not only make natural mistakes as to the time when they saw accused, but they were also subject to the temptation to protect their comrades from being punished for committing a crime against a hated enemy. Into this milieu of doubt the prosecution intruded what were alleged to be the considered results of a scientific investigation which, if believed, effectively smashed the alibi of accused. If Mason's pistol was fired in the Frantzen home at 2140 hours that night one of the inferences is that Mason fired it, and, if Mason were in that home that night then Parker and Ryan were there too. The defense's entire case was carefully built on the theory that the three were together all night. Frau Hammer's identification of Ryan as one of the intruders assumes under these circumstances greater importance. The testimony of the defense witnesses was thereby practically destroyed. If they were wrong about Mason, then they were wrong about Ryan and Parker. The alibi was smashed and smashed not by a witness who had a motive to falsify or whose powers of observation might be questioned but by the disinterested conclusions reached through a well recognized science, conclusions whose accuracy presumably could be demonstrated to the court if need arose. Yet it was smashed by a witness who was not subject to cross-examination. It seems to us, therefore, to be an inescapable conclusion that this evidence was nothing short of annihilating in its prejudicial effect. To a court which may still have had doubts as to which evidence was more credible, the prosecution's or the defense's, it furnished a standard against which they could and were well-nigh obliged to measure all the other evidence in the case and measure it to the disadvantage of accused.

To be sure, we have held that "if legal evidence of itself, substantially compelled a conviction" the introduction of incompetent evidence would not vitiate the findings (CM ETO 1693, Allen). In that case we quoted with approval the rule laid down in CM 130415 (1919) (Dig.Op.JAG, 1912-30, sec.1284, p.634).

> "The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved".

In elaboration of the foregoing the holding in CM ETO 1201, Pheil contains the following pertinent statement of the applicable rule of law:

"The fate of the accused in the instant case is not to be determined by the simple, expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. Such process would be an over simplification and would wholly ignore the actualities of the trial. The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure the influence of the illegal evidence upon the court and should it attempt to do so it would be usurping the functions of the court (CM ETO 132, Kelly and Hyde). A reviewer in considering the record of trial to determine whether the 'legal evidence of itself substantially compelled a conviction' cannot ignore the impact upon the mind of the court of the illegal evidence. For this reason the Board of Review in CM 127490 (supra) particularly qualified its pronouncement by the statement 'nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction'. (Underscoring supplied). An accused has not received a fair and impartial trial if his conviction is based upon a body of evidence part of which is legal and which standing alone possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the 'strongest forms of proof known to law'. The Board of Review undoubtedly had this situation in mind when it adopted the qualification last quoted in its holding CM 127490 (supra)".

Applying this rule to the facts of this case, we are of the opinion that the legal evidence, apart from the incompetent ballistics report, was far from compelling on the issue of accused's identity as the rapists. The legal evidence that remained, in our opinion, "does not contain the robust quality of moral certainty and determinativeness" which will sustain the finding in the face of this grievous error. It would be a great reflection on the administration of military justice if this case were to be sustained when the record reveals an error so glaringly prejudicial to the substantial rights of accused. The record, accordingly, is legally insufficient to sustain the findings of guilty.

7. The charge sheet shows that accused Parker is 36 years of age and was inducted 1 September 1943 at Huntington, West Virginia; that accused Ryan is 22 years of age and was inducted 30 May 1944 at Fort George G. Meade, Maryland; and that accused Mason is 30 years of age and was inducted 11 January 1944 at Lubbock, Texas. Each was inducted to

serve for the duration of the war plus six months. Accused Parker had prior service from 17 February 1930 to 3 June 1932, and from 19 July 1932 to 5 December 1934. He had service as an enlisted reservist from 9 May 1939 to 31 January 1941. Accused Ryan and Mason had no prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. Error injuriously affecting the rights of accused was committed at the trial. For the foregoing reasons the Board of Review holds that the record of trial is legally insufficient as to each accused to sustain the findings of guilty and the sentence.

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Daniel D. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 1 8 SEP 1945

CM ETO 13319

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at Darmstadt, Germany, 1 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technicians Fifth Grade BEN L. BEETS (38405308) and LONNIE W. NANNEY (14040408), both of Company B, 33rd Armored Regiment	

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 jointly upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 5th Grade Ben L. Beets and Technician 5th Grade Lonnie W. Nanney, both of Company B, 33d Armored Regiment, acted jointly and in pursuance of a common intent, did, at Dahl, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Wilma Ley.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the times the votes were taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions of either accused was introduced. 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, as to each accused, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Substantial, credible and uncontroverted evidence adduced by the prosecution and the court establishes that, at the date and place alleged, the following occurred: The two accused, Beets armed with a carbine and Nanney with a pistol, uninvited, entered a room in which Fraulein Wilma Ley, a physician 25 years of age, weighing about 140 German pounds, partially unclad, was bathing. She testified that Nanney held his pistol against her stomach and both accused grabbed her by the arm, removed her sweater and pants and threw her upon the bed, where Nanney overcame her resistance by holding her legs. When she endeavored to leave the bed, Beets held her down by the hair, struck her with his fists and engaged in sexual intercourse with her without her permission. When he placed her arms around his neck, she removed them. Meanwhile Nanney stood next to the bed with his pistol against Beets and the woman. Although she was in fear of her life, she resisted the sexual act to the maximum of her ability.

Pursuant to her appeal for help shortly after the two accused entered, military personnel arrived at the scene and demanded through the door of the room, which Nanney held closed, that accused come out, but were answered by muffled replies and a pistol shot by Nanney in the room. Thereafter the door was opened, Fraulein Ley emerged and ran down the hall, and accused appeared and were apprehended. Both had been drinking and were "fairly drunk". The prosecutrix' testimony, corroborated except as to the actual intercourse and violence immediately accompanying it, is clear and convincing. Beets' guilt as a rapist and Nanney's guilt as his aider and abettor in the rape were sufficiently established (CM ETO 14596, Bradford et al, and authorities therein cited).

The question of accuseds' drunkenness and the effect thereof upon the criminal intents involved in the rape and aiding and abetting thereof constituted an issue of fact for the sole determination of the court, whose findings of guilty may not be disturbed in view of the substantial evidence that each accused was in control of his faculties (CM ETO 14256, Barkley; CM ETO 14564, Anthony and Arnold).

4. a. The Specification alleges in effect that accused

> "acted jointly and pursuance of a common intent, did,"

rape the victim. The evident meaning and effect of the word "acted", in its context, is equivalent to "acting" and it is so construed by the Board of Review (CM ETO 9643, Haymer; CM ETO 11076, Wade).

b. The charges were referred to trial, by command of the appointing authority, to Captain Vernal W. Prewett, trial judge advocate of the court appointed by paragraph 1, Special Orders No. 121, Headquarters Third Armored Division. The order appointing the court which tried accused (par.1, SO 137, same headquarters) named Captain Prewett as trial judge advocate, but did not direct that cases in his hands as trial judge advocate of the court named in the reference to trial (appointed by par.1, SO 121) be brought to trial before the subsequent court. The irregularity, however, was waived by the subsequent action of the reviewing authority in approving the sentence (CM ETO 1606, Sayre; CM ETO 5234, Stubinski).

5. The charge sheet shows that accused Beets is 30 years of age and was inducted 22 May 1943 at Oklahoma City, Oklahoma, under the provisions of the Selective Service Act and that he had prior service in the United States Naval Reserve from 18 April 1942 to 5 January 1943; accused Nanney is 25 years of age and enlisted 30 January 1941 at Montgomery, Alabama, to serve for three years, and had no prior service.

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

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. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Orell V. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 2

4 AUG 1945

CM ETO 13327

UNITED STATES	3RD ARMORED DIVISION
v.	
Private DONALD D. COLUMBUS (13111197) Headquarters Company, 3rd Armored Division Trains	Trial by GCM, convened at Darmstadt, Germany, 19 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of Specification 2 of Charge I, and Charge I, and the remaining charges and their respective specifications. It is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge I as involves a finding that accused absented himself without leave for the period alleged in violation of Articls of War 61, and legally sufficient to support the sentence.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

11 AUG 1945

CM ETO 13369

U N I T E D S T A T E S	20TH ARMORED DIVISION
v.	Trial by GCM, convened at Prien, Germany, 28 May, 13 June 1945.
Privates WILLIAM H. McMILLON (35801092), WILLIS E. SHORT (39421854), and REX E. TARPLEE (35829026), all of Service Company, 27th Tank Battalion	Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor, McMILLON for life, SHORT for 20 years and TARPLEE for 10 years. Places of confinement: McMILLON and SHORT, United States Penitentiary, Lewisburg, Pennsylvania; TARPLEE, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

McMILLON

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

Specification 1: In that Private William H. McMillon, Service Company, 27th Tank Battalion did, at Kirchweidoch, Germany, on or about 2300, 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Leopoldline Novotny.

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

Specification 1: (Finding of not guilty).

Specification 2: In that * * * did, in conjunction with Private Rex E. Tarplee, Service Company, 27th Tank Battalion and Private Willis E. Short, Service Company, 27th Tank Bn., at Kirchweidoch, Germany, on or about 2300, 7 May 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Leopoldline and Franz Novotny, the property of one (1) watch, one (1) bill-fold, seventeen hundred (1700) Marks, one (1) camera, one (1) roll of film, value about $200.00. The property of the said Leopoldline and Franz Novotny.

SHORT

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

Specification 1: In that Private Willis E. Short, Service Company, 27th Tank Battalion did, at Kirchweidoch, Germany, on or about 2300, 7 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Leopoldline Novotny.

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

Specification 1: (Finding of not guilty).

TARPLEE

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Rex E. Tarplee, Service Company, 27th Tank Battalion did, in conjuction with Private Willis E. Short, Service Company, 27th Tank Battalion and Private William H. McMillon, Service Company, 27th Tank Battalion, at Kirchweidoch, Germany, on or about 2300, 7 May 1945, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Leopoldline and Franz Novotny, the property of one (1) watch, one (1) bill-fold, seventeen hundred (1700) Marks, one (1) Camera, one (1) roll of film, value about $200.00. The property of the said Leopoldline and Franz Novotny.

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Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the votes were taken concurring, accused McMillon was found guilty of Charge I, its Specification, Specification 2, ChargeII, except the words "Private Willis E. Short, Service Company, 27th Tank Bn" and of Charge II, and not guilty of Specification 1, Charge II; accused Short was found guilty of the Specification of Charge I, except the words "forcibly and feloniously against her will, have carnal knowledge of", substituting therefor, respectively, the words "with intent to commit a felony, viz.: assault with intent to rape, commit an assault upon Leopoldline Novotny, forcibly and feloniously, against her will, attempt to have carnal knowledge of the said Leopoldline Novotny", of the excepted words not guilty, of the substituted words guilty; of Charge I not guilty, but guilty of violation of the 93rd Article of War and not guilty of Charge II and its Specification; and accused Tarplee was found guilty of the Charge and its Specification, except the words "Private Willis E. Short, Service Company, 27th Tank Battalion". No evidence of previous convictions was introduced against accused McMillon. Evidence was introduced of two previous convictions against accused Short by special court-martial, one for absence without leave for 90 days in violation of Article of War 61 and one for disobedience of an order of commissioned officer in violation of Article of War 96. Evidence was also introduced of two previous convictions against accused Tarplee by special court-martial for absences without leave for 13 days and 21 days, respectively, 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, McMillon for the term of his natural life, Short for 20 years, and Tarplee for ten years. The reviewing authority approved the sentences of accused McMillon and Tarplee and designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement of accused McMillon, and the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of accused Tarplee. As to accused Short, the reviewing authority under date of 10 June 1945 returned the record of trial to the court for proceedings in revision under paragraph 83, Manual for Courts-Martial, 1928, with respect to its findings on the Specification of Charge I and Charge I. Thereafter on 13 June 1945 the court reconvened, revoked its former findings and, three-fourths of the members of the court present at the time the vote was taken concurring, said accused Short was found guilty of the Specification of Charge I, except the words "forcibly and feloniously, against her will, have carnal knowledge of", substituting therefor, respectively, the words "with intent to commit a felony, to-wit, rape, commit an assault upon Leopoldline Novotny by willfully and feloniously placing his body on the person of the said", of the excepted words not guilty, of the substituted words guilty; of Charge I, not guilty, but guilty of violation of the 93rd Article of War and not guilty of Charge II and its Specification. The court adhered

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to its former sentence imposed upon said accused Short. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of said accused.

The record of trial was forwarded for action pursuant to Article of War 50½.

3. a. McMILLON - Charge I and Specification:

The evidence without contradiction established the fact that McMillon engaged in an act of sexual intercourse with Frau Leopoldline Novotny at Kirchweidoch, Germany, on the night of 7 May 1945. The question involved is whether the act was performed with the consent of the woman or whether she submitted through fear of death or great bodily harm. Considering the facts that McMillon, Short and Tarplee were armed trespassers in the Novotny home at a late hour in the night, that immediately prior to the act of intercourse they had searched the bedroom and with force and violence had taken money and personal property of the Novotnys therefrom and that McMillon when he returned to the bedroom exhibited a knife, the Board of Review believes there was substantial evidence to support the court's finding that the woman submitted through fear and that her submission was not voluntarily given. The accused's version of the affair at most created an issue of fact for resolution by the court, which it was at liberty to disbelieve. The evidence forms a familiar pattern to the Board of Review and the conclusion here stated is supported by many precedents (CM ETO 8511, Henry Smith, and authorities therein cited).

b. McMILLON - Charge II, Specification 2:

McMillon, Short and Tarplee searched the suitcase and other places of storage in the bedroom. All of them were armed with lethal weapons. They removed and carried away the watch, camera, roll of film, bill-fold and 1700 marks in German money. The question whether such larcenous taking was committed by force and violence from the persons or immediate presence of the owners so as to constitute robbery was one of fact for the court and under the circumstances shown the Board of Review concludes that the finding is supported by competent, substantial evidence (CM ETO 78, Watts; EM ETO 1453, Fowler; CM ETO 3628, Mason). It is obvious that the property taken had some value to its owners. Proof of pecuniary value was unnecessary (54 CJ, sec.16, p.1012; 46 Am. Jur. sec.8, p.142). The record is legally sufficient to support the findings of guilty.

4. SHORT - Charge I and Specification:

By exceptions and substitutions Short was found guilty of assault upon Frau Novotny with intent to commit rape. The evidence showed that he exposed his person, threw himself upon the woman and actually attempted to penetrate her genitals. The proof is clear of his intent to secure carnal connection with the victim and that he committed an overt act toward accomplishment of his purpose (Hammond v. United States

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(App. D.C. 1942), 127 F.(2nd) 752,753). Evidence that he intended to carry into effect his purpose with force and against the consent of the female is supplied by the circumstances of the assault. The court was justified in believing that the woman neither invited nor consented to the act (CM ETO 8519, Henry Smith, supra, and authorities therein cited).

> "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted" (MCM, 1928, par.149, p.179).

All of the elements of the crime were proved beyond reasonable doubt.

5. TARPLEE: Tarplee's guilt of robbing the Novotnys at the time and place and of the property alleged was proved beyond reasonable doubt. He was obviously the manager of the expedition and was concerned primarily with the material benefits to be gained by the unlawful seizure of other people's property (See par.3b, supra).

6. The fact, if it were a fact, that the accused's company commander informed them that it was all right to steal the property of German subjects did not constitute a defense. While evidence of such fact might explain their conduct it neither excused nor exculpated them from the crime of robbery.

7. The charge sheets show that McMillon is 20 years three months of age and was inducted 8 May 1943, Short is 19 years five months of age and was inducted 17 September 1943, and Tarplee is 24 years six months of age and was inducted 31 March 1944. The period of service of each accused is for the duration of the war plus six months. None of the accused had any prior service.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567); upon conviction of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463), and 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,

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

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2 6 JUL 1945

CM ETO 13370

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, 11 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class SAMUEL ROSENBLUM (32538530), Company E, 121st Infantry	

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Samuel Rosenblum, Company "E", One Hundred and Twenty First Infantry, having received a lawful command from Captain Benjamin S. Inman, his superior officer, to go forward to his company did at or near Siegen, Germany, on or about 1 April 1945, Willfully disobey the same.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. 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, 8th 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 Articles of War 48 and 50½. The confirming authority, the Commanding General, European Theater of Opera-

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tions, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

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

Accused has been a member of Company E, 121st Infantry for two years (R5). He was lightly wounded in action and on 9 July 1944 was evacuated to the 8th Clearing Station. The supply sergeant of his company picked him up at the field train on 1 April 1945 in order to return him to his unit, which was in action on the front (R6,9,11,14). When they started for the company accused asked the supply sergeant if he could see an officer as "he didn't think he could make it". He was turned over to Captain Inman, the Battalion Adjutant, who gave him a direct order to return to his company. He left with the supply sergeant, who had to make a stop to pick up some Post Exchange rations, and when they started up, accused again refused to go. He was returned to Captain Inman, who gave him another direct order to go back to his company. Accused answered "I cannot go" and was turned over to the supply sergeant for return to the field train (R6,8,11,12). Captain Inman was wearing his insignia of rank at all times (R6,11) and accused was on a duty status at the time (R14). Accused did not make any statement regarding his health (R12) and there was no reason why he was not physically able to join his company (R14).

4. The accused after his rights as a witness were fully explained to him (R12,13), elected to remain silent and no evidence was introduced in his behalf.

5. The uncontradicted evidence presented by the prosecution establishes that on 1 April 1945 accused was twice given a direct order to return to his company, which was in combat at the front, and that he willfully disobeyed the command in each instance. The battalion adjutant was authorized to issue this order, which related to a military duty, and from its very nature, it is obvious that prompt compliance was contemplated. There is no suggestion that accused was either physically or mentally unable to understand and obey the command. There is clear and substantial evidence covering all the essential elements requisite to a violation of Article of War 64 (MCM, 1928, par.134b, pp.148,149; CM ETO 8492, Winters).

6. The charge sheet shows that accused is 23 years of age and was called to duty 6 November 1942 at Fort Dix, New Jersey. He had no prior service.

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

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rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for willful disobedience of the lawful command of a superior officer in time of war is death or such other punishment as the court martial may direct (AW 64). Confinement in a penitentiary is authorized by way of commutation of a death sentence (AW 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private First Class SAMUEL ROSENBLUM, (32538530), Company E, 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 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 13370. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 13370).

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

(Sentence as commuted ordered executed. G.C.M.O. 284, ETO, 24 July 1945).

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

BOARD OF REVIEW NO. 1 11 AUG 1945

CM ETO 13376

U N I T E D S T A T E S)	13TH AIRBORNE DIVISION
)	
v.)	Trial by GCM, convened at B 54,
)	France, 13 April 1945. Sentence:
First Lieutenant NESTOR C.))	Dismissal, total forfeitures and
AASEN (O-1301406), Head-)	confinement at hard labor for life.
quarters Company, 517th)	Eastern Branch, United States
Parachute Infantry)	Disciplinary Barracks, Greenhaven,
)	New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that First Lieutenant Nestor C. Aasen, Headquarters Company, 517th Parachute Infantry, then assigned to Company H., 517th Parachute Infantry, did, at or near Mount Grazian, France, on or about 13 November 1944, misbehave himself before the enemy by running away from his platoon, which was then engaged with the enemy, and seeking safety in the rear.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 life. The reviewing authority, the Commanding General, 13th Airborne Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution

On 13 November 1944 accused was assistant platoon leader of the 2nd platoon of Company H, 517th Parachute Infantry, which was located near Sospell in Southern France (R7). At about 0600 hours on that day his platoon set out for Mount Grazian to relieve the third platoon. When they reached the bottom of the hill small arms fire was audible and, on arriving at the top of the hill at about 0900 hours, they learned that there had been some fighting which resulted in a few Germans being killed (R8). After the 2nd platoon had taken up its positions the platoon leader directed accused to accompany him on an inspection tour so that he (accused) could become familiar with the location of the men (R9). About 1100 hours while the platoon leader, accused, and the platoon sergeant were working their way around the platoon positions, the Germans placed the hill under artillery fire (R8). The platoon leader sought shelter in a fox-hole about twenty-five yards forward from the position of the party when the shelling broke out (R8). The next nearest fox-hole was some 50 yards away, but it was possible that accused, not being familiar with the locality, did not see it (R10). Apart from that there was no other cover available except at the platoon command post which was 150 yards distant and located 50 yards from the top of the hill (R9). Accused stated that he was getting out of there (R8,11). The platoon leader

testified that it was not necessary that accused be with the platoon at that time, since there was no enemy activity other than artillery fire; that accused's only duties were to make an inspection tour; that it was logical for accused to seek cover; that he, the witness, did not feel that by going to the platoon command post accused was abandoning his position; and that accused's duties might possibly take him beyond the platoon command post because there had been some difficulties with the mule supply train (R9,10,11).

Some time "after dinner" accused's company commander, First Lieutenant James G. Bennett, met him about 150 yards from the company command post walking hurriedly in that direction. This command post was about two miles from the platoon command post and about 1,000 yards from the enemy. Accused was in a "bad nervous state". His eyes were "excited" and "stary". He was in "poor physical condition". Apparently he could not remain standing and Lieutenant Bennett ordered a Lieutenant Jackson to see that he received medical treatment (R12-16).

Accused made two statements after being warned of his rights in both instances. The first was made sometime during the afternoon of 13 November. He was badly frightened at the time. He stated that when about six rounds of artillery fire fell in his area he went to the platoon command post. He remained there a short time and when more shells fell he became "panicky" and ran down the hill about 200 yards. He sat on a rock and tried to get up courage to return. Failing that, he went to the company command post (R16,17).

Sometime after 20 November accused made his second statement. He stated that he went to the command post after requesting his platoon leader's permission. On his arrival there he was told that there was some difficulty with the mule pack and he went down the hill to investigate. When he arrived there the mules had started up the narrow trail and he sat down to wait for them. While sitting there enemy artillery opened up again and "he lost his mind", "became confused" and ran down the hill. After running some distance he decided he was too nervous to return to the platoon so he went to the company command post (R18).

4. Evidence for the defense

Major Irving L. Berger, Medical Corps, a psychiatrist, testified that he examined accused about 27 November. Based on interviews with accused and with his company officers, Major Berger concluded that accused at the time of the offense was suffering from "psychoneurosis, anxiety state, moderately severe"; that he was "Emotionally labile" with an "unstable type of personality"; that this was a "defect of reason resulting from a disorder of the mind" which prevented him from knowing the consequence of a wrongful act. He was unable in the opinion of the witness, at the time, to distinguish between rightful and wrongful acts and to control his behavior (R19-21; Def.Ex.1). The witness was unable to state whether accused could distinguish between right and wrong when the first shelling occurred although he was then suffering from acute anxiety. On the occasion of the second barrage, the witness' opinion was that accused's anxiety state developed into acute panic and he was unable to make that distinction (R22).

Accused after being warned of his rights elected to be sworn and testify. His testimony was in all material particulars identical with the statement he gave sometime after 20 November (R23-24).

5. Competent and undisputed evidence shows that accused abandoned his platoon because of his fear of enemy artillery fire and sought safety at the company command post some two miles from the place where the platoon was located. With his platoon under artillery fire and its members required to take cover, there can be no doubt that accused was before the enemy (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1659, Lee; CM ETO 1408, Saraceno). Every element of the offense charged was accordingly established by competent evidence and the only question presented is whether accused was mentally responsible for his actions (CM ETO 4783, Duff; CM ETO 3196, Puleio).

6. The burden of proving that accused was mentally responsible for his actions rested on the prosecution (Davis v. United States, 160 U.S. 469; 40 L.Ed. 499(1895); MCM, 1928, par.78a, p.63; 1 Wharton Criminal Evidence (11 Ed. 1935) sec.77, p.93). In discharging this burden the prosecution was aided by the presumption of sanity which relieved it merely of the necessity of introducing

evidence to that effect until such time as there was some assurance that accused's mental responsibility was a real issue in the case.

> "The peculiar effect of a presumption 'of law' (that is, a real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule * * *. It is, therefore, a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary" (Wigmore, Evidence (2 Ed.), sec.2491 quoted in 95 ALR 880).

> "It [a disputable presumption] points out the party on whom lies the duty of going forward with evidence on the fact presumed. And when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the office of the presumption is performed, and the fact in question is to be established by evidence as are other questions of fact, without aid from the presumption, which has become functus officio" (Tyrrell v. Prudential Insurance Company of America, 109 Vt. 6; 192 A.184, 115 ALR 392 at page 403 (1937)).

There have been various statements concerning the quantum of evidence necessary to destroy a presumption. Wigmore, supra, lays down the rule that there must be sufficient evidence to "satisfy the judge's requirement of some evidence". Tyrrell v. Prudential Insurance Company of America, supra, is in accord with Wigmore when it states that the presumption disappears when enough rebutting evidence "is admitted to make a question for the jury on the fact involved". Lee v. United States, 91 F(2nd) 326 (CCA 5th 1937), cert. denied, 302 U.S. 745; 82 L.Ed. 576 (1937); specifically deals with the presumption of sanity in a criminal case and says that "only slight evidence to the contrary" is "sufficient to raise the issue, to be sub-

mitted to the jury, with all other evidence". CM 193543 (1930), Dig.Op.JAG, 1912-40, sec.395(36), p.227, would seem to hold that in the absence of "substantial" evidence to the contrary of the presumed fact, the presumption is still operative. It is doubtful, however, if the use of the word "substantial" in this connection adds anything to the defense's burden. In speaking of a statute which created a presumption against suicide "in the absence of substantial evidence" to the contrary the United States Supreme Court said,

> "The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case" (Del Vecchio v. Bowers, 296 U.S. 280; 80 L.Ed. 229(1935)).

The defense's evidence on the question of accused's mental responsibility consisted of the testimony of Major Berger, a psychiatrist, who stated that in his opinion accused was suffering from "psychoneurosis, anxiety state, moderately severe" and that at the time of the alleged offense he was incapable of distinguishing between right and wrong and could not control his behavior. This opinion was based in part on statements of third parties not in evidence. Regardless of the strength we accord to the presumption, short of permitting it to shift the burden of proof or endowing it with evidentiary effect, this evidence is sufficient to dissipate it. It is clear testimony, directly contrary to the presumed fact, of the opinion of an independent witness who is presumably familiar with the various neuroses and psychoses which result from combat.

However, despite the fact that the prosecution can derive no benefit from the presumption, and despite the fact that they offered no medical testimony tending to prove accused sane there is still substantial evidence establishing that before his offense was consummated accused knew the difference between right and wrong and could adhere to the right. In the statement he made on

the day he committed the alleged offense, accused related how he ran down the hill from the platoon command post about 200 yards and then stopped and tried to get up courage to go back. The court could infer from this that accused had some comprehension of his obligation to stay at his post and some consciousness that what he was doing was wrong. Both in his extra-judicial statement made sometime around 20 November and in his testimony at the trial accused told how he left the platoon command post to investigate the difficulties the men were having with the mule supply train. He told how he fled from there in panic when the enemy opened up with another artillery barrage; how he ran some distance down the hill; how at last he stopped, deliberated on returning, and finally decided to report to the company command post because he felt that his nervous condition would have an adverse effect on the morale of the men. Certainly the court could conclude that a man who was capable of deliberating and deciding on the desirability of a course of conduct was not a man whose faculty of choice had been paralyzed and whose moral sense had been destroyed. The testimony of a psychiatrist is valuable, but he will not be permitted to usurp the function of the judge. Such opinion evidence will be given careful consideration, but it is not binding and the conclusions thereof need not decide the ultimate issue. The responsibility for decision was the court's. Particularly is this true when not all the assumed facts, as the premise of the hypothesis, are in evidence, as is the case here. The effect of the expert's conclusion is that accused was afraid, so afraid that he did not know what he was doing. The 75th Article of War is intended to punish cowardice, and it would be reductio ad absurdem to hold that a man cannot be punished for cowardice because he was too cowardly. The Article is essential to military success in battle and must be enforced to deter cowardice and panic. The conclusion of the psychiatrist places accused within the terms of the Act. There is substantial evidence in the record to sustain the court's implied finding that accused was sane and cowardly at the time of the offense (CM ETO 895, Davis, et al; CM ETO 13458, Stover; CM NATO 2047 (1944), III Bull.JAG 228).

7. The charge sheet shows that accused is 24 years and one month of age. The Staff Judge Advocate's review shows that he enlisted in the Regular Army on 28 October

1939 and was commissioned a second lieutenant on 25 November 1942 and promoted to first lieutenant on 11 June 1943.

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. Dismissal and confinement at hard labor are authorized punishments for violation of the 75th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant NESTOR C. AASEN (O-1301406), Headquarters Company, 517th Parachute Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The many officers connected with this case have expressed various opinions as to its disposition and as to a proper sentence. Both his platoon leader and company commander agreed (R10,14) that his initial action in returning to the platoon command post to seek cover was logical and proper under the circumstances. The investigating officer, Major William L. Johnson, stated in his report

> "The fact that Lieutenant Aasen had been in action only six days and was found to be suffering from an emotional or physical disorder that might have affected his behavior should be taken into consideration".

The psychiatrist, Major Irving L. Berger, recommended reclassification and reassignment. The staff judge advocate stated that

> "Life imprisonment, however, seems too severe a punishment for one whose dereliction was the result of terror"

but he recommended against reduction of the sentence. The reviewer in the office of the theater judge advocate recommended that the confinement be remitted.

The foregoing raises the question whether at this time the period of confinement should be reduced.

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 13376. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13376).

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

(Sentence ordered executed. GCMO 353, ETO, 29 Aug 1945).

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

BOARD OF REVIEW NO. 2 1 SEP 1945

CM ETO 13379

U N I T E D S T A T E S	66th INFANTRY DIVISION
v.	Trial by GCM, convened at Ploermel, France, 18-19 April 1945. Sentence: To be hanged by the neck until dead.
Private CHARLES M.ROBINSON (38164425), 667th Quartermaster Truck Company	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review, 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 Charles M. Robinson, 667th Quartermaster Truck Company did, at Messac, France, on or about 1 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Yvonne Le Ny, a human being by shooting her with a pistol, caliber 45.

He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for gambling in violation of Article of War 96 and absence without leave for two days in violation of Article of War 61.

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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, 66th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Prosecution evidence:

The accused soldier was acquainted with Yvonne Le Ny (R21-22), the deceased, a white woman (R10; Pros.Ex.1). She carried his picture in her handbag (R68). She spent the night of 31 March 1945 sleeping with another colored soldier named "Jimmy" in a tent occupied by six soldiers, including the accused, located in a camp near Messac, France (R10,23-26). The following day, estimated by witnesses to be about 1430 to 1500 hours, she returned on foot with another woman to the camp and on the road met the accused and another soldier (R13,19,30). The accused was observed to have a pistol tucked in his trousers, which he had also been seen carrying earlier in the day (R15,29). He talked to Yvonne in angry tones about her having slept with another soldier. Yvonne appeared gay. After conversing in this manner with her for about a half-hour, the accused told her to go and get "Jimmy" and then at a distance of four or five feet he pointed his pistol at her and shot her through the head causing her death (R15-17,31-32,39,43). The actual shooting was witnessed by a soldier who identified the accused (R43). Three other witnesses, two of whom knew the accused, saw him with the deceased, heard their discussion and the shot and saw the accused with smoking pistol in hand standing over or near the deceased's body immediately after the shooting (R17,32,38). Accused ran away toward the camp and was found shortly thereafter sitting in a tent behind an officer who, unconscious of his presence, was playing a piano (R18,32-33, 38,46-47,51-53,59). A mud-covered pistol which had been recently discharged was recovered from a ditch in the line of accused's flight (R55,64-65,70-71; Pros.Ex.3). A medical officer who examined the deceased within half an hour after the occurrence pronounced Yvonne as dead and attributed death to a bullet that had passed through her head (R6-8).

4. Defense evidence:

Accused was advised of his rights and elected to testify in his own behalf. He denied that he met Yvonne on the road; that he saw her that day; and that he shot her. He claimed that he was in the tent where he was found with the lieutenant who was playing a piano at the time it was alleged that Yvonne was shot (R83-85,89). He denied that he had a pistol (R87). He admitted that he had seen the deceased twice before but did not know her name and did not know how she obtained his photograph (R86-87).

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An enlisted man testified that the accused, who was quartered in the same tent with him came into the tent about 1545 hours of that day and was still there when the witness departed at 1600 hours. He was not in the tent when the witness returned at 1630 hours (R75-77).

Another enlisted man testified that a Lieutenant Satter came into his tent about 1500 hours to play and did play a piano. About 10 minutes later the accused entered the tent and was there 15 or 20 minutes when he was apprehended (R78-79). Lieutenant Satter testified that he started to play the piano about 1440 hours and played until about 1525 or 1530 hours when a sergeant came in to arrest the accused who was then in the tent but the witness was not aware of his previous presence (R80-82).

5. The accused has been found guilty of the murder of Yvonne Le Ny. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148a, p.162).

It was conclusively shown by the evidence that a colored soldier at the time and place alleged in the specification killed Yvonne Le Ny, the woman named therein, by "shooting her with a pistol, caliber .45". A legal presumption of malice may arise 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 finding that Yvonne Le Ny was murdered in the manner alleged was therefore legally supported by the evidence. The person who killed her deliberately pointed and fired a .45 pistol at her, thereby causing a bullet to go through her head which resulted in her death. The only real issue in the case was the identity of the assailant. An eyewitness testified that he actually saw the accused fire a pistol at the deceased. Two other witnesses saw him with the deceased immediately before the shooting and immediately thereafter with smoking pistol in hand standing over or near the deceased. No other persons were shown present to commit the crime. He was also seen hurrying away from the scene of the shooting following a course which would take him past the spot where a .45 pistol was found which showed that it had been recently fired. Many of the witnesses knew him well. None had any disclosed reason for telling an untruth in identifying the accused. The accused denied that he was present at the time of the shooting contending that he was at that time sitting in a tent several hundred yards away listening to an officer play a piano. The witnesses estimated the time of the shooting to be between 1500 and 1530 hours. Time was estimated only - no one was definite. The time when Robinson came into the tent was also estimated at 15 to 20 minutes before he was apprehended, which also was estimated to be about 1525 or 1530 hours. There was therefore no direct conflict of time sufficient to establish an alibi. The issue of fact thus raised was resolved by the court against the accused. Inasmuch as it was within the exclusive province of the court to determine

this issue of fact, it will not be disturbed by the Board upon review (CM ETO 2686 Brinson et al; CM ETO 3200, Prive; CM ETO 4194, Scott). There was no contention on the part of the defense that the accused was insane or intoxicated. The evidence clearly justifies the conclusion that the accused was jealous and angry because the deceased had slept with another soldier the preceding night and in revenge he deliberately shot and killed her, thereby committing murder.

6. The charge sheet shows the accused to be 22years of age. Without prior service, he was inducted 2 July 1942 at Fort Sam Houston, Texas.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

(319)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 1 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private CHARLES M. ROBINSON (38164425), 667th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, 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 13379. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13379).

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

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

(Sentence ordered executed. GCMO 416, USFET, 17 Sept 1945).

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

7 AUG 1945

BOARD OF REVIEW NO. 1

CM ETO 13402

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class ALBERT GREEN (38546361), 3174th Quartermaster Service Company, Private First Class WESLEY B. CARDWELL (35220515), and Private GEORGE A. WILSON (31010535), both of 19th Replacement Control Depot, and Private WALTER TANNER (39566050), 3170th Quartermaster Service Company.	Trial by GCM, convened at Paris, France, 14, 15 November 1944 (all accused) and 29 March 1945 (retrial of accused GREEN and TANNER). Sentence as to each accused: Dishonorable discharge (suspended as to accused CARDWELL and WILSON), total forfeitures and confinement at hard labor, GREEN and TANNER each for ten years, CARDWELL and WILSON each for one year. Places of confinement: GREEN and TANNER, Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York; CARDWELL and WILSON, Loire Disciplinary Training Center, Le Mans, France.

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

1. The records of trial in the case of the soldiers named above have been examined by the Board of Review and found legally sufficient to support the sentences as approved.

2. With respect to accused Green and Tanner, Charges II and specifications, although erroneously laid under the 96th Article of War, allege offenses of suffering military property of the United States to be "wrongfully disposed of" under the 83rd Article of War. The designation of the wrong Article of War is immaterial (CM ETO 6268, Maddox; CM ETO 9421, Steele) and the speci-

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fications will be considered as having been laid under the proper article.

The evidence would have sustained the charge of wrongful sale of property of the United States of a value of more than $50 furnished and intended for the military service, a crime under the ninth paragraph of the 94th Article of War, and such offenses should have been so charged. However, there is also evidence in the case which strongly suggests that colored American soldiers, other than accused, and certain French prostitutes were primarily concerned in the sale and delivery of the gasoline to Manga. While the two accused (Green and Tanner) actively participated in the illegal transactions the facet of the evidence last above indicated is sufficiently substantial to sustain the charges that accused "suffered" the wrongful disposition of military property (MCM, 1928, par.143, pp.157,158; CM ETO 393, Caton and Fikes; CM ETO 2926, Norman and Greenwalt).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1 17 Jul 1945

CM ETO 13406

U N I T E D S T A T E S v. Second Lieutenant ABRAHAM WEISKOPF (O-1948849), Transportation Corps, Cargo Security Officer, S.S. Henry S. Lane.	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Antwerp, Belgium, 16 April 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Second Lieutenant Abraham Weiskopf, Transportation Corps, Cargo Security Officer, SS Henry S. Lane, did, at Antwerp, Belguim, on or about 9 March 1945, feloniously take, steal, and carry away one case of cigarettes, value about $25.00, property of the United States.

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

Specification: In that * * * did, at Antwerp, Belgium, on or about 9 March 1945, knowingly and willfully misappropriate one case of cigarettes, of the value of about $25.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be 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, Channel Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, 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 in this case clearly establishes that accused removed one case of cigarettes from the SS HENRY S. LANE, on which he was Cargo Security Officer, for the purpose of selling it on the black market.

4. Accused did not deny the theft. Rather he admitted it, but vigorously contended that he had been entrapped by an officer of the Cargo Security Section of the Port of Antwerp. Following is a summary of the prosecution's evidence on this point:

Second Lieutenant Clifford B. Foster, attached to the Cargo Security Section of the Port of Antwerp, met accused on the SS. HENRY S. LANE, early in January 1945, in connection with his (Foster's) official / duties. On 8 March 1945 he met accused again and on this occasion accused asked him about selling cigarettes and other commodities on the black market and invited him to dinner aboard the ship (R6, 13-16). After dinner they went to accused cabin where Lieutenant Foster saw a case of Philip Morris cigarettes. He asked accused if they were the cigarettes which were for sale. Accused replied in the negative but added that he knew someone on another ship who could get cigarettes and asked Lieutenant Foster if he knew how to dispose of them. The latter said that he could get a boat and take them off the ship. Accused asked for his address to arrange further details (R6, 7, 16-19). Lieutenant Foster then reported the matter to Major Hyatt, his section chief, who ordered him to assist accused in disposing of the cigarettes (R6, 21). That evening accused, accompanied by one Larry Maraia, steward on the SS. ROBERT E. CLARKSON, whom he introduced as the person who would furnish the cigarettes, called on Lieutenant Foster at his apartment. Maraia stated that he wanted 275 francs per carton for the cigarettes and arranged to furnish some other commodities which were to be sold.

Accused insisted on an advance of 25,000 francs. Lieutenant Foster promised to make efforts to obtain this sum and the meeting concluded after arrangements were made to remove the contraband from the ship the next evening by using a boat which Lieutenant Foster agreed to provide (R7,21,23). The following morning, Lieutenant Foster came alongside the SS. HENRY S. LANE in a small-boat manned by two enlisted men, who had been apprised of the situation and ordered to feign participation in the conspiracy. Accused and Maraia attended a meeting on board this boat at which the details of the removal of the commodities from the Clarkson were again rehearsed and at which there was a further discussion about price. Either Maraia and Lieutenant Foster, or Maraia and accused - the evidence is conflicting - promised the enlisted men 2,000 francs each for their work in manning the boat (R7, 8, 23, 35, 36). Lieutenant Foster then obtained 5,000 francs from an agent of the Criminal Investigation Department, their serial numbers having first been noted, and that afternoon on the Clarkson gave them to accused who immediately gave them to Maraia. Accused and Lieutenant Foster then left the Clarkson and accused told the latter that he did not think he would realize enough by merely assisting Maraia to dispose of his goods and suggested that Lieutenant Foster bring his boat alongside the Lane and night before he went to the Clarkson (R9,10). That night Lieutenant Foster came alongside the Lane in a small boat and accused lowered a case of Philip Morris Cigarettes over the side. He miscalculated, however, and the cigarettes dropped into the water. Lieutenant Foster then took his boat to the Clarkson where two bags of contraband were lowered into it. Maraia and accused came over the side and proceeded in Lieutenant Foster's boat to shore, where they were arrested by agents of the Criminal Investigation Department, placed there in advance for that purpose (R9,10,23-25,29-31,36,37). Major Hyatt was kept informed at all times by Lieutenant Foster of the progress of the conspiracy (R7-10, 20,23,25).

In addition, there was evidence, objected to by the defense, that before accused met Lieutanant Foster in March he questioned one Sergeant Ernest J. Campbo about the possibility of disposing of lipstick and cigarettes on the black market in Antwerp (R48-50).

4. Accused, after being warned of his rights, elected to be sworn and testify. He stated that Lieutenant Foster paid a social call on him on board ship in January, although the two were previously not acquainted, and suggested that on his next trip to Antwerp he bring some lipstick, silk stockings or liquor with him and that he (Foster) would dispose of them at a good price. When accused arrived in Antwerp in March, Lieutenant Foster called on him in his cabin. At that time accused had taken two cases of cigarettes and two cases of peanuts, which had been pilfered, into his cabin for safekeeping until he could return them to the "recoopering" shed. Lieutenant Foster noticed them and when he learned what accused intended to do with them he remonstrated with him, suggesting that they could be sold on the black market. He told accused that he could

procure a boat and remove them from the ship. Upon his offering accused 300 francs per carton, accused agreed to sell one case, although Lieutenant Foster wanted to buy all four. Accused returned the other three cases to the "recooperage shed". Lieutenant Foster also brought up the subject of American money and bought $12, in American money for 1,000 francs from accused. He tried to purchase from accused a pistol for $50, which he knew was United States Government property and made inquiries about the lipstick, and other commodities which he had mentioned to accused on the occasion of their first meeting. Lieutenant Foster told accused to visit him any time at his apartment. Accused admitted that he and the steward of the Clarkson went to Lieutenant Foster's apartment and discussed the proposed transaction. He admitted that next morning there was another meeting on Lieutenant Foster's boat, but denied that he offered the crew any money, stating that Maraia and Lieutenant Foster did that. He admitted dropping the case of cigarettes overboard that night and then going ashore from the Clarkson (R52-60).

On cross-examination, accused conceded that he needed money and that he and the chief mate had purchased 900 lipsticks with the idea of selling them on the black market in England, which they thought was their destination. He likewise admitted giving the lipstick to Sergeant Campbo in Antwerp, although he denied that the conversation to which the latter had testified had occurred. Up to the time Lieutenant Foster mentioned selling the cigarettes accused had no intention of doing so (R60-68).

5. The rule on entrapment as a defense to criminal prosecution was recently stated in CM ETO 8619, Lippie:

> "'When the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute', such conduct on the part of the officials amounts to entrapment and may constitute a defense (Sorrells v. United States, 287 U.S. 435, 77 L. Ed. 413). Where, however, the criminal intent originates in the mind of accused, the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense, does not defeat the prosecution (Grimm v. United States, 156 U.S. 604, 39 L.Ed.550)".

See also CM ETO 11681, Henning. It was a question of fact for determination by the court whether accused or Lieutenant Foster originated the criminal design. The latter testified that accused initiated the transaction and while he was somewhat of an evasive witness, still the credibility of his testimony and the weight to be given to it was a question for the court (CM ETO 895, Davis, et al). Implicit in the court's findings of guilty was the finding that there was no entrapment. Inasmuch as there is substantial evidence that the felonious design originated in the mind of accused and that Lieutenant Foster simply facilitated the theft of the cigarettes, the Board of Review upon appellate review will not disturb the findings.

6. a. Evidence was introduced over accused's objection as to his planned black market dealings in lipstick. Ordinarily so-called similar fact evidence is inadmissible, except in those cases where criminal intent, motive, or guilty knowledge is an important element in the case (MCM, 1928, par. 112b, p. 112). Accused raised the defense of entrapment. In effect, he claimed that he had a mind devoid of any intent to profit in the black market until he was corrupted by the agents of the government. While the act of selling privately owned property in the "black markets" of European cities is not related to the crime of stealing or misappropriating property of the United States, it is apparent in this case that the ultimate purpose of accused was to sell the stolen property in the "black market" of Antwerp. Evidence of his potential illicit dealings in other commodities therefore had a direct relevancy in determining the varity of his defense that he was entrapped into stealing the cigarettes for "black market" sales. The questioned evidence bore directly upon the issue as to whether he was innocent of the design to deal in the "black market" and this design in turn related itself to the ultimate question whether he or Lieutenant Foster originated the scheme.

b. The ruling of the law member in sustaining prosecution's objection to the defense's question propounded to Lieutenant Foster on his cross-examination: "Did you ever do business with him /accused/ before?" (R18) was erroneous. It was a proper question to test the credibility of the witness and bore on the question whether he originated the idea of the theft of the cigarettes. However, the error was non-prejudicial in view of the fact that accused testified at length as to his relations with Lieutenant Foster and he did not even suggest that any deal was consummated between them until the one involving the cigarettes was planned and partially executed. It was a non-prejudicial error under the 37th Article of War.

c. Both specifications contain allegations that the case of cigarettes was the property of the United States. The accused who was in

a position to know who owned the cigarettes admitted they were property of the United States (R67). The overall evidence clearly established this fact, and in addition that they were furnished and intended for the military service (CM ETO 1538, Rhodes).

d. The charging of larceny under Article of War 94 and misappropriation under Article of War 96 of the same property is an unreasonable multiplication of charges (MCM, 1928, par. 27, p. 17), but since the sentence was not increased thereby no prejudice resulted to accused (CM 247391, Jeffrey, 30 B.R. 337 (1944)).

7. The charge sheet shows that accused is 21 years of age, that he had enlisted service from 9 September 1943 to 28 November 1944, and that he was appointed a second lieutenant 29 November 1944.

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. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violation of the 93rd or 94th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir 210, WD, 14 Sept. 1943, sec. VI, as amended).

/S/ B. Franklin Riter Judge Advocate

/S/ Wm. F. Burrow Judge Advocate

/S/ Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 Jul 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant ABRAHAM WEISKOPF (O-1948849), Transportation Corps, Cargo Security Officer, SS Henry S. Lane, 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 13406. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13406).

/S/ E.C. McNEIL

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

(Sentence ordered executed, GCMO 288, ETO, 26 July 1945).

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

BOARD OF REVIEW NO. 3

14 JUL 1945

CM-ETO 13415

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, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JAMES L. RICE (35799638), 3222nd Quartermaster Service Company	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Private James L. Rice, 3222nd Quartermaster Service Company, did at or near Klotze, Kreis Gardelegen, Province of Magdeburg, Germany on or about 19 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ernest Fleckstein, a human being, by shooting 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 Charge and its specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the

service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of Specification 1 of the Charge, approved the findings in all other respects, approved the sentence, designated the "U. S. Penitentiary", Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

On 19 April 1945, at about 1100 hours, accused and Private Harold A. Love, both colored soldiers of the 3222nd Quartermaster Service Company, which was then attached for duty with the 663rd Quartermaster Truck Company in Klotze, Germany, were talking together on a street in that town when they observed a white soldier carrying his gun at port arms following two men dressed in blue denims. Love asked what he had there. The white soldier replied that he had two "SS troopers" and was going to shoot them. At Love's suggestion, he and accused followed along "to see what he was going to do" (R11-12,24). Love was unarmed and accused had his carbine over his shoulder as they watched, but did not participate, when the white soldier stopped the two prisoners behind a barn and thoroughly searched them (R12-13,17-18,25,27,42-43,45,48-49). One prisoner asked for the return of a personal picture. The white soldier said "Hell, where you are going you won't need these" and "threw the pictures away". When the younger of the prisoners said, "Nichts Nazi", the white soldier said that not long ago his brother was killed by a Nazi (R13,24). The search completed, he marched them towards a water-filled shell crater in a field, accused and Love following (R13,28-29,43, 45-46). One prisoner stopped on the way, but continued on after the white soldier fired one or more shots at his feet (R13,29,33,36). Accused said to Love that he "had better go get his piece" and Love accordingly went back to his company area (R14,31). The others continued on to the crater which the prisoners entered. Accused and the white soldier stood at its edge (R26-27). As the prisoners with their hands behind their heads turned and faced accused and the white soldier (R26-27), they were shot (R29,30-31,33,38-39,43,46-47; Pros. Ex. Nos. 1-7), the white soldier firing at one of the prisoners, accused at the other (R34-35). When they "got through shooting" accused and the white soldier left the crater. The latter returned, fired three or four more shots and then both men went away (R23,47).

Second Lieutenant Gerald Meillet, French Liaison, G-5, XIII Corps, testified that his duties concerned the rehabilitation and screening of French prisoners of war and French displaced persons, that the two men, described as "SS troopers" by the white soldier, were in fact Frenchmen "who had been taken in the military service, compulsory service, into the Wehrmacht" and that the name of the younger of the two was Fleckstein (R50; Pros.Ex.No.1), and the older, Paulus (R50; Pros.Ex.No.6).

On the same day after the shootings, Captain John J. O'Brien, Assistant Provost Marshall, XIII Corps, talked with accused and informed him of his rights under Article of War 24 (R51,52). Accused thereupon made a voluntary statement which the witness testified was as follows:

> "He told me that on the morning of the 19th he, with Private Love, met an unknown white soldier who was walking two prisoners of war down the street. He or Love asked the white soldier what he was going to do with the PWs and the white soldier stated he was going to shoot them. They followed along to see if he would. They took them behind the barn and took their papers and scattered them to the winds. The three soldiers with the two prisoners of war in front of them went to the water hole. Love did not go all the way out but returned to his quarters. Upon reaching the water hole they forced the PWs into the water. The white soldier then shot at them. Rice's first shot was shot into the water, the second shot Rice did not look, he could not see himself shoot someone. He turned his head and pulled the trigger. Upon looking at the PW he aimed his rifle at he was lying down submerged in the water. The unknown soldier then turned his rifle from the one PW he had been shooting and shot several times at the one Rice had shot at and was laying down submerged in the water. They then left and went up the street away and had a drink and then they parted. I asked him about his rifle and first he said he had an M-1 and then he said he had a carbine and I sent my driver to his quarters and he came back with a carbine rifle which had been shot" (R53-54).

That accused fired at the younger prisoner, Fleckstein, at the time of the shootings and not at Paulus was indicated by the following evidence:

Lieutenant Meillet identified Prosecution's Exhibit 1 as a picture of the body of Fleckstein and Prosecution's Exhibit 6 as that of Paulus (R50). As disclosed by the pictures themselves and the testimony of Technician Fourth Grade Henry Allen, 168th Signal Corps, Exhibits 1 and 2 show the same body (R10). Captain Edgar M. Krieger, and Technician Fifth Grade Leon M. Prater, both of the 663rd Quartermaster Truck Company, each testified that he came to the crater on 19 April and that the body shown in Prosecution's Exhibits 1 and 2 was then lying completely under water (R8,37). Allen testified that he saw the body which was floating

on the water in the crater and took the picture of it shown in Prosecution's Exhibit 6 to demonstrate "where the body was found that morning" (R10). Prosecution's Exhibit 7 shows a military policeman (on the left side of the photograph) pointing to a submerged body and an aid man (on the right side of the photograph with a red cross on his helmet) pointing to a floating body (R10-11). It follows therefore that the submerged body was that of Fleckstein and the floating body was that of Paulus. Prater testified that on the morning in question he was "in the back yard washing clothes" and heard a few shots "fired out across the field" so he

> "looked up and saw two civilians and two soldiers, they started going along. One of the civilians turned around like he was going to say something and the white soldier I think it was, kept shooting at his feet to make him go on".

The two civilians had their hands back of their heads (R31-33). They came to the crater and stood there for a while and "one got in the hole and the white soldier kicked one in the hole". They were then in the crater facing towards Prater who could see them "From about the shoulder up" (R34). Referring to Prosecution's Exhibit 7, the colored soldier was then where the military policeman is shown in the photograph and the white soldier was where the aid man appears (R37-38). He testified, "Well, then the white soldier was standing up and the colored soldier was kneeling down, so they started shooting at them, so they disappeared". They fired with carbines and he could see how they were pointed - "One was pointing at each man" (R34). "The white soldier had one and the colored soldier had one". He could not say exactly how many shots were fired, but there were "quite a few of them" and

> "when they got through shooting they left the crater and started back towards where I was, they walk a few feet and changed their mind and walked back. The white soldier walked to the crater and finished shooting back into the hole then they cut on back to the high way, that was the last time I saw them" (R35).

In returning to shoot into the crater the white soldier fired this time from the place where the military policeman is seen squatting in Prosecution's Exhibit 7 (R38). After "it was all over with", Prater called his friend, "Corporal Neal", and together they went to the crater where he saw that "one of the civilians was already under water and the other soldier was laying on top of the water trying to get his breath, wasn't dead yet" (R35-36). The body of the "one under water" was that shown

in Prosecution's Exhibit 1 (Fleckstein) and "the fellow that was still alive" was the one depicted in Prosecution's Exhibit 6 (Paulus) (R37). Prater had seen the shooting from a spot "back up in this way somewhere" and indicated the right background of Prosecution's Exhibit 7 where trees and buildings are shown (R38). Accused stated to Captain O'Brien that he had "turned his head and pulled the trigger" and "Upon looking at the PW he aimed his rifle at he was lying down submerged in the water" (R53).

On 20 May 1945 accused was examined by a board of medical officers which found:

> "Private Rice is a highly suggestible and mentally deficient individual who can be easily led. It is very questionable whether he is of sufficient intelligence to cooperate with counsel. Private Rice was sufficiently free from mental disease or defect at the time of the commission of the alleged offense as to be able to distinguish right from wrong and to adhere to the right" (R57).

4. After his rights were explained (R58-59), accused elected to make an unsworn statement through counsel which was in substance in accordance with his statement previously made to Captain O'Brien, except it added that he had had some wine to drink before he and Private Love first saw the white soldier and the two prisoners and while not drunk he had felt a little dizzy. He did not know why Love left when they went across the field to the crater. After they got to the shell crater he asked the white soldier what he was going to do. The white soldier said it would be all right to kill these prisoners of war, that they were "SS troopers". Accused felt nervous and afraid. He had never been in that situation before. He

> "doesn't remember what happened, he does remember hearing shots from files and he remembers that his carbine hung from his hand at the side of his body, his finger was on the trigger. The accused said he wanted to get away from there and as he turned to go away he was nervous and his finger contracted on the trigger of his carbine and it fired. He turned away and walked away. The white soldier turned and shot some more in the crater, the white soldier then said to him that they would go and get some wine. The accused does not remember what he did but remembers going

back to his organization for mess. He states that at the investigation he was frightened of the officers who were there. He has a natural timidity of appearing before officers and he did not know what to say. He was afraid of Captain O'Brien. Captain O'Brien did not read to him the 24th Article of War but Captain O'Brien did tell him if he made a statement it would be used against him and he did not understand exactly what it was all about, he did not tell Captain O'Brien he had killed one of these men" (R59-61).

5. The circumstances under which the two killings were shown to have occurred, the position of the two bodies when found in the crater, their identification and the voluntary statement of accused to Captain O'Brien, all demonstrated beyond any reasonable doubt that accused shot and killed Fleckstein at the time and place alleged. It was shown that he fired at least two shots at Fleckstein and must have known that his death or serious bodily injury might result. Even if accused was told by the white soldier that it would be "all right to kill these prisoners of war", as contended in his unsworn statement (R60), this was manifestly beyond accused's duty and authority as a soldier and conduct that even a man of accused's limited sense and understanding should have recognized as criminal (MCM 1928, par.148,pp. 162-163).

"A deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequences of his act" (1 Wharton's Criminal Law, 12th Ed., sec. 420, p.633).

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life * * *. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or 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 * * *, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par.148a, pp. 163-164).

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

It was indicated that the two "SS prisoners" were prisoners of war and as such were entitled to treatment in accordance with established principles of international law and the declarations of the Geneva Convention as fully set forth in CM ETO 4581, Ross.

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

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

In accordance with the foregoing authorities, the Board of Review is of the opinion that the evidence is legally sufficient to support the court's findings of guilty, as modified.

6. Attached to the record of trial is a recommendation for clemency signed by five of the nine members of the court present at the trial, recommending that the term of confinement be reduced to ten years for the following reasons:

a. Accused was led and definitely influenced in his actions by a white American soldier, who was involved in the crime but never appre-

hended, and by a companion colored soldier who remained with him until immediately before the crime was committed.

b. Accused is quite evidently mentally deficient.

7. The charge sheet shows accused is 23 years of age and was inducted 16 April 1943 at Cincinnati, Ohio for the duration of war plus six months. He had no prior service.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levey Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 13416

8 SEP 1945

U N I T E D S T A T E S v. Private DORSEY B. WELLS (6984715), Headquarters Company, XIII Corps	XIII CORPS Trial by GCM, convened at APO 463, U. S. Army, 1 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

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 Dorsey B. Wells, Headquarters Company, XIII Corps, did, at or near Stadthagen, Kreis Stadthagen, Land Schaumburg-Lippe, Germany, on or about 10 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Frans Doelmans, a human being, by shooting him with a pistol.

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

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at such place as the reviewing authority may direct, for the term of "your natural life". The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

On 10 April 1945 the three floors of Schramm's Hotel in Stadthagen, Germany, were occupied by American troops. Doors in the main lobby of the hotel opened into a central hall, on the left side of which was a beer parlor and on the right a restaurant. Also on the right side of the hall was a staircase, about 50 feet from the main entrance, leading from the first, or ground, floor to the second floor of the hotel. In the attic of the hotel were two bedrooms, one occupied by a Polish girl, Maria Fiut, and a Belgian boy, Frans Doelmans (the deceased), and the other occupied by a second Polish girl, Leokadia Wietrykawska. The stairway leading to the attic was reached through a small room on the right hand side at the end of the hallway on the third floor. The same flight of stairs continued down from the third floor to the second floor, giving access to the loft of a barn (R12,19,20,32,38; Pros.Ex.3).

Maria Fiut was in bed in her room at about 2300 hours on that date when Frans Doelmans, accused, and two other soldiers entered the room. These two soldiers were armed with carbines, but she saw no weapon on accused. He came up to her bed, sat down, and drank some schnapps out of a bottle he took from his pocket. One of the soldiers, who was standing by the door, asked where the toilet was. She got out of bed, put her coat on, and went down with him. Accused went along with them. The soldier went to the toilet and she did not see him again. Accused then took her by the hand and took her back upstairs. After they came upstairs, accused told her he wanted to "stay" with her and she said "no". He stated that he could not understand why she said "no" and took her back into her room. He told Frans to get some beer. Frans went downstairs and she went with him down the back steps. She went to an unoccupied room on the second floor and hid under the bed. While under the bed she heard Frans and a man, whose voice she could not identify, searching for her. They came three times into the room in which she was hiding. She came out from under the bed when she heard many persons go up and down stairs and heard Leokadia cry. She never saw Frans alive again. When she left her room in the attic, Leokadia and one of the other soldiers, as well as accused, were in the room. This other soldier had a moustache, was dark, was wearing a helmet, and had a carbine. Accused wore olive drab trousers, a coat similar to a field jacket, and had neither a hat nor a helmet (R7-13,55).

Leokadia Wietrykawska was in Maria's room in the attic when Frans, accused, and two other soldiers entered. They were all drunk. Frans said, "Here are the girls". The "black soldier" sat down on the bed where she lay. Accused sat on Maria's bed and pulled out of his pocket a bottle of schnapps. The third soldier left and she saw him no more. Accused told Frans that he should bring them some beer; he left the room, and Maria followed him. Accused "went out after them". That was the last time she saw Frans alive.

The soldier at her bed became "fresh" and, after telling him she would call an officer if he did not leave, she descended the stairs. She first went to the toilet and afterwards "saw upstairs in the attic another soldier sitting in a chair but I wouldn't be able to recognize him for it was dark". When she came down from the toilet she saw accused on the second floor. As he ascended the stairs, he hit her over the head. She went downstairs to an officer who was playing cards in the dining room on the first floor. As she came out of the dining room, she saw the soldier who had sat on the bed by her, leaving by the front door downstairs. The officer then searched for this soldier but failed to find him. She and the officer then went upstairs and she saw accused standing against the wall of the back entrance of the back stairs on the second floor. She, with the officer, entered the room in the attic and saw Frans lying across the left bed. The right side of his neck was full of his blood, and the blood was thick. It "could have been about five minutes" between the time she went downstairs to get the officer and the time she returned and saw Frans on the bed. On the night in question accused was wearing a coat similar to a field jacket. She did not see the pistol until they took the weapon from him. The other two soldiers had carbines (R14-19,56).

Captain Haskell J. Weinstein was playing cards with a group of officers in the officers' dining room when one of the women living in the attic of the hotel came down and reported that someone was in her room. Being unarmed, he took a pistol from a man in the lobby, proceeded up the stairs, apprehended accused, who was standing at the foot of the stairs leading to the attic, and instructed Corporal Johnson, corporal of the guard of the headquarters, to put accused under arrest. The officer and the woman then proceeded up the steps to the attic. He swung his flashlight around the attic and saw nothing. The woman opened a door on the left and immediately started screaming. He saw Frans half-sitting and half-lying on one of the beds in the room and bleeding profusely from the throat. The soldier from whom he had borrowed the pistol and who had followed him upstairs, rushed over to apply first aid. Captain Weinstein then made a search of the rest of the attic and found "no man there who should not have been there". Quite a few people had followed him up the stairs and, so far as he knew, they were not there when he first came up. Frans, who seemed to be badly wounded and unconscious, was removed to a hospital. In the opinion of Captain Weinstein, accused was quite drunk at the time he saw and arrested him on the steps, and was too drunk to answer coherently. "There is no question" about the fact that the man was drunk He was wearing a combat jacket, with jersey wool collar and cuffs. When the officer entered the room, he saw no evidence of any struggle, no evidence of any chairs or tables being turned over, nor anything, except the fact that the beds were disarranged, to indicate that people were sleeping there (R20-22,57).

Technician Fifth Grade Karl F. Johnson testified that at 2315 hours on the night in question he proceeded up the stairs in the hotel with Captain Weinstein and ran across a "guy" standing in the hall, whom the captain told him to take into custody. He could not identify this

person, who was armed with a pistol, similar to a Belgian P-38, which was introduced in evidence as Pros.Ex.2. Johnson disarmed him and turned the pistol (which he could not identify in court) over to someone of the military police (R23,24).

Private First Class Louie Dillenger of the military police was called to the hotel about the time in question. He found that a group of persons had accused in custody on the second floor. They said, "Here is a soldier, search him". Accused had on a pair of fatigues, which witness told him to pull off, and had on a suit of olive drab clothes underneath. No gun was found on him, but "someone" came down, gave witness a gun, and said, "This is the gun the soldier shot the guy with". Accused said "he didn't shoot the guy". He identified the gun as the Belgian-made pistol introduced in evidence as Pros.Ex.2. The clip that fit in the pistol held 12 cartridges, but only 11 were counted in it. He smelled the barrel and the powder smell was strong. Accused did not have on a field or combat jacket (R26-29).

Another member of the military police, called to the hotel at the same time, found an empty 38 Belgian special cartridge lying on the edge of the bed which was on the opposite side of the room from the bed on which a body was lying. It was the same type of cartridge as in the clip in the pistol that Dillenger had. The clip had a capacity of 12 cartridges but contained only 11 (R31).

Captain David K. Hunter, investigating the homicide about 11 or 12 April 1945, found a bullet (Pros.Ex.5) in a straw bolster at the head of the bed on the left side of the room. He also found a small saturation of blood at the head of the same bed and immediately alongside of the bed. In the pool of blood on the floor there was a blood-soaked first-aid pad. About 12 April he saw the body of Frans Doelmans in the morgue of the hospital. Frans was dead. There was a gunshot wound on the right side of the throat. There were black marks around the wound which were bruises, not powder burns (R32-40).

Captain Hunter also testified that, after an explanation of rights under Article of War 24, accused made the statement that early in the evening of the alleged homicide he had fired several rounds from the gun (Pros.Ex.2) together with another member of his company, whom he referred to as "Blackie". In answer to the question with respect to this weapon, "Is that your gun", accused answered, "Yes". Captain Hunter made no inquiry to discover who "blackie" was (R37,38,41).

A ballistics expert testified that the bullet (Pros.Ex.5) was fired from the pistol introduced in evidence as Pros.Ex.2 (R42-43;Pros. Exs.7,8).

Captain John J. O'Brien testified that, after accused had stated he understood his rights under Article of War 24, he swore to a written statement, reading substantially as follows:

He went to his quarters at about 1930 hours on 10 April 1945, had a few drinks with some men, drinking for around an hour, then went to a nearby shed with one of the men called "Blackie", and they both fired his pistol several times at a target. His gun was a Belgian automatic pistol he had picked up in Africa. While washing and cleaning up, he had four or five drinks of corn whiskey with some of the men. On the way uptown he joined two other soldiers. They were invited into a cafe where they were given beer and wine. He had a few drinks at the party, which he left to go to the latrine. He went back of the building and into a shed. When he finished, he heard a commotion and ran back into the main building to see what was going on. Someone said "There he is, grab him". A guard was put over him. They went upstairs, stood in the hall, and one of the guards took his pistol out of his holster, which was the last time he saw it. He was never any farther upstairs than where he was standing with the members of the military police, and he only went up that far while he was under guard (R50,51;Pros.Ex.9).

There was no medical evidence that the wound received by Frans Doelmans caused his death.

4. For the defense, Major Bennett R. Adams testified that accused was a very good soldier and that his character was excellent (R46,47).

Private Arnold W. Wolfgong testified that about the first part of April he saw accused mark a pistol by putting a piece of red cellophane on the handle, but the pistol in evidence (Pros.Ex.2) was not marked in the manner he saw accused mark his pistol (R47,48).

Accused, after his rights as a witness were explained to him, elected to make an unsworn statement for the reason, as stated by his counsel, "that that particular night he was so drunk he doesn't know what happened". The unsworn statement, read by his counsel, was substantially as follows:

On 10 April 1945 at about 1930 hours he went to his quarters and had some drinks with the men for about an hour. He then had four or five drinks of corn whisky while washing and cleaning up, and walked uptown. While with two other soldiers he was invited into a cafe where he was given some beer and wine, staying there for several hours and having several drinks. He could remember going to the latrine and he could hazily remember some excitement when he got back, and being arrested soon after his return. He was so drunk he could not remember anything else. He was sure he had nothing to do with any women because he did not have women on his mind. He was sure he did not kill anybody or shoot at anybody. While with Wolfgong he put red cellophane inside the grips on the handle of his gun, and had never removed the cellophane. If there was no red cellophane in the gun, it was not his gun. When Captain Hunter showed him the gun, he told the officer he had one something like it but did not know whether or not it was his (R49,50).

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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).

The proof required to support a finding of guilty is laid down in the Manual for Courts-Martial as follows:

> "(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) that such killing was with malice aforethought" (MCM, 1928, par.148a, p.164).

In the present case proof of the identification of accused as the person responsible for the death of Frans Doelmans rests entirely upon circumstantial evidence. It is necessary, therefore, to refer to the established rules regarding the nature and strength of the evidence required to sustain a conviction.

It is fundamental that a conviction may be had upon circumstantial evidence alone (CM ETO 2686, Brinson and Smith; CM ETO 3200, Price; CM ETO 6397, Butler). It is equally well established that mere conjecture or suspicion does not warrant a conviction. With respect to circumstantial evidence, the following from the opinion in Buntain v. State, 15 Tex. App. 490, has often been quoted with approval by boards of review:

> "While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens" (CM 233766, Nicholl, 20 BR 121 (1943) at p. 123-124, and authorities herein cited; II Bull JAG 238; CM ETO 3200, Price; CM ETO 7867, Westfield).

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A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence (People v. Galbo, 218 N.Y. 283, 112 N.E. 1041, 2 ALR 1220, and authorities cited therein; CM ETO 6397, Butler).

The rules regarding the weight and sufficiency of circumstantial evidence in homicide cases, are thus stated in Corpus Juris:

> "In order to show the connection of accused with the crime, circumstantial evidence may be resorted to, and frequently the body of the offense and the identity of the murderer are established by the same circumstances. In drawing inferences from the proved facts, great care and caution must be employed. Each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence, although failure to prove a particular fact does not destroy the chain of evidence, but only fails to give it corroboration in that particular. All the facts proved must be consistent with each other and with the main fact. It is not sufficient that the circumstances produce a strong probability, to a 'mere suspicion', or a strong suspicion. All the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that accused and no one else committed the act, and must exclude every other reasonable theory or hypothesis and be inconsistent with any other rational conclusion. Mere proof that defendants had an opportunity to commit the homicide, without proof excluding an opportunity by anyone else to commit it, is not sufficient" (30 CJ, sec.542,pp.297,298).

Applying these rules to the evidence in the present record, the following situation results:

Several of the links in the chain connecting accused with the pistol (Pros.Ex.2), and the bullet (Pros.Ex.5) and cartridge case (Pros. Ex.6) with the pistol, are very weak. Maria Fiut at no time saw accused with a weapon (R13). Leokadia Wietrykawska did not see accused's pistol until it was taken away from him. She said they were all drunk and others could have had the pistol before the shooting. (R18). Captain Weinstein did not know whether or not accused had a weapon (R20). Corporal Johnson could not identify accused, but said he had taken a pistol like Pros.Ex.2 (though he could not swear it was the same one) from a person whom he took into custody at Captain Weinstein's direction, and turned it over to the military police within a few minutes; Johnson did not state to which member of the military police shown to be present he gave it (R23,24). Private First Class Dillenger, of the military police, searched accused and found no gun on him, but afterwards someone came down, gave him a

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pistol and said "This is the gun the soldier shot the guy with". He identified Pros.Ex.2 as that pistol. A "couple of MP's" came up later. Later Dillenger turned the pistol over to "somebody in the MP's who was investigating the case" (R27,28). On the night of the shooting, Private First Class Wurtzbacher, of the military police, found in the room a 38 Belgian special cartridge case and handed it to Dillenger (R30). On 11 or 12 April, Captain Hunter found in the room a bullet. He also received from someone a cartridge case. Upon his securing possession of a pistol, which he identified as Pros.Ex.2, he locked it in his footlocker, where it remained until he turned it over to "CID agent Sergeant Davis" who also took the bullet and cartridge (R34,35). Davis was not a witness at the trial.

According to Captain Byrd, who was a ballistics expert, a Warrant Officer Davis delivered to him a pistol, a bullet, and a cartridge case. Captain Bird identified them as Pros.Exs. 2,5 and 6, respectively, and testified that the bullet and the cartridge case were fired from the pistol (R42). In his pretrial oral statement to Captain Hunter, accused said that the pistol then in Hunter's possession, which Hunter identified as Pros.Ex.2, was his pistol (R41) and in his pretrial written statement he said that a guard took his pistol out of his holster (Pros.Ex.9); but in his unsworn statement at the trial he asserted that he told Captain Hunter he had a pistol "something like" the pistol in question but did not know whether it was his or not, and asserted that the pistol was not his, if there were no red cellophane on it (R50). A defense witness testified that Pros.Ex.2 was not marked with red cellophane in the manner in which accused had marked his pistol (R48).

Tracing the pistol, bullet, and cartridge case through the evidence, the following conclusions may be drawn: The chain completely breaks as to the cartridge case (Pros.Ex.6) because there is no evidence that this exhibit was the cartridge case found in the room. The evidence as to the bullet (Pros.Ex.5) is weakened by the fact that it was found in the room either one or two days after the shooting, and there is no competent evidence in the record to show that there were no changes made in the room during the intervening period. Competency of the evidence depends entirely upon its identification in court. Several links in the evidence connecting accused with the pistol (Pros.Ex.2) are so weak that the chain would break completely unless Captain Hunter's identification of it and his version of accused's oral statement is relied upon. The defects in the above evidence are rendered more significant by the fact that the testimony of the prosecution's witnesses is irreconcilable on the subject of the clothes accused was wearing, which further weakens the inference that the pistol (Pros.Ex.2) was the one taken from accused. Gaps in the trains of tracing these exhibits are attempted to be filled by identification thereof in court, based on meagre and insubstantial explanations of improbable knowledge.

But even on the assumptions that the proof is sufficient to show that this pistol (Pros.Ex.2) belonged to accused, that it was found in his possession after the shooting, and that the cartridge case (Pros.Ex.6) and the bullet (Pros.Ex.5) were fired in the room from this pistol on the

night in question, causing the death of Frans Doelmans, and accepting the prosecution's theory to the fullest, the evidence in the record shows only the following pertinent facts: Frans, accused, and two other soldiers entered Maria's and Frans' room in the attic, one of these two other soldiers leaving shortly afterward. Frans left the room, followed by Maria and then by accused. That was the last time any witness testified as to seeing Frans until he was found bleeding on the bed. Leokadia and the dark soldier were then the only persons in the room. Leokadia left and went to the toilet. After that she saw a soldier upstairs in the attic sitting in a chair whom she was unable because of the dark to recognize. She then saw accused as he went upstairs between the second and third floors where he hit her and she went downstairs to the officer. Some time later she saw the dark soldier leaving at the front door of the hotel.

Mystery enshrouds the events that took place in the attic room during the several minutes elapsing between the time Leokadia left the room to go to the toilet and the time she returned with Captain Weinstein. No witness testified as to hearing the shot, so there is no certainty as to exactly when it was fired, whether it was while Leokadia was in the toilet and before accused was seen going upstairs toward the room, or whether it was while the dark soldier was in the room. No one testified to seeing Frans return to the room. No witness testified to seeing accused with a pistol or any weapon before the shooting. The record fails to throw any light on the manner of the shooting. Was the shot fired as a result of a pure accident, was it during an altercation or an act of horseplay? Whose finger pulled the trigger?

Accused did not apparently resist arrest, nor did he appear to be fleeing from the scene. In response to an indirect accusation, accused denied guilt immediately after the killing.

One further element beclouds the factual situation, viz., the drunkenness of the soldiers involved. Leokadia testified that the three soldiers were "quite drunk". Captain Weinstein said that accused was "Quite drunk" and too drunk to answer coherently, although Dillenger said accused did not act as if he had been drinking. Accused said in his unsworn statement that he was too drunk to remember what happened, although he indicated he remembered some details and was sure he did not shoot anybody.

Who shot Frans Doelmans? Even assuming that the pistol from which was fired the bullet that struck Franz was in accused's possession after the shooting, there is no proof that he had it in his possession immediately before or at the time of the shooting.

Witnesses then with him saw no gun or holster upon him. When and How in his drunkenness he secured possession of the damning object, if he did, is an unsolved mystery. Whether found where it lay at a time unknown, or taken in stupor from the hand of the killer, is the secret of a guilty heart, be it that of accused or another. Yet on this single fact of such tenuous evidence of possession rests the whole

case and with it our decision whether a man shall spend his life free or in prison.

Granting the prosecution's theory, that Pros.Ex.2 was the gun found on the accused and which fired the death missile, there remain under the evidence in the case these reasonable hypotheses:

1. Frans shot himself by accident or on purpose.

2. Maria Fiut, who, though apparently not married to him, slept in the same room as Frans, returned to the room and shot Frans, for any of the reasons often motivating such crimes in relationships of this kind, aggravated by his abetting the soldiers in their obvious search for women who would engage in sexual intercourse with them.

3. Leokadia Wietrykawska was involved in the relationship between Frans and Maria Fiut, and in a jealous temper shot him under circumstances to throw blame upon a drunken soldier. She was enraged at Frans' bringing the soldiers up to her room. She handed the gun to accused on the steps.

4. The "dark" soldier shot Frans. The shooting occurred while only he and Frans were in the room, or while he, Frans, and accused were in the room. This "dark" soldier was seen leaving the front door sometime after Leokadia had gone downstairs and was fleeing from the scene.

5. The third soldier was unaccounted for. He went down the backstairs to the loft of the barn, or elsewhere in the house, and returned to fire the shot. He, or any other perpetrator of the crime, hid in the barn after the shooting.

6. The man in the lobby from whom Captain Weinstein grabbed the pistol in the hallway shot Frans. This pistol was handed to someone who, thinking it was taken from accused, turned it over to the military police, saying "This is the gun the soldier shot the guy with", in conformance with Private First Class Dillenger's testimony.

7. Accused may have shot Frans, despite the apparent absence of any malice or ill will. It is no doubt true that the finger of suspicion points to the accused as the possible perpetrator of the crime, because of his subsequent possession of the pistol, assuming this fact to have been proven. Withdraw that assumption, and others of the hypothesis are the more plausible. Considering how easily possession could be gained, and assuming such possession, it cannot be held as a matter of law that the inference of accused's guilt is more reasonable than of guilt of the others.

It is not necessary to determine who shot Frans Doelmans; the decision to be made is whether the proof shows beyond a reasonable that accused is guilty of each element of the murder, if such it was.

the fact that a holding that the evidence is insufficient to convict accused leaves the mystery unsolved is wholly immaterial.

> "Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will account for all the facts proven. Much less does it afford a just ground for conviction that, unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery" (People v. Razezicz (1912), 206 N.Y. 249, 99 N.E. 557, quoted with approval in CM ETO 7867, Westfield).

In this State of the record, the Board of Review is of the opinion that the evidence falls short of the standards required by circumstantial evidence to sustain a conviction. While the presence of accused near the scene of the crime under the circumstances shown, may create a strong suspicion or even a strong probability that he shot Frans Doelmans, the Board cannot say that there is a moral certainty that accused committed the act, nor that the evidence is sufficient to exclude every reasonable hypothesis except the one of accused's guilt (CM ETO 7867, Westfield; CM ETO 10860, Smith and Toll).

6. The charge sheet shows that accused is 29 years three months of age and enlisted 19 December 1939 at Fort Knox, Kentucky, to serve for three years. His service period was extended by the Service Extension Act of 1941. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. For the reasons stated, the Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty and the sentence.

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Arnold D. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 3

13 JUL 1945

CM ETO 13419

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, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class RUFUS GREENE (34064477), Battery B, 349th Field Artillery Battalion	

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

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

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

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

Specification: In that Private First Class Rufus Greene, Battery "B" Three Hundred Forty-Ninth Field Artillery Battalion, did, at Gamsen, Kries Gifhorn, Province of Hanover, Germany, on or about 2400 hours 20 April 1945, forcibly and feloniously against her will, have carnal knowledge of Frau Hildegard Wehmeier.

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

Specification: In that Private First Class Rufus Greene, Battery "B" Three Hundred Forty-Ninth Field Artillery Battalion, did, at Gamsen, Kries Gifhorn, Province of Hanover, Germany, on or about 20 April 1945, in the night time, feloniously and burglariously break and enter the dwelling house of Frau Hildegard Wehmeier, with intent to commit a felony, viz rape therein.

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

3. Prosecutrix resided at 138 Gamsen, Kries Gifhorn, Germany, with her three children and a Frau Thran (R7). Just before 2400, 20 April 1945, two negro soldiers entered her dwelling. According to the prosecutrix,

> "They broke the top pane of glass on the door and reached their hand in to unlock the door. * * * They broke open another three doors inside the building. * * * As I got up and went into the kitchen they came up to me with a rifle and asked where is the man. * * * I told them my husband is a soldier and I returned to my children in the bed room. * * * The one held the gun pointed at me and the other one opened his trousers and came to me. * * * I don't know which one. The one was standing there with the gun and the other one came to me. * * * he held my mouth shut * * * /The other/ stood there with his rifle. * * * He used me then. * * * I begged them several times to let me go and I was afraid he was going to shoot me because I had my children with me. * * * Then the next one came to me. * * * I was always begging to let me go loud enough for the people upstairs to hear but they just did not listen to me. * * *

> Then the first one came again. * * * After that the next one came, in total everyone twice" (R8-11).

Her three children were in the bedroom (R11), one in bed with her (R14). In saying "used me" she was referring to sexual intercourse. Each inserted his penis into her private parts. Each had sexual intercourse with her twice. She did not consent. She tried to push them off. She did not use physical force because: "I was glad that I was alive"; "I was glad they let me live"; "I was afraid I was going to get shot". When leaving they gave her a box of food. "I did not take it as a payment, I was just glad they left me alone and I was still alive". They left just before 0130 hours. Since then she had identified one of the soldiers. He was not accused. The only light was that of a flashlight. She saw only one clearly. He was not the accused (R9-15).

Prosecutrix's eight year old son, after voir dire, was sworn and testified that in April negro soldiers broke into the house. His mother was lying in bed and she cried. They went into his mother's bed (R29-30).

Accused and Private S. L. Henry of the same battery were absent at a bed check made between 2400 hours, 20 April 1945 and 0100 hours, 21 April 1945. They were in the battery area between 0030 hours and 0045 hours and were present at the bed check between 0100 hours and 0200 hours (R15-17).

On 21 April 1945 accused's battalion commander talked with accused. "There had been a rape case and I had called Private Greene in for a conference and a confession "(R17). "He was warned of it", (his rights) (R24). He was told "he would not have to answer * * * any question which might incriminate him" (R18) but was not read Article of War 24 (R21). Later "he was warned again that anything he might say could be used against him and he need not answer" (R24). After intermittent questioning by his battalion and battery commanders and another officer, accused made a confession. In all, including the time required for writing the confession, accused was questioned for "perhaps two hours" (R20-21,24-26). He was nervous and perspiring but did not seem afraid (R20). There was no threat, promise, or physical abuse (R18). He answered each question (R21). Private S. L. Henry had been identified as one of the men alleged to have committed rape (R18,28). Accused was told his story did not agree with what other witnesses said nor with the story given by Henry who had been identified (R20-21). He was also told:

> "If I could not come to a conclusion with the answers I get from him and Private Henry I would turn the matter over to CID as I did not have time, we were going to move out the next morning".

The witness further testified "I do not think that was a threat". "None of the investigations we had had by CID had ever developed a case and I had had several investigations" (R25). After a time accused acted as if he wanted to say something to the battalion commander privately whereupon the other officers left the room (R21). Then the battalion commander

> "turned to him and remarked in substance this, that we were not getting very far, I was having a lot of stories, that I personally felt that he knew something and would not tell it which was his privilege. Told him to think it over, gave him a cigarette, lit one myself, sat back and smoked mine and he smoked his. After we were through I asked him what he wanted to tell me, he started in and told me fairly closely the story he had developed" (R25-26).

Accused's statement was reduced to writing. Accused was further warned of his rights. The statement "was read to him and passed over by the battery commander and he was told, 'I have read this and you can also read it'". Accused could read. He signed without any threats (R26).

Over objection by defense (R22-23) accused's statement was ruled by the law member to have been made voluntarily (R27).

The original statement was either lost (R19) or was with accused's unit some hundred miles away (R27). The statement exhibited to the battalion commander in court was substantially the same statement made by accused (R19). The trial judge advocate explained that the exhibited statement was a typed copy of the longhand original (R27). The exhibited statement was not introduced. Rather, the battalion commander gave the substance of accused's statement. In substance,

> "Private Greene testified that he and Private Henry had left the battery area at about 9:00. That just prior to leaving Private Henry had said to him 'Would you like to * * * 'get a piece of tail'. Greene asked Henry where and he said 'Down the street, come with me'. He said that they went to * * * the third house, knocked, and there was no answer, at which time Private Henry broke the glass or pane of the door, I forget which he stated it was, reached in, unlocked the door and they

entered, They went to one room which was a bed room and they found a woman and three children in this bed room. The woman with one child was in one bed and the other two children were in the other bed. They had their rifles with them * * *. The weapon was pointed at the woman and S. L. Henry pushed the woman back on to the bed, she had sat up in bed, at which time Private Henry had intercourse with the woman. When Henry was through, Greene had intercourse and then Henry and then Greene again. I asked him if he had given the woman anything for the intercourse and he said no. I asked him if he had left anything and he said he did not. I asked him did she give her consent and he said no and I asked him why did you do it and he shook his head and said, 'Sir, I was just a damn fool'" (R27).

4. No witnesses were called by the defense. After his rights as a witness were explained, accused elected to remain silent (R30-31).

5. a. Defense contended the confession was involuntarily made: (1) Accused had not cared to make a statement. (2) He was questioned for approximately two hours. (3) He was told he would be court-martialed. (4) He was told if he did not tell the truth the matter would be referred to "CID". (5) He was not given the opportunity of seeking counsel and advice (R22-23).

It does not appear in evidence that accused had not cared to make a statement. Rather, it appears that he answered all questions put (R21); telling him he would be tried seems to have been nothing more than a factual statement. There is no suggestion that accused was given the alternative between making confession and being court-martialed. Telling him that the matter would be turned over to "CID" seems to have been nothing more than another factual statement. The battalion commander had no more time to give the matter. Accused did not ask for an opportunity to seek counsel and advice. Accused replied to questions. He was told his answers did not conform to the stories of others, thereupon he would contradict himself, and this was pointed out to him. Finally accused made a confession which was reduced to writing and signed - all within perhaps two hours. Accused failed to testify concerning the confession. Whether this confession was made by accused to escape further questioning was a question for the court (CM 2502006, Kissell (1944), 33 B.R. 331,341-3); CM 237711, Fleischer(1943), 24 B.R. 89, 98; CM 238696, White (1943), 24 B.R. 321,330; and CM 252772, Gentry (1944), 34 B.R. 181,188 are not applicable. In the first case

accused was advised that a confession would make it easier for him. In the two latter cases accused were not advised of their rights.

b. The battalion commander related the substance of accused's confession which had been reduced to writing and signed by accused. While he stated that the written confession has been lost, the trial judge advocate implied it was at a command some distance away. Defense did not object on the ground that the best evidence was not offered. Failure to object on that ground constituted a waiver (CM ETO 5765, Mack; CM ETO 739, Maxwell).

6. a. One witness twice testified that Private S. L. Henry had been identified as the other soldier involved, once over defense's objection (R18,28). Reference is made to CM ETO 7209, Williams, where authorities are collected dealing with the competency of such testimony. Even if incompetent (CM 270871, IV Bull. JAG 4), its admission was not prejudicial error for there was other substantial and compelling evidence as to the identity of the accused (CM ETO 6554, Hill; CM ETO 10891, Murphy) and the prosecutrix had testified she had identified the other soldier (Cf: CM ETO 7209, Williams; CM ETO 10891, Murphy). The offenses occurred on the night of 20-21 April 1945 at a time accused was absent from his battery area. On 21 April 1945, accused confessed to conduct and observations conforming in detail to the prosecutrix's testimony. While the prosecutrix was unable to identify accused as one of her assailants, the coincidence of her testimony and his confession compel the inference that accused was one of her assailants. The Board of Review is of the opinion that substantial and compelling evidence supports the findings of Charge I and Specification (CM NATO 643 (1943), CM NATO 1121 (1944), III Bull. JAG 61).

b. The record of trial contains substantial and compelling evidence to support the findings that accused also was guilty of Charge II and Specification.

7. The charge sheet shows that accused is 25 years six months of age and was inducted 15 October 1941. He had no prior service.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of rape by Article of

War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567); and also upon conviction of burglary by Article of War 42 and Section 22-1801 (6:55), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B V Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 2 12 JUL 1945

CM ETO 13425

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, 29 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class JACK C. KELLEY (39200920), Battery B, 207th Field Artillery Battalion	

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

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

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

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

Specification 1: In that Private First Class Jack C. Kelley, Battery B, 207th Field Artillery Battalion, did at or near Bremke, Lemgo, Westfalen, Germany, on or about 7 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Elfriede Noltemeier.

Specification 2: In that * * * did, at or near Bremke, Lemgo, Westfalen, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Annie Meyer.

(360)

Specification 3: In that * * * did, at or near Bremke, Lemgo, Westfalen, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Waltraud Sivering.

Specification 4: (Findings of not guilty)

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

Specification 1: In that * * * did, at or near Bremke, Lemgo, Westfalen, Germany, on or about 8 April 1945, wrongfully have carnal connection per os with Annie Meyer, a female human being.

Specification 2: In that * * * did, at or near Bremke, Lemgo, Westfalen, Germany, on or about 8 April 1945, wrongfully have carnal connection per os with Waltraud Sivering, a female human being.

Specification 3: (Disapproved by Reviewing Authority)

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found not guilty of Specification 4, Charge I, guilty with exceptions of Specification 3, Charge II, and guilty of all the other 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 rest of his natural life. The reviewing authority disapproved the findings of guilty of Specification 3, Charge II, approved the findings in all other respects and the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The prosecution's evidence shows that on 7 April 1945, Waltraud Sivering, a 24 year old married woman and her five year old child were living in Bremke, Germany. On that evening between 8:30 and 8:45, they were in bed when the glass in the door was broken and the door kicked in. Waltraud and three other women in the house went downstairs and found four soldiers, who with flashlights searched all over the house and then produced a bottle of alcohol and also some

eggs, which they required one of the women to fry. The soldiers ate the eggs and drank the alcohol and then left the house about 10:30 and the women returned to bed. One of the soldiers was tall, black-haired and stocky, one was blonde. The other two were not recognized. After midnight a "terrific noise" was made at the door and when opened two American soldiers entered holding a pistol (R7-9). They were the black-haired soldier and the blonde one who had been in the house earlier. The black-haired one she identified as accused. Accused pulled Waltraud into the sleeping room and her child began to cry (R10-11) when he placed the muzzle of his pistol against the child's breast. When Waltraud placed her hand on the pistol, he struck her in the face with his hand. She succeeded in returning with her child to the kitchen where the other women and the blonde soldier were. The black-haired soldier (accused) (R19) followed her, put his hand on her breast under her dress, opened his trousers and again forced her into the bedroom, threatening her constantly with his pistol (R12-15). He required her to undress completely and "threw" her on the bed and, although she cried for help and tried to push him away, he lay on her and had sexual intercourse with her without her consent several times (R16-17) over a period of about an hour (R23). Between times he turned her around on the bed, placed his head between her legs and for "quite a while" (R18) it could have lasted four or five minutes (R26) he had his mouth on her sexual parts. She was unable to do anything as he held her with his hands on her legs and body. A candle was burning in the room and she could see but "he was very brutal" and despite her resistance she was unable to prevent his acts. The blonde soldier came in while accused was again having sexual intercourse with her, and spoke to accused who immediately got up and left. She attempted to escape but the blonde soldier blocked the door, disrobed and compelled her to return to the bed. When she later came out in the kitchen accused was asleep on the couch. The two soldiers then required them all to leave the kitchen as they wished to sleep there. The next morning they were gone (R18-23).

On 7 April 1945, Elfriede Noltemeier, 21 years old, was living with her farmer parents in Bremke, Germany. She was in bed at 10:20 that night when awakened by knocking at the door and she heard strange voices and several persons enter. Because of the sound of artillery fire she had retired fully dressed, and she had started for her parents' room across the vestibule when she was stopped by a soldier whom she identified as accused. With a pistol he forced her to accompany him on a search of several rooms and in her room motioned for her to lie on the bed and slapped her in the face, when she refused (R38-39). Because of fear she then lay on the bed and he removed her pants and then required her to remove all her

clothes. She was very much afraid and wanted to yell but he held her mouth shut, put his penis in her private parts, laid his pistol on the bed at her head and had sexual intercourse with her (R40-41) followed in turn by three other soldiers. Accused did not use a rubber (R43). Mrs. Sivering is her neighbor on one side, Agnes Nowicki is her sister-in-law, living in the same house with her and Annie Meyer lives in a neighboring house "all three of them in a row" (R45-46).

Annie Meyer, 30 years old, housewife with two children, five and two years old, was in her home in Bremke, Germany, on the night of 7 April 1945 (R47) when about one o'clock or later she heard a noise in back of the house and a window was knocked in. Because of artillery shelling, she was lying on the couch fully dressed and jumped up when a black-haired soldier, whom she identified as accused, held a pistol in front of her and searched the room. Then he locked the door, took one child out of her bed and put it into bed with the other, motioned for her to undress and on her refusal held the pistol in front of her. She took her dress off but when she failed to further undress, he hit her in the face and on the head with the pistol (R48-49). He ripped off her slip so she was entirely naked and when she refused to lay down on the couch, he "grabbed me by the body and literally threw me down" and then he undressed (R50) entirely (R55). She resisted, yelled out loud and pushed him back but he lay on top of her and had sexual intercourse with her twice without her consent, his penis being in her private parts and the act being fully completed, his hands being clasped around her so thoroughly that although she tried to resist, she could do nothing. She did not consent to the intercourse (R50-51). Then he forced her to kneel and put his penis into her rectum, again without her consent. He then ordered her to take his penis in her mouth and on her refusal pushed her head down, held her tight and had his penis in her mouth three times, each time causing her to throw up (R53,56). She finally succeeded in escaping naked into another room. The soldier left the house about two o'clock (R54).

4. Accused on being informed of his rights as a witness elected to remain silent and no evidence was presented for the defense.

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

"Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being" (MCM, 1928, par.149k, p.177).

While both sodomy and rape are offenses easy to charge and hard to be defended by the party accused, the facts herein are in each case given in great detail. The court could observe the witnesses and judge the truth or falsity of their stories. As no defense or denial was presented to the prosecution's evidence which fully covered all the essential elements of the offenses of which accused was found guilty, its credibility, a question of fact for the consideration of the court alone, when determined by them will not be disturbed by the Board of Review when supported as it is here, by substantial evidence (CM ETO 11971, Cox et al).

6. The charge sheet shows accused to be 22 years of age and that without prior service, he was inducted 15 February 1943.

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 as approved and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567) and of a conviction of sodomy by Article of War 42 and of section 22-107, District of Columbia Code (CM ETO 3717, Farrington). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

(ON LEAVE) Judge Advocate

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

BOARD OF REVIEW NO. 2

7 SEP 1945

CM ETO 13445

U N I T E D S T A T E S	) 3RD AIR DIVISION
	)
v.	) Trial by GCM, convened at AAF
	) Station, APO 559, U. S. Army.
Second Lieutenant ROBERT B.	) Sentence as to YEOMANS: Dismissal,
YEOMANS (O-552165) and First	) total forfeitures and confinement
Lieutenant (formerly Second	) at hard labor for one year; as to
Lieutenant) LOUIS C. CAUHAPE JR.	) CAUHAPE: Forfeiture of $100.00
(O-2065956), both of 711th	) per month for six months and to
Bombardment Squadron, 447th	) be reprimanded. Eastern Branch,
Bombardment Group (H)	) United States Disciplinary Barracks,
	) Greenhaven, New York.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Robert B. Yeomans, 711th Bombardment Squadron, 447th Bombardment Group (H), and Second Lieutenant Louis C. Cauhape, Jr., 711th Bombardment Squadron, 447th Bombardment Group (H), acting jointly and in pursuance of a common intent, did, in conjunction with First Lieutenant Denver W. Kinney, 550th Bombardment Squadron, 385th Bombardment Group (H), and Sergeant Edwin N. Van Sciver, 709th Bombardment Squadron, 447th Bombardment Group (H), at Stowmarket, Suffolk, England, on or about 18 April 1945, feloniously take, steal, and carry away one (1) barrel containing nine (9)

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gallons of Stout all of a total value of about eighteen dollars and fifty cents ($18.50), the property of Charles Norman, Pickeral Inn, Stowupland Street, Stowmarket, Suffolk, England.

Each accused pleaded guilty to the Specification of the Charge, except for the words "and in pursuance of a common intent" and except for the words "feloniously take, steal, and carry away", substituting therefor the words "wrongfully take and use without proper authority", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of the 96th Article of War. Each was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by general court-martial against Yeomans for wrongfully taking and using without proper authority a government motor vehicle, driving a motor vehicle while intoxicated and failure to stop at the direction of a military policeman, all in violation of Article of War 96. No evidence of previous convictions was introduced against Cauhape. Yeomans was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years, and Cauhape was sentenced to forfeit $100.00 per month for six months, and to be reprimanded. The reviewing authority, the Commanding General, 3rd Air Division, approved the sentence as to Cauhape and ordered it executed, and as to Yeomans approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in this case, reduced the period of confinement to one year, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The proceedings, as to accused Cauhape, were published in General Court-Martial Order No. 47, Headquarters 3rd Air Division, APO 559, U. S. Army, 12 May 1945.

3. The evidence for the prosecution, buttressed by the admissions of both accused, established that about 1500 hours on 18 April 1945 a Lieutenant Kinney, Private (then Sergeant) Van Sciver and both accused were in the courtyard behind the Pickeral Inn in Stowmarket, Suffolk. The owner of the establishment and a truck driver were unloading beer from a truck that was back there. Lieutenant Yeomans inquired if he could buy some beer and was told by the owner that the place was closed and no beer was for sale until he opened at 1930 hours. Van Sciver went to the latrine and when he returned in approximately 90 seconds, no one was in the courtyard. Yeomans soon came out the back door of the Pickeral Inn, as did the other two officers. Yeomans said, "Come on with me. We have lots of beer" (R7,8.17,19,21). All four of them then went through an alleyway to the street and went to the front door

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of the Pickeral Inn, in front of which was a keg of beer. Yeomans said that he put the beer out there and, at his request, Van Sciver helped Yeomans carry the keg down the street about 30 feet, where they sat it down. At the suggestion of Lieutenants Cauhape and Kinney, Yeomans and Van Sciver stayed with the beer while the former went and got a taxicab. They returned in a taxi, the beer was put in the back seat and they all went to a house at 81 Regent Street, Stowmarket, where the beer was taken into the yard of this house. Lieutenant Yeomans then opened the keg and all four of them drank some of the beer. At this point there was some "kidding back and forth about having taken the beer" between the three lieutenants present (R10,11). After about one hour to an hour and a half, Lieutenants Yeomans, Cauhape and Van Sciver left by way of a back gate, Lieutenant Kinney remaining behind. Yeomans disappeared and as Lieutenant Cauhape and Van Sciver continued down the street, the owner of the Pickeral Inn approached them. Lieutenant Cauhape ran away and Van Sciver accompanied the owner to the military police station (R12,13,16). A standard nine-gallon, wooden cask similar to the one that disappeared from the Pickeral Inn on the day in question was received in evidence (R19; Pros.Ex.1). The owner of the Inn did not sell this cask of beer to anyone and he did not give anyone permission to remove it (R20). He has since been paid for the beer (R26). It was stipulated by the prosecution, defense counsel and the accused that the reasonable market value in the City of Stowmarket, England, of a barrel similar in every detail to Prosecution's Exhibit 1 containing nine gallons of stout is approximately $18.50 (R24).

A written pre-trial statement signed by accused Yeomans wherein he admits moving the keg of beer from the Pickeral Inn to the sidewalk and participating in the events that followed was received in evidence (R23; Pros.Ex.2).

4. Accused Yeomans, after his rights as a witness were fully explained to him (R26), was sworn and testified in substance that he placed the keg of beer on the street and participated in the events that followed. He explained that the group was celebrating, inasmuch as one of them had completed his missions and was leaving for the United States and they were feeling happy over some of the things they had pulled through. The beer was taken in the spirit of fun in the manner that children play on Halloween. He has completed 25 missions as a co-pilot and on the day before this incident occurred he was checked out as a first pilot (R30,31).

Two officers who lived in the same barracks with both accused testified that Yeomans is above average as an officer; he lives a normal life and conducts himself on about the same plane as the rest of the flying personnel (R32,33).

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5. The evidence presented by the prosecution and accused Yeoman's admissions, both in his pre-trial statement and his sworn testimony at the trial, clearly establish all the essential elements of the offense of larceny as alleged in the Specification of the Charge (MCM, 1928, par.149g, p.173). Accused's contention that he did not "feloniously take, steal and carry away" the keg of beer, raised by his limited plea of guilty, is negatived by his admissions that he participated in the removal of the keg of beer from the owner's premises and in the consumption of its contents a short while thereafter. The court's finding that the taking was effected pursuant to a common intent is amply supported by the evidence that all four of the persons involved participated in the removal and consumption of the beer.

6. The charge sheet shows that accused Yeomans is 23 years, two months of age and enlisted 2 July 1940 at Sunnyvale, California. 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. Violation of Article of War 93 by an officer is punishable by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties (AW 93). 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

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(369)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 10 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Second Lieutenant ROBERT B. YEOMANS (O-552165) and First Lieutenant (formerly Second Lieutenant) LOUIS C. CAUHAPE (O-2065956), both of 711th Bombardment Squadron, 447th Bombardment Group (H), 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 as to Yeomans.

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 13445. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13445).

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

(Sentence ordered executed . GCMO 417, USFET, 17 Sept 1945).

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

BOARD OF REVIEW NO. 3

19 JUL 1945

CM ETO 13452

U N I T E D S T A T E S	XXII CORPS
v.	Trial by GCM, convened at Grevenbroich, Germany, 17 May 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for one year.. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Captain JOSEPH B. BELLON (O-1101331), Company A, 1251st 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 officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that Captain Joseph B. Bellon, 1251st Engineer Combat Battalion, did, at Vincennes, France, on or about 4 February 1945, wrongfully shoot 1st Lieutenant Carl F. Newman in the foot, and Corporal Howard A. Hilderbrand in both feet, with a machine gun.

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

Specification: In that * * * was, at Vincennes, France, on or about 4 February 1945, found drunk while on duty as Commanding Officer, Company A,1251st Engineer Combat Battalion.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 1 of the Charge, guilty of the Charge and Specification 2 thereof, and guilty of the Additional Charge and its 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 such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, XXII Corps, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution, excluding that under Specification 1 of the Charge of which accused was found not guilty, is as follows:

On 3 February 1945, accused was the Commanding Officer of Company A, 1251st Engineer Combat Battalion, then situated at Vincennes, France (R7,10,15). After drinking an indeterminable amount of red wine and champagne on the evening of 3 February in two bars in Vincennes, accused returned between 2300 and 2400 hours (R7-8) to the company area where he requested platoon leaders and some noncommissioned officers of his company to meet about 0100 hours, 4 February at his billet room. The meeting was called because accused wanted to know why the platoon ordnance rooms were locked. He was going to have the platoon leaders explain (R11). Shortly after the group assembled, accused demonstrated the workings of a captured machine gun set up in the middle of the room (R8,12,15,18). After pointing out the safety and other parts of the weapon he touched the "fast fire trigger". The gun fired (R9,12,15). As a result, First Lieutenant Carl F. Newman and Corporal Howard A. Hilderbrand, both of accused's company, were wounded, the former being shot through his right foot (R12,19; Pros. Ex.A), the latter in both feet (R19).

Three witnesses testified that at this time accused was drunk (R9,14,16). He did not talk or act in his normal way. He acted "sort of tough" (R14); his speech was "slightly slurred" (R16). What he said was disjointed and "seemed to be incoherent" (R14,16). Corporal Hilderbrand testified he did not think accused was intoxicated (R19).

4. For the defense, it was stipulated that two military policemen observed accused at about 2200 and 2345 hours, 3 February 1945, in the Cafe de L'Aviation, Vincennes, and he was not intoxicated (R20; Def.Ex.3).

Major Harold W. Leath, accused's battalion commander testified that he rated accused "Very satisfactory" for the period 1 January to 3 February 1945 (R21-22), that he "has been a superior officer" (R20) and that for the period 1 July to 31 December 1944 he was rated "Superior" (R21). Major Leath "would unhesitantly take him into an organization which I command" (R20).

After his rights were explained accused elected to remain silent (R22).

5. a. Additional Charge and Specification. The prosecution was required to show "(a) that the accused was on a certain duty, as alleged, and (b) that he was found drunk while on such duty" (MCM, 1928, par.145, p.160). As the commanding officer of Company A, accused was on duty at the time and place alleged, actually conducting a meeting of his officers and noncommissioned officers. He was constantly on duty (MCM, 1928, par.145, p.159). As regards his alleged drunkenness, the Manual for Courts-Martial states that

> "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (MCM, 1928, par.145, p.160).

The issue of drunkenness in this instance was one of face for the sole determination of the court and its findings of guilty are supported by substantial evidence (CM ETO 1065, Stratton; CM ETO 1267, Bailes).

b. The Charge and Specification 2. It was shown that at the time and place alleged Lieutenant Newman was shot in the foot and Corporal Hilderbrand in both feet by a machine gun operated by accused. That this shooting was wrongful was demonstrated beyond question by the circumstances surrounding the shooting - accused's drunkenness, his irrational conduct in calling a meeting of platoon leaders at 0100 hours, his disjointed and incoherent speech and his operation of the "fast fire trigger" of the machine gun while it was pointed at members of his command. Such careless discharge of a weapon is specifically mentioned in the Manual for Courts-Martial is a disorder and neglect punishable under Article of War 96 (MCM, 1928, par.152a, p.187). The court's findings of guilty were fully warranted.

6. The charge sheets show that accused is 31 years nine months of age and enlisted 15 September 1935. His enlisted and commissioned service is shown as follows: "15 Sep 35 to 14 Sep 38, 11th Engr C Bn; 15 Sep 38 to 14 Sep 41, 87th Engr (Hy Pon); 15 Sep 41 to 7 Jul 42, 87th Engr.; Commissioned 8 July 42, service governed by Extension Act of 1942 to serve duration plus six (6) months".

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 a wrongful shooting by an officer resulting in the injury of one or more persons is such punishment as a court-martial may direct (AW 96) and for an officer found drunk on duty in time of war dismissal and such other punishment as a court-martial may direct (AW 85). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E. L. Levy Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain JOSEPH B. BELLON (O-1101331), Company A, 1251st 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 and this indorsement. The file number of the record in this office is CM ETO 13452. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13452).

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

(Sentence ordered executed. GCMO 286, ETO, 26 July 1945).

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

BOARD OF REVIEW NO. 4

30 JUN 1945

CM ETO 13453

U N I T E D S T A T E S	XXIII CORPS
v.	Trial by GCM, convened at Idar-Oberstein, Germany, 9 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private MIKE KOBLINSKI (20639207), Headquarters XXIII Corps (formerly of Detachment 83, 470th Reinforcement Company, 17th Reinforcement Depot, Ground Forces Reinforcement Command)	

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

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

2. The evidence is not adequate to show that accused deserted the service of the United States on 23 April 1945 and 10 May 1945, and the record of trial is, therefore, legally insufficient to support the findings of guilty of Specifications 2 and 3 of Charge I.

3. 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 thereof by Article of War 42, and upon conviction of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b (4), 3b).

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Lester A. Danielson Judge Advocate
Judge Advocate
John A. Burns Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 13458

U N I T E D S T A T E S	)	9TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Borna, Germany, 24 April 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Captain RICHARD E. STOVER (O-440621), Company C, 14th Tank Battalion	)	

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

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1. The record of trial in the case of the 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 on the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Captain Richard E. Stover, Company "C", 14th Tank Battalion, being in command of a task force and being present with such task force while it was engaged with the enemy, did, in the vicinity of Friesheim, Germany, on or about 1 March 1945, shamefully abandon the said task force and seek safety in the rear.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by general court-martial for willful disobedience of the lawful command of a superior officer in violation of Article of War 64. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the terms of his natural life. The reviewing authority, the Commanding General, 9th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, 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. On 28 February 1945 the 14th Tank Battalion of the 9th Armored Division was divided into three task forces, each task force being made up of an armored infantry company, a tank company, and a platoon of engineers. Accused, company commander of C Company, 14th Tank Battalion, was in command of one of these task forces and on 1 March 1945, about 1300 hours, received orders to assist in the capture of Friesheim, Germany (R7,11). Accused's task force encountered heavy antitank fire which disabled three tanks and four half-tracks before a smoke screen was laid which enabled it to effect a withdrawal (R11). Accused who was riding in the command tank became nervous and ordered his radio operator to communicate with Second Lieutenant Hugh R. Morrison, a platoon leader. He then left the tank and his crew saw no more of him (R8-10). There was considerable disorder at this point and enemy artillery fire was quite heavy (R11). Accused, who was visibly shaken, told Lieutenant Morrison when the latter reported at his tank, that he was unable to cope with the situation and was relieving himself of command. Lieutenant Morrison then assumed command (R10,11). About 1900 hours that evening accused appeared at the battalion aid station and talked with Captain Forrest C. Lawrence, Medical Officer, 14th Tank Battalion. At that time shells were falling in the area occupied by the aid station. He told Captain Lawrence that he had seen some of his men killed and that he couldn't face it any longer. He said he had left Lieutenant Morrison in command of the company. Captain Lawrence's efforts to persuade accused to return to his command were fruitless. Accused slept at the aid station that night and the next morning reported at the battalion command post. While at the aid station he showed no signs of fear and was not, in the opinion of Captain Lawrence, a medical case (R12,13). At the battalion command post accused told the same story about being unable to face it and was, accordingly, relieved of his command (R15,16).

4. After being warned of his rights accused was sworn and testified in his own behalf. He confirmed the prosecution's evidence as to the attack, the fierce German resistance, and the withdrawal. He was despondent because of seeing his men killed and wounded and was confused as to what to do next. He remembered nothing that occurred after the withdrawal until a soldier came into a shed where he was sitting. Accused was ignorant of his whereabouts and obtained directions to the battalion aid station which was located about 500 yards from the front line. At this time he had an attitude of complete defeatism. He talked with the medical officer there, stayed all night, and went to the battalion command post the next morning. He denied experiencing other than normal sensations of fear when he was under fire. In fact, after the withdrawal, his tank had excellent defilade. He disclaimed all memory of having talked to Lieutenant Morrison (R17-21).

Major Theodore J. Dulin, Medical Corps, division psychiatrist, testified that he examined accused about 15 March. He found that accused suffered from deep mental conflict since childhood. The conflict arose out of a feeling of resentment when the birth of a young brother had relegated him to a position of secondary importance in the family. With this feeling came "death wishes", and when the baby brother did in fact die, these wishes were supplanted by a consciousness of guilt, although accused had nothing whatever to do with his brother's death. The conflict engendered by this sense of guilt manifested itself in an aversion to violence. He had, for instance, a lack of enthusiasm for football or any other sport in which there was danger of physical injury. The conflict was so intensified when accused saw the men for whom he was responsible being killed, that a hysterical reaction occurred which resulted in amnesia, a condition where the individual loses "identity of himself or his surroundings or any associations of the past as far as he can remember". This condition lasted for an hour or two. He did not testify as to accused's ability to distinguish right from wrong or to adhere to the right (R21-25).

5. Captain Forrest C. Lawrence, recalled by the prosecution, testified in rebuttal that accused showed no signs of loss of memory when he talked with the witness at the battalion aid station (R25-26).

6. The evidence leaves no doubt that accused was the commanding officer of a task force that was engaged with the enemy and that he surrendered his command to another officer and went 500 yards to the rear. The phrase "engaged with the enemy" is equivalent to the phrase "before the enemy" as used in AW 75

(CM ETO 1404, Stack). From the evidence as to accused's nervousness and from the fact that the area around the battalion aid station, even though under shell fire, was less dangerous than the front lines, the court could conclude that accused's purpose in going there was to seek safety. He abandoned his command at a crucial moment of combat and sought safety from the perils and hazards confronting it. His guilt of the offense charged was proved beyond all doubt (CM ETO 4783, Duff and authorities therein cited).

There was testimony that accused was suffering from amnesia at the time, but it was neither clear nor convincing, and by hardly any standard was it proof of insanity such as would be a complete defense if believed by the court. Moreover the court was justified in concluding that accused was not suffering from such disability as would afford him a defense (Winthrop's Military Law and Precedents (Reprint, 1920), p.624). It was not required to accept Major Dulin's opinion, particularly in view of the testimony of the medical officer who talked to accused at the battalion aid station (CM ETO 895, Davis et al; CM NATO 2047 (1944), III Bull JAG 228).

7. The charge sheet shows that accused is 24 years eight months of age and that he was called to active duty as a second lieutenant, Infantry Reserve, on 5 June 1942, promoted to first lieutenant on 13 March 1943, and promoted to captain on 8 October 1943.

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

9. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violation of Article of War 75. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir.210, WD, 14 September 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain RICHARD E. STOVER (O-440621), Company C, 14th Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 13458. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13458).

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

(Sentence ordered executed. GCMO 344, ETO, 25 Aug 1945).

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

BOARD OF REVIEW NO. 2

28 JUL 1945

CM ETO 13461

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Weiszenburg, Germany, 29 May 1945.
Private EDWARD A. MAINVILLE (31275787), Company A, 610th Tank Destroyer Battalion.	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward A. Mainville (then Sergeant), Company "A", 610th Tank Destroyer Battalion, did, at Thanning, Land Kreis Wolfratshausen, Oberbayern, Germany, on or about 2 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Elizabeth Orterer.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when

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the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The testimony for the prosecution shows substantially:

Accused was a gun commander (R4) in the second platoon (R8) of Company A, 610th Tank Destroyer Battalion, which had entered the town of Thanning, Germany, about 11:30 pm on 1 May 1945. He was billeted that night in a large two-story civilian building (R4), possibly 100 by 50 feet in size, with four rooms on the ground floor (R5). One room was used for storage, one was a bedroom, one the kitchen and in the one large room there were between 80 and 90 prisoners with the two doors thereto guarded (R5). The entire second platoon was billeted upstairs, where there was one large room and about five small ones (R10). Three of the rooms were occupied by some 30 or 40 civilian refugees. There was considerable confusion in the building at the time the company moved in (R5). [It was pretty well filled and some were sleeping on tables and some on the floor].

About four o'clock in the afternoon of 2 May a report reached the commanding officer of "A" company (R6) as a result of which he questioned a woman in the house and ordered that she be given the opportunity to view the platoon to "see if the woman could identify the man" (R7) and with perhaps "a bit of hesitation" she pointed out accused (R8). Between five and seven o'clock the morning of 2 May, a Frenchman, who came in from the street, asked a member of accused's platoon to enter the bedroom on the ground floor and there he saw accused and a girl both on the bed, and knowing accused should not be there, he got him dressed and out of the room. Accused was naked. He was very drunk and it took about five minutes of very hard work to get him up, help him dress and get him upstairs (R13-14) where he was put to bed. Accused did not talk nor did the girl. He had been in the kitchen the night before and had a few drinks but was not drunk (R15-16). When found, accused was asleep in the middle of the bed and the girl, dressed only in a slip, was sitting on the side of the bed towards the door. Accused was not touching her and there was nothing to prevent her getting off the bed (R17,26). She looked normal and was not crying but when she got off the bed there was blood on her leg (R17) and she spoke to the Frenchman perhaps a little excitedly (R19).

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Her clothes were beside the bed and no weapon was seen (R17). The night before she had been seen in the kitchen laughing and talking with an American soldier who spoke German (R18,26). Also the night before accused had his pistol with which he was normally armed (R18).

Another member of accused's platoon was on guard from five until after seven on the morning of 2 May most of the time in the kitchen and in sight of the bedroom door. A woman "in her thirties" came out of the bedroom and went to milk the cows and a man came out but could not make himself understood. The guard did not go into the bedroom until a Frenchman came and after he had first talked to the older woman wanted him to go (R22). He saw the girl sitting on the edge of the bed and accused, naked, was asleep in the middle of the bed. The girl was awake but neither moved or spoke and the guard immediately left to call his sergeant who got accused out of the room. Accused looked pretty sober to the guard at that time (R23-24). Later the girl, fully dressed, left with the Frenchman (R25).

Elizabeth Orterer, 21 year old single German girl, was employed as cashier in the saloon of George Neuhauser and lived in his home in Thanning, Germany. When on the night of 1 May 1945, American soldiers first came to the town and were billeted in the building in which she lived, the seven civilians, five women and two men living there, had to all go into one room downstairs, the room of Neuhauser. She testified that she talked with one American soldier who spoke German (R28). There were two beds in Neuhauser's room where she remained all night. Only one soldier came into the room, an American who stayed until a comrade woke him about seven o'clock the next morning. He had a pistol when he came into the room, had difficulty walking and she thought he was drunk. He asked for "schnapps" and laid his pistol on the bed. Neuhauser stated they had none and that all the people were sleeping in that room. The soldier left but returned approximately an hour later (R30) alone. The room was lighted and the soldier was still drunk. He picked up his pistol and left after again asking for schnapps. He returned again about 3:00 or 3:30 (R32) bringing a pistol (R39). The civilians were all awake. He walked over to her bed where were all five women and ordered everybody out and they all got out of the bed except her. He held her down in the bed and laid his pistol by the pillow. She was frightened and Neuhauser went outside where she heard him ask a guard for help. The soldier, whom she identified as accused, undressed himself while holding her with one hand (R32), directed the others to turn out the light and got into bed with her. He threatened her with his pistol at her chest and undressed her over her objections and resistance and, although she

pleaded and cried, she could not prevent him from having sexual intercourse with her several times, all without her consent. She called the others to help her but they could not and when she opened her mouth he had the pistol for she could feel it when she attempted to push him away (R33-34,37). He finally went to sleep on top of her (R34). He had his arms around her so tightly (R37) that she was unable to push him off until about seven o'clock in the morning when a Frenchman brought in a soldier who woke him and told them both to get up. Accused dressed, laughed and left. She was suffering pain and was bleeding from her sexual organ (R35) and was afraid to stay in the saloon (R39).

When the Frenchman returned she went with him to the French camp where he got a doctor who examined her that morning (R35-36). The doctor found a recent tear of the rear vaginal canal of approximately two centimeters in length which was bleeding and also a small bleeding of the vaginal lips indicating that penetration had taken place shortly before and that probably she had been a virgin. Her pulse was very weak and she was listless because of the very heavy loss of blood (R41-42).

George Neuhauser, employer of Elizabeth Orterer and with whose family she lived, spent the night in the same room and testified to substantially the same facts. Elizabeth was crying and kept begging someone to help her with accused, but the guards paid no attention and he could only tell her he could not help her any more for they were all afraid of the pistol. He saw accused asleep on top of Elizabeth when he left at 6:30 in the morning (R43-46). She was still crying and saying, "I must die now". Neuhauser found the Frenchman, a war prisoner, and asked him to help (R47).

Anna Gleise, farmer's maid for Neuhauser, testified that she remained awake and that Elizabeth's pleadings continued until morning, and his daughter, Maria Neuhauser, identified accused as the soldier who was in the bed in the room. Both were occupants of the bedroom all night (R48-52).

Accused, after due warning of his rights as an accused, gave the officer investigating the charges a signed statement (Pros.Ex.B) dated 10 May 1945 which was admitted in evidence (R39-40). In this statement, accused admitted drinking and feeling "pretty good" while he was on guard "from 1 to 145" that night. His brother had been reported missing in action in Germany and he was worried about that. He was looking for some drink and opened the door about three o'clock where the girl was sleeping but was pretty drunk and did not remember much of what was happening. He did remember asking to sleep with her and "she said 'Yad'" but that is the last until he was awakened the next morning.

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4. The evidence for the defense was to the effect that accused was pretty drunk between 2:00 and 3:00 of the morning of 2 May while he was on guard and for that reason his pistol was taken from him when his tour of duty was up and was not returned to him. At that time accused could walk without difficulty (R53-56). One of the guards who relieved accused at 3:00 testified that accused was then unarmed and intoxicated but was not staggering. He saw accused go into the bedroom where the civilians were, but did not see him come out (R57-60). The other guard relieving accused also testified that accused had been drinking, that he came upstairs to wake his relief and that he saw him go into the civilian's room but did not see him come out. At that time accused had no weapon, could walk all right but talked "a little thickly". The guard heard no cries or commotion in the civilian's bedroom (R61-63).

Accused elected to remain silent (R64).

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

That by force of arms accused intimidated the civilians in the bedroom including Elizabeth Orterer whom he himself admits asking to sleep with, is convincingly shown. That he also had carnal knowledge of her having by use of that same force frightened her into submission, also substantially appears. From 3:30 or 4:00 o'clock until about 7:00 in the morning she remained in his power, painfully and seriously injured by him and begging continuously for help. His only defense was that he was intoxicated, worried about his missing brother, and an attempted showing that he was not armed while in the bedroom. Under the facts as shown, the court could have reached no other findings than that of guilty.

6. The charge sheet shows that accused is 24 years eight months of age. Without prior service, he was inducted at Hartford, Connecticut, 22 December 1942.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and

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sections 278 and 330, Federal Criminal Code (18 USCA 457,567). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 JUL 1945 TO: Commanding General, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private EDWARD A. MAINVILLE (31275787), Company A, 610th Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 herewith. The file number of the record in this office is CM ETO 13461. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13461).

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

1 Incl:
Record of Trial

(Sentence ordered executed by Theater Commander in absence of reviewing authority GCMO 322, ETO, 11 Aug 1945).

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Branch Office of The Judge Advocate General
with the
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APO 887

BOARD OF REVIEW NO. 3

13 JUL 1945

CM ETO 13463

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Windsheim, Germany, 1 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private RICHARD E. WEEKS (36683891), Company H, 12th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Richard E. Weeks, Company H, 12th Infantry, then Private First Class Richard E. Weeks, Company H, 12th Infantry, did, at L'Eptinette, France, on or about 29 July, 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit:

Engaging the German forces in the vicinity of L'Eptinette, France, and did remain absent in desertion until he was apprehended at St. Jean de Day, France, on or about 30 October, 1944.

Specification 2: In that * * * did, at Hurtgen, Germany on or about 21 November, 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: engaging the German forces in the vicinity of Hurtgen, Germany, and did remain absent in desertion until he was apprehended at Seraing, Leige, Belgium, on or about 22 January, 1945.

Specification 3: In that * * * then attached unassigned to 177th Replacement Company, APO 312, US Army did, at Doncourt, France on or about 31 January, 1945, desert the service of the United States by absenting himself from his organization, and did remain absent in desertion until he was apprehended at Seraing, Liege, Belgium, on or about 28 February 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of Specification 2, except the words, "was apprehended", substituting therefore the word, "surrendered", of the excepted words, not guilty, of the substituted word, guilty; and guilty of Specifications 1 and 3, and of the Charge. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the remainder of his natural life. The reviewing authority approved only so much of the findings of Specification 3 as involves findings that accused did, at a place not shown, on 31 January 1945, desert the service of the United States by absenting himself from his organization, and did remain absent in desertion until he was apprehended at Seraing, Liege, Belgium, on or about 28 February 1945, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as

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

3. The following evidence was undisputed:

a. Specification 1 of the Charge: On 29 July 1944 accused, who was an ammunition bearer, went absent without leave from his organization while it was before the enemy and receiving artillery and small arms fire (R4-6; Pros.Ex.A). He was apprehended at St. Jean de Day, France, on or about 30 October 1944 (R5) and returned to his company under guard on 19 November. Regarding his initial absence at that time, he said "I wanted to live" (R8).

b. Specification 2 of the Charge: On 21 November while his company was before the enemy and receiving enemy artillery shells, he went absent without leave again, breaking arrest (R7,9; Pros.Ex.A) and so remained until he surrendered to military control at Seraing, Liege, Belgium, on or about 22 January 1945 (R10).

c. Specification 3 of the Charge: On 31 January 1945, he went absent without leave from his organization from a place not shown and on or about 28 February 1945 was apprehended at Seraing, Liege, Belgium (R10-11; Pros.Ex.B; Pros.Ex.C).

4. After his rights were explained, accused elected to remain silent (R11).

5. Under Specifications 1 and 2 of the Charge, the court's findings of guilty, as approved, are fully supported by the evidence (CM ETO 11402, Diedrickson; CM ETO 9796, Emerson and cases therein cited) as is also its finding of guilty under Specification 3 of the Charge (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll).

6. The charge sheet shows that accused is 19 years of age and that he was inducted 2 August 1943 at Champaign, Illinois. He had no prior service.

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

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Lewey Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

22 SEP 1945

CM ETO 13475

UNITED STATES	4TH ARMORED DIVISION
v.	Trial by GCM, convened at Meerane, Germany, 21 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private SILVIO F. PODESTA (12036548), Company B, 53rd Armored Infantry Battalion	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Silvio F. Podesta, Company "B", 53rd Armored Infantry Battalion, did, at Bisping, France, on or about 18 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit, action against the enemy, and did remain absent in desertion until he was returned to his organization at Rubenoch, Germany on or about 10 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 a summary court-martial for absence without leave of 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, 4th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that, if the sentence be confirmed, it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but 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 the accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution: An extract copy of the morning report of the accused's organization, Company "B" of the 53rd Armored Infantry Battalion, was introduced in evidence without objection which showed that the accused was absent without leave from that organization at Bisping, France from 18 December 1944 (R4,Pros.Ex.A) until 10 March 1945 (R4;Pros.Ex.B). Upon his return the organization accused was questioned by the Adjutant at Rubenoch, Germany, and he voluntarily gave as his reason for having been absent without leave that he was transferred from the 22nd Field Artillery, where he liked it, to the infantry and that he would not soldier in the Infantry. The Adjutant further testified to his conversation with accused:

> "He was at the Service Battery of the Field Artillery and he liked it and he would not soldier in the Infantry and that he went AWOL. He never reported to the company. He came up with the trains vehicle and stopped there at the Service Company. He got off the vehicle and was shown where to report and when the vehicle left he departed. He went to Nancy, France. * * * He was picked up by the M.P.'s. He was again told to report to * * * our Service Company. He got off the vehicle and left again * * *" (R5).

He went back to Nancy, where he stayed until 18 February and then went to Paris and there was apprehended and returned to the 53rd Armored Battalion on or about 10 March 1945. He said he would not soldier in the infantry (R5).

During his absence from 18 December 1944 until 10 March 1945, the organization was committed to combat except for two or three two-day breaks (R5).

4. The rights of the accused as a witness having been fully explained to him, he elected to remain silent.

5. The accused has been found guilty of desertion in violation of Article of War 58, with the specific intent to "avoid hazardous duty and to shirk important service, to wit, action against the enemy", and so it was incumbent upon the prosecution to prove that intent. Proof only of an intent to remain away indefinitely although sufficient to support a conviction of ordinary desertion, is not sufficient to support a conviction under this charge and specification (CM ETO 5958, Perry et al; CM ETO 7532, Ramirez).

In order to properly establish guilt of desertion to avoid hazardous duty it is necessary to prove the following elements: (1) That the accused was absent without leave; (2) that the accused or his organization was under orders or anticipated orders involving hazardous duty; (3) that the accused was notified, or otherwise informed, or had reason to believe, that his organization was about to engage in a hazardous duty; and (4) that at the time he absented himself, he entertained the specific intent to avoid such hazardous duty or shirk such important service (CM ETO 1921, King; CM ETO 5958, Perry et al). The evidence showed, and the accused admitted, that he absented himself without leave at and during the time alleged in the specification. The organization to which the accused was transferred was committed to combat at the time the accused absented himself and continued indefinitely in that status thereafter during his 82 days of unexplained absence. The only debatable element of offense is that of notice to or knowledge on the part of the accused that Co "B" of the 53rd Armored Infantry Battalion was at the time he departed engaged in the hazardous duty of combat with the enemy. By his own admission he left the Service Company of a field artillery regiment and by vehicle train reached the Service Company of the 53rd Armored Infantry Battalion. This occurred on 18 December 1944 when it was universally known that the German forces had broken through the Allied line and the opposing forces were locked in the battle known as the "Battle of the Bulge". The infantry being in front was in need of reinforcements. The accused in his travels from the rear of an artillery organization to the rear of an infantry battalion must have observed the situation and must have been travelling toward the front. From the circumstances shown by the evidence including the time and the places mentioned the court was justified in inferring knowledge on the part of the accused and the intent to avoid that hazardous duty by his conduct of departing upon observing the locality and situation of the Service Company of the Infantry Battalion. Knowledge may be inferred from circumstances (CM ETO 6934, Carlson; CM ETO 7688, Buchanan). Judicial notice may be taken of von Rundstedt's winter offensive and that it started 16 December 1944 (CM ETO 6934, Carlson; CM ETO 7148, Grombetti; CM ETO 7413, Gogol).

6. The charge sheet shows that accused is 28 years of age. He enlisted 13 December 1941 at New York, N.Y.

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

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

8. The penalty for 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).

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 22 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private SILVIO F. PODESTA (12036548), Company B, 53rd Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 13475. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 13475).

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

(Sentence as commuted ordered executed. GCMO 467, USFET, 7 Oct 1945).

RESTRICTED

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

BOARD OF REVIEW NO. 3

14 AUG 1945

CM ETO 13476

U N I T E D S T A T E S	10TH ARMORED DIVISION
v.	Trial by GCM, convened at Ohringen, Germany, 1 May 1945.
Private First Class EUNAH GIVENS (38323004), Headquarters Battery, 423rd Armored Field Artillery Battalion	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Pfc Eunah Givens, Headquarters Battery, 423d Armored Field Artillery Battalion, did, at Ettenhausen, Germany, on or about 11 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anna Rieger.

CHARGE II: Violation of the 93d Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

(404)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and its Specification and not guilty of Charge II and its 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. The reviewing authority, the Commanding General, 10th Armored Division, approved the sentence but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 1800 hours on 11 April 1945, accused entered a farmhouse owned by prosecutrix's brother near Ettenhausen, Germany. Present in the house were prosecutrix and six of her relatives (8,17,19). Accused was armed with a rifle and was "a bit drunk" but not "strongly drunk" (R15,16). He first entered a downstairs room, pointed his gun at Emma Groner, aged 35, and looked at the people present "in a bad way as if he wanted to scare or shoot us". He "hit with his gun against the finishings in the kitchen" and also "all over" in the living-room upstairs, where he went with Emma Groner upon hearing a noise from that direction (R15-16,19).

Frau Anna Rieger, the prosecutrix, who was 64 years of age, after hearing that a "strange soldier" was upstairs, went into the living room with her needlework, sat down on the sofa and continued her sewing. After about five minutes accused sat "tailor fashion" with his legs crossed on the sofa by the side of prosecutrix. He forced Paul Rieger, her 30-year-old son, and George Groner, an old man, to sit in front of him with their chairs back to back, and wanted the other persons present to sit around him. He "played with" his rifle, pressing the trigger and acting as though he wanted to shoot it. He also kept pointing the rifle at the persons in the room, who were very firghtened and who "always said, 'Kamerad, don't shoot, we don't shoot either'" (R6,12,15-16,19,23,25-26). Prosecutrix did not leave the sofa because "we always heard the Americans are good people and I wasn't scared" (R12). Accused looked both tired and drunk and his eyes had a glazed or staring appearance (R11,16,20,25,28,23-24). He did not appear abnormal, but a "half wild impression he did make" (R21).

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Finally, he ejected from three to five rounds of ammunition from his gun and the people in the room felt relieved because they did not believe he intended to shoot anybody. However, he kept pointing the gun towards George Groner and Paul Rieger, who kept telling him not to shoot and kept pushing the gun aside with his hand. Then accused fired a shot which went into a flower stand across the room. Everyone in the room except prosecutrix became frightened and ran from the room and out of the house (R6,15-20,23-27). Prosecutrix "wasn't as scared as they were and I didn't even know why they were jumping out" (R9). She also testified, however, that she did not leave the house because if she "had gone out he probably would have shot me" (R10). Accused went outside and looked for the others who had left. Then he returned and asked where they went, but prosecutrix did not know (R6). As to the subsequent happenings, she testified:

> "He always wanted to shoot towards the ceiling and I stayed close to him all the time. I put my arms around him and begged him and told him I was an old mother because he always put the gun in front of me. I begged him and said he also has a mother and that he should have pity on me. Then he tore open the door to the next room and shot into it. Then he shot through the closet. * * * Then he shot over there to the window at the white dress hanging there. He shot through that. Then he went outside and shot downstairs. Then he went down the steps. He opened the cellar door and shot down the cellar steps and then he came back upstairs. Then he came near to me. He wanted sexual intercourse. I put my arm around him in fear of death and sat myself on the sofa. I called on my God that he should let me go. * * * He laid me on the sofa. He took my pants off and laid himself on top of me. I always begged him that he should leave me alone. * * * He tried and he tried but he did not get what he wanted as he wanted it" (R6-7).

Accused's private parts entered her private organ "a little". She repeatedly asked him to stop because she had severe backaches and because she was old and might get sick from it. Then he got up and went outside and shot upstairs, into the barn a couple of times, and into the stable where he killed a dog. She remained in the house because she "did not know where to go" (R7,15). Then, she testified:

> "he came back upstairs and then he led me again in the back bed room and showed me the bed. He said, 'Lie on the bed', and I again put my arms around him and told him he should let me go. He led me out to the outside bedroom. He forced me onto the bed and put my legs on the bed and laid on top of me and I had begged him so much to let me go" (R7).

As to whether accused achieved penetration this time, she testified:

> "He did not get too far. A little bit but not completely. He only dirtied my shirt and I washed myself immediately after he went" (R8).

She pushed accused with her hands and struggled with him, but did not strike him because she "would have been dead in the next moment" (R14). He did not treat her roughly "at all" (R14).

4. After his rights as a witness were explained to him, accused elected to testify (R35-37). He is a full-blooded "Crete" Indian from Oklahoma, and completed the seventh grade in school. He drove a 3/4-ton truck for his outfit in the army and had driven all night the night before entering the German town on 11 April. He had breakfast but no noon meal. Between 0900 hours and noon he consumed about two quarts of wine and schnapps. He recalled being in his squad room at about 1400 hours, but did not remember leaving the squad room or anything else that happened that day prior to 2300 hours that night, at which time he woke up in a tank and a guard told him to stay there. He had no recollection of talking to any German people or shooting a gun on 11 April. He never saw the prosecutrix before the day of trial. He gets drunk often and sometimes stays drunk for two days (R38-44).

For the defense, it was stipulated that First Lieutenant Robert Spooner, if present, would testify that at approximately 2000 hours on 11 April, during an interrogation of witnesses in the case, in his opinion "accused was so under the influence of alcohol he could not in anyway protect his own interest". It was further stipulated that Captain Eugene M. Van Loan, if present, would testify that during an immediate investigation made by him of the charges against accused on the night of 11 April, "accused was physically incapable of understanding any matters which he might hear from witnesses and could not intelligently ask questions of them" (R34).

5. The testimony of prosecutrix shows that accused had carnal knowledge of her without her consent at the time and place alleged in the Specification of Charge I. Although she testified that the penetration was only "a little", and it is doubtful if the act of intercourse was fully consummated, "any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (MCM, 1928, par.148b, p.165). The evidence fails to show the employment of any great amount of force by accused or a great amount of physical resistance to his advances on the part of the prosecutrix. However, her testimony fairly shows that she failed to resist to any

greater extent because she was in fear of her life. Accused's actions in pointing his gun at her and the other persons present and in repeatedly firing his gun at random about the house were certainly reasonably calculated to inspire a maximum amount of fear or apprehension in a 64-year-old woman whom he, a member of a conquering force, had never seen before. Her testimony is corroborated in part by other witnesses and is not refuted by accused. The evidence is sufficient to support the findings of guilty of the Specification of Charge I and Charge I (CM ETO 3740, Sanders et al; CM ETO 5870, Schexnyder; CM ETO 10841, Utsey). The evidence for both accused and prosecution suggests a strong probability that accused was drunk at the time of the commission of the offense. Nevertheless, the degree of his intoxication was a question for the court, and voluntary drunkenness alone does not constitute an excuse for the crime of rape or destroy accused's responsibility therefor (CM ETO 9611, Prairiechief; CM ETO 3859, Watson et al).

6. It appears from the report of the investigating officer and from stipulations in the record of trial that accused was so intoxicated at the time of the investigation of the charges, on the same day the offense was committed, that he was incapable of understanding or interrogating the witnesses. However, it appears that at the direction of the commanding officer, an officer represented accused's interests at the investigation, and that subsequently, on 17 April, accused stated to a second investigating officer that he did not desire to cross-examine the witnesses and desired no further investigation of the case. There was thus a substantial compliance with Article of War 70, and accused's substantial rights were not injuriously affected within the meaning of Article of War 37 (CM 251370, Blanton, 33 B.R. 221 (1944)). Moreover, it is well settled that the provisions of Article of War 70 are not jurisdictional and are "intended primarily for the benefit of the appointing and referring authority" (CM ETO 6684, Murtaugh; CM ETO 1631, Pepper).

7. The charge sheet shows that accused is 26 years and seven months of age and was inducted 19 November 1942 at Tulsa, Oklahoma. 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 rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567).

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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 Keeper Judge Advocate

(ON LEAVE) Judge Advocate

B L Levy Jr Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 14 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private First Class EUNAH GIVENS (38323004), Headquarters Battery, 423rd Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 13476. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 13476).

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

(Sentence ordered executed, GCMO 361, USFET, 29 Aug 1945).

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

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