E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 10617

CM ETO 11987

VOLS. 23-24

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 24 B. R. (ETO)
CM ETO 11201 - CM ETO 11987

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

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 24 B.R. (ETO)

including

CM ETO 11201 - CM ETO 11987

(1945)

Office of The Judge Advocate General

Washington : 1946

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

CONTENTS FOR VOLUME 24 B.R. (ETO)

ETO No.	CM No.	Accused	Date	Page
11757	287427	Magoon	11 Jun 1945	278
11758	299098	Vollmer	26 Jun 1945	281
11775	295095	Porter	28 Jul 1945	286
11779	296912	Bohn, Bourbon	15 Sep 1945	298
11790	287543	Andes	10 Aug 1945	307
11830	295957	Green, Bernard, Lane	15 Sep 1945	313
11838	295519	Augtin	18 Aug 1945	325
11845	295081	Stard	28 Jul 1945	332
11856	289413	Debeau	29 Aug 1945	338
11869	289565	Hise	31 Aug 1945	342
11903	299009	Wofford		346
11905	302431	Howse	2 Aug 1945	353
11914	306907	Lawler, O'Hearn	11 Aug 1945	362
11924	289918	Polidoro	15 Jun 1945	370
11926	300517	Hughes	2 Jun 1945	374
11929	286082	Brattesani	9 Jun 1945	375
11930	288301	Kenehan	9 Jun 1945	378
11936	297219	Tharpe, Perry, Bentely, Byrd	5 Jun 1945	382
11950	295594	Abbott	7 Sep 1945	389
11958	291196	Falcon	28 Aug 1945	394
11970	307562	Manko, Wortheam	21 Jun 1945	397
11971	295850	Cox, Bowen	26 Jun 1945	403
11972	287350	Allison	28 Jun 1945	408
11978	295297	Bromley	2 Jun 1945	414
11982	295287	Jones	28 Jun 1945	415
11987	293853	Johnston	20 Jul 1945	416

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

BOARD OF REVIEW NO. 3

CM ETO 11201

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOE M.LIVINGSTON (18014353), 361st Replacement Company, 96th Replacement Battalion, 16th Replacement Depot.	Trial by GCM, convened at Etampes, France, 23 January 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 Joe M. Livingston, 361st Replacement Company, 96th Replacement Battalion, 16th Replacement Depot, did, at Warminster Barracks, Warminster, Wilts, England, on or about 13 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended aboard the vessel "U. S. Poland Victory", on or about 19 September 1944.

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

Specification: In that * * * having been duly placed in confinement in the 16th Replacement Depot Guardhouse Warminster Barracks, Warminster, Wilts, England, on or about 3 September 1944, did, at said place, on or about 13 September 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of both charges and their specifications. Evidence was introduced of two previous convictions, one by summary court for absence without leave for 3 days, and one by special court-martial for absence without leave for 9 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 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. For the prosecution, testimony of the prison officer and assistant prison officer of the 16th Replacement Depot at Warminster, England, established that, on 3 September 1944, accused was in confinement in the depot stockade awaiting trial by court-martial. He was never released by proper authority (R6,8). On or about 13 or 14 September 1944 he "broke confinement" from the stockade (R8). Daily roll calls were taken at the stockade (R9), and he was not present at roll call from 19 September through 23 September (R6). He was returned by a military police guard on either 23 or 24 September 1944 (R6,9), at which time he was dressed in

fatigues and a field jacket (R9). The clerk of the stockade office, who kept the morning report, testified that on or about 13 or 14 September he noticed two more prisoners on the morning report than were present (R7).

A duly authenticated extract copy of the morning report of the 16th Replacement Depot Guardhouse, introduced in evidence without objection, shows that accused was confined on 3 September, that he escaped confinement on 13 September, and that he was confined again on 23 September 1944 (R6; Pros.Ex.A).

After his rights under the 24th Article of War were fully explained to him by Captain Hermah Steutzer, Jr., on 16 December 1944, accused signed a written statement which was introduced in evidence without objection (R9-10; Pros.Ex.B). He admitted that about noon on 13 September he and his "buddy" left the stockade--"just went AWOL"--after hiding behind a table at the end of a hangar. They went onto a highway and to Bristol, then to Swansea, 140 miles away, sleeping in haystacks and air raid shelters. They "knew the ropes" and walked onto the docks, and after getting on and off three or four boats bound for France, they finally sailed on the "USS Poland Victory", a large ship bound for the United States. They were unable to get into the hold of the ship and were discovered in the laundry room by a "Phillipine". He took them to the captain, who had a British destroyer signalled, and they were returned on the destroyer to England, where they were turned over to military police about 19 September 1944. They never had any passes. Accused's reason for absenting himself without leave was that he wanted to get home to marry a girl whom he had got in trouble back in the States. "She was going to have a baby" (Pros. Ex.B).

4. For the defense, the prison officer testified that he had no knowledge of accused's desire to return to the United States until after accused had escaped and been returned, at which time accused told him he had had trouble with a girl in the States and wanted to go back and marry her (R10-11).

After having his rights as a witness explained to him, accused made an unsworn statement in which he said

that "the papers show I had a girl back in the States knocked up". He had left the States before he knew she was pregnant or could marry her. He was "shanghaied" out of his old outfit in England before it came across to France. His first sergeant told him the commanding officer had put him on the "overage list", but he did not know why he was put on it. The personnel officer had then told him he would not go in the infantry, but he was sent to an infantry replacement company. He went absent without leave from the infantry and was placed in the guardhouse. He then got a letter that his girl had fallen down some stairs and hurt herself. After he was apprehended and brought back he received a letter stating the baby was born dead (R11-12).

5. Competent evidence and accused's plea of guilty clearly establish that, on 3 September 1944, he was placed in confinement in the guardhouse of the 16th Replacement Depot, and that on or about 13 September he escaped from such confinement before he was set at liberty by proper authority, as alleged in the Specification of Charge II.

With respect to the Specification of Charge I, the evidence is undisputed that accused absented himself without leave by escaping his confinement while awaiting trial by court-martial, and went a distance of 140 miles and stowed away upon a ship bound for the United States from England. He was apprehended only after the boat had actually sailed and was returned to England by a British destroyer approximately a week after his escape was consummated. He admits his intention was to return to the United States and marry a girl who was to give birth to his child. Under such circumstances the court was fully warranted in inferring that he intended to remain permanently away from the service (See CM ETO 960, Fazio, et al; CM ETO 1645, Gregory; CM 229813, II Bull.JAG 62).

6. The charge sheet shows that accused is 23 years and 11 months of age, and enlisted for 3 years on 16 August 1940 at Fort Bliss, Texas. No prior service is shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 11202

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private FREDERICK B. MOORE (33778632), 361st Replacement Company, 96th Replacement Battalion, 16th Replacement Depot.	Trial by GCM, convened at Etampes, France, 23 January 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 Frederick B. Moore, 361st Company, 96th Replacement Battalion, 16th Replacement Depot, did, at Warminster Barracks, Warminster, Wilts, England, on or about 13 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended aboard the vessel "U. S. Poland Victory", on or about 19 September 1944.

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

Specification: In that * * * having been duly placed in confinement in the 16th Replacement Depot Guard-house, Warminster Barracks, Warminster, Wilts, England, on or about 3 September 1944, did, at said place, on or about 13 September 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of both charges and their specifications. Evidence was introduced of two previous convictions by special court-martial, one for absence without leave for 55 days, and one for absence without leave for 12 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 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. For the prosecution, testimony of the prison officer and assistant prison officer of the 16th Replacement Depot, at Warminster, England, established that, on 3 September 1944, accused was placed in confinement in the guardhouse of the depot, awaiting trial by court-martial (R6,14). He was never released by proper authority, and "broke confinement" from the stockade on 13 September 1944. On 19 September it was first determined that he had escaped (R6-7,14). He was not present between 13 September and 23 September 1944, and was returned by military police on 23 September (R7,14), at which time he was dressed in fatigue clothing and a field jacket (R14). He was put in a special confinement cell on a bread and water diet as a part of the regular administrative procedure of the stockade in all such cases (R8-10,11-13, 15). The clerk of the stockade office testified that on or about 14 September he noticed a discrepancy between the number of prisoners counted and the number appearing on the morning report in that two prisoners were missing (R10-11). No actual roll call was taken on 14 September (R12).

A duly authenticated extract copy of the morning report of the 16th Replacement Depot Guardhouse, introduced in evidence without objection, shows that accused was confined on 3 September, escaped confinement on 13 September, and was confined again on 23 September 1944 (R6, Pros.Ex.A).

After being duly warned of his rights under the 24th Article of War by Captain Herman Steutzer, Jr., on 16 December 1944 accused signed a statement, which was introduced in evidence without objection, in which he admitted that about 13 September 1944 he and his "buddy" hid behind a table in a hanger and during chow they cut a rope holding the hangar doors together and "just went AWOL" from the stockade without any

passes or permission. They "hitchhiked" their way through Trowbridge and Bristol, and to Swansea, sleeping in a hay stack and an air raid shelter for two nights. At the docks in Swansea they found several boats destined for France, and in the evening finally got on an American boat destined for the United States and sailed at about 5:00 am the following morning. The crew of the ship gave them coffee, but a "Phillipine" turned them in. The captain signaled a British destroyer which returned them to England, and they were turned over to the military police about 19 September (R16-17, Pros.Ex.B).

4. Defense counsel stated that he had explained accused's rights to him, and that accused elected to remain silent (R17). No evidence was offered in his behalf.

5. The findings of guilty of Charge II and its Specification are fully supported by accused's plea of guilty and the undisputed evidence showing his escape from the guardhouse of the 16th Replacement Depot as alleged.

With respect to the Specification of Charge I, there was enough other evidence tending to show absence without leave from 13 September to 23 September 1944 to render admissible accused's statement that he went from the stockade to a port and actually sailed for the United States before he was apprehended and returned to England by a British destroyer (Dig. Op. JAG, 1912-40, sec. 416(7a), p.267). These circumstances, together with the fact that he escaped confinement while awaiting trial by court-martial, constituted a reasonable basis for the court's inference that he intended to remain permanently away from the service (See CM ETO 960, Fazio, et al; CM ETO 1645, Gregory; CM 229813, II Bull. JAG 62). The lack of any proof as to the alleged name of the ship upon which accused was apprehended is immaterial (CM 233688, Aievoli, 20 BR 49 (1943)).

6. The charge sheet shows that accused is 20 years and ten months of age and was inducted 30 April 1943 at Philadelphia, 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.

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

(10)

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

C. J. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

CM ETO 11216

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Chaudfontaine, Belgium, 7 March 1945.
Lieutenant Colonel Stewart A. Andrews (0367429, General Staff Corps, Headquarters, First United States Army.	)	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 8 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING BY BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, JUDGE ADVOCATES

---

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

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

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

Specification: In that Lieutenant Colonel Stewart A. Andrews, General Staff Corps, Headquarters, First United States Army, did, at Paris, France, on or about 8 September 1944, wrongfully and in violation of sub-paragraph g, paragraph 7, Part I, Circular No. 53, Headquarters, European Theater of Operations, dated 17 May 1944, resell items purchased in an Army Exchange, to wit, seven (7) cartons of

cagarettes, twenty-four (24) Baby Ruth chocolate bars twenty-four (24) Hershey chocolate bars, and six (6) cans of Nescafe.

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

Specification: In that * * * did, in a United States Army vehicle, on a public street of Paris, France on or about 8 September 1944, wrongfully, unlawfully and publicly re-sell at an exorbitant price, items purchased from an Army Exchange, to wit, seven (7) cartons of cigarettes at five-hundred (500) to one-thousand (1,000) French francs per carton, twenty-four (24) Hershey chocolate bars at twelve and one-half (12½) to fifteen (15) French francs per bar.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of guilty disapproved by the confirming authority)

Specification 3: In that * * * did, at Charleroi, Belgium, on or about 15 October 1944, wrongfully and knowingly dispose of by delivering to a civilian one (1) case of cigarettes of the value of about Twenty-Five ($25.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 4: (Finding of not guilty)

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

Specification: In that * * * did, at Brussels, Belgium, on or about 28 October 1944, wrongfully and knowingly dispose of by delivering to a civilian one (1) case of cigarettes of the value of about Twenty-Five ($25.00) Dollars, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that * * * did, without proper leave, absent himself from his command and station at Charleroi, Belgium, from about 20 September 1944 to about 23 September 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I, except the words "six (6) cans of Nescafe"; not guilty of Specifications 1 and 4 of Charge III, and guilty of all charges and the remaining specifications thereunder. 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 a period of ten years. The reviewing authority, the Commanding General, First United States Army, approved the sentence but reduced the period of confinement to eight years and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 2, Charge III, 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 established that on 8 September 1944, accused was a Lieutenant Colonel, General Staff Corps, serving as an assistant in the G-1 Section, Headquarters First United States Army near Versailles, France (R12,20,38,41). He was also in charge of the Miscellaneous Division, which included the operation of a small special branch Post Exchange for the benefit of General Staff and other officers (R41). He had a key and access to a box containing supplies which were sold by roster to these officers to supplement the amounts authorized by their regular ration cards (R41, 43). On 8 September accused reported to his assistant who kept a record of all sales, that an officer had purchased from the "Branch PX" that day, two cartons of Chesterfield cigarettes, 24 Baby Ruth candy bars, 24 Hershey chocolate bars, six cans of Nescafe and five cartons of assorted brands of cigarettes (R42, 47). Accused signed a receipt covering the sale of these items (R47, Pros. Ex. 4). On the same day accused, together with a warrant officer and an enlisted man, drove in a jeep to Paris, France arriving there about 1030 hours (R20). They parked the vehicle on the square opposite the Ritz Hotel and accused started selling cigarettes and candy from a box and a duffle bag that he had in the jeep. He sold about five or six cartons of Chesterfield cigarettes, a minimum of three or four cartons of Hershey chocolate bars and several bars of Baby Ruth candy (R21,33). The prices charged by accused for the cigarettes ranged from 500 to 1000 francs per carton and for the candy was 15 francs a bar or two bars for 25 francs (R21,33). He kept the proceeds of the sale (R22,33). The Army Exchange sale price for cigarettes is 25 francs per carton and 2½ francs per Hershey chocolate bar (R43, Pros. Ex.4). The sale, which lasted about an hour and a half, attracted approximately 200 persons, mostly French civilians, and was described as "something like a bargain sale back home". Accused was "sweating" and "pretty busy" trying to supply his customers (R34).

There was received in evidence Circular 53, Headquarters, European Theater of Operations, United States Army, 17 May 1944, regulations relating

to the sale of Army Exchange Supplies which forbade the purchase of items for resale, and the resale of articles so purchased (R80, Pros. Ex 5).

On or about the 5th of October 1944, Sergeant Elias S. LaHaie of Headquarters Detachment, Army Exchange Service, was ordered by accused to pick up certain captured German supplies and a quantity of American cigarettes in Paris (R52,53). At this time there was a critical shortage of American cigarettes, and the men of the First Army were receiving only one package of cigarettes a week (R61,64). Accused's instructions were complied with and certain quantities of the cigarettes were delivered to the First Army Quartermaster Depot and to the Special Service Supply Warehouse at Soumagne, Belgium (R58,60,69). On 15 October accused removed one of the cases of cigarettes from the Special Service warehouse and instructed his driver to load it on a jeep. Together with his driver, he proceeded to Charleroi, Belgium, where he delivered the case of cigarettes to a civilian in a store, not a military installation (R69,74,75). On 28 October 1944, he returned to the Special Service supply warehouse and removed two additional cases of cigarettes and delivered one of these to a civilian in Brussels (R70,71,78,79). He later returned the remaining case to the army warehouse at Soumagne (R80). It was stipulated that the cigarettes delivered to Sergeant LaHaie in Paris were intended for use in the military service and were of a value of $25.00 per case (R81).

Sometime prior to 20 September 1944, while the Headquarters of First Army was located at Charleroi, accused asked for permission to visit his wife in the United Kingdom. His request was denied by higher authority (R12). However, on 20 September, without having secured a pass or permission to leave, he flew with General Hodges' pilot from Charleroi, Belgium, to Paris, France, and there with the aid of this pilot secured transportation by air to London, England (R12,14,15). The pilot did not ask accused for his orders authorizing him to make the flights (R15). Certified true copies of flight reports showing accused made the trips in question were received in evidence (R16,17, Pros.Exs. 1 and 2).

4. Accused, after his rights as a witness were explained to him elected to be sworn and to testify in his own behalf only with respect to Specification 4 of Charge III (R83). The court, having acquitted accused of this specification, no evidence of either the prosecution or defense pertaining to this count is herein considered. It was stipulated that if available as witnesses, Brigadier Generals L.L. Stuart and J.J. O'Hare and Colonel H.L. Branson would testify that at various times accused served under their command and that they

at all times rated him either "Excellent" or "Superior" as an officer (R81,82, Defense Exs 1, 2 and 3). Colonel William R. Silvey, Executive Officer, G-2 Section, First Army, testified that he had known accused since November 1943; that his reputation was excellent and that his behavior, both personally and officially has always been perfectly correct and proper (R90,91).

5. Competent, substantial evidence establishes that accused purchased certain items of Army Exchange merchandise at the established exchange price and that he later transported this property in a jeep to a public square in Paris, France, where he peddled and sold the goods (American cigarettes and candy) to French civilians, at exorbitant prices. Par. 7g, Circular 53, Headquarters, European Theater of Operations, 17 May 1944, provides that:

> "The resale, barter or exchange of any item purchased in an exchange is prohibited" (Pros.Ex.5).

The conduct of accused in engaging in such activity on a public street in Paris constitutes, in addition to a direct violation of the directive of his Command, an act of a most disgraceful and dishonorable nature, which seriously compromises his character and standing as an officer and gentleman. He was a member of the Exchange Council and the officer responsible for the operation of a Branch Exchange for the benefit of General Staff and other officers, and therefore, knew or should have known of the prohibition against the sale of such merchandise to persons other than members of the military establishment or others authorized. He is charged with a knowledge of the circulars and directives of his Command (CM 241385, Fields; CM ETO 6881, Hege and Parsons).

Article of War 95 establishes a standard of discipline and behavior required of officers of the American Army and provides that:

> "Any officer * * * who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service" (AW 95).

The fact that an officer of the army, not to mention one of accused's rank and position, would engage in the prohibited sale of scarce items of merchandise to our recently liberated French Allies, wholly apart from the question of profiteering at the expense of the cravings of these civilians, shows that accused fails to possess, or

at least to exercise, that quality of moral probity required of an officer of the American Army. He also wrongfully disposed of two cases of cigarettes, intended for use in the military service, possessing a value of about $50.00, by delivering the same to civilians on 15 and 28 October 1944 at Soumagne and Brussels, Belgium. He was therefore, properly found guilty of the offenses alleged in the specifications of Charges I and II and Specification 3 of Charge III, and the Specification under Additional Charge I (CM ETO 6881, Hege and Parsons, supra; CM ETO, 8234, Young etal; CM ETO 8636, Fleming etal; EM ETO, 8599, Hart etal; CM ETO, 9345, Haug and Frederick).

The absence without leave of accused was established by both oral testimony and documentary evidence - the testimony of the pilot who flew accused to Paris and aided him in making arrangements to fly to England, and who piloted him on the return trip to the Continent from England, plus the flight reports showing that accused was an air passenger on such journeys. He was refused permission to go to England by his superior officer, but deliberately left his command and went there and remained in unauthorized absence for a period of three days. The offense of absence without leave, as charged is thus conclusively established. (CM ETO 3974, Brown; CM ETO 4171, McKinnon; CM ETO 4494 Wood). The findings, as approved and confirmed, being supported by substantial evidence, will not be disturbed by the Board of Review on appellate review; CM ETO 3937, Bigrow; EM ETO 5561, Holden and Spencer.

6. The charge sheet shows that accused is 36 years and nine months of age and that he completed eight years service on 15 November 1944. He was commissioned a first lieutenant, 4 June 1940, promoted to Captain 24 February 1941, advance to Major 1 February 1942, and promoted to Lieutenant Colonel, 15 May 1944.

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

8. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of violations of Articles of War 94 and 96. Conviction for an offense under Articles of 94 and 96 may be punished at the discretion of the court martial. The

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(18)

1st Ind.

War Department, Branch Office of The Judge Advocate General
with the European Theater of Operations. 28 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887,
U.S. Army

1. In the case of Lieutenant Colonel STEWART A. ANDREWS (0367429), General Staff Corps, Headquarters First United States Army, 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 11216. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11216).

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

(Sentence ordered executed. GCMO 216, ETO, 17 June 1945.)

11216

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

BOARD OF REVIEW NO. 2

15 AUG 1945

CM ETO 11217

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at APO 252, U. S. Army, 16 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Corporal DAVID M. MEEKS (14000019), Battery C, and Private First Class CHARLES P. MARTIN (6668322), Battery A, both of 78th Armored 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 soldiers named above has been made 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 Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal David M. Meeks, Battery "C", 78th Armored Field Artillery Battalion, and Private First Class Charles P. Martin, Battery "A", 78th Armored Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at or near Lank Latum, Germany, or or about 5 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Eva Maria Mostertz.

Each accused pleaded not guilty and all of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial against Meeks for larceny of a keg of beer and absence without leave for two days in violation of Articles of War 93 and 61, respectively, and of one previous conviction by special court-martial against Martin for absence without leave for one day and a half in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, 2nd Armored Division, approved the sentences 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 sentences but, owing to special circumstances in this case, commuted the sentence 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 his 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 is substantially as follows:

Accused Meeks was a member of Battery C and accused Martin a member of Battery A, both of the 78th Armored Field Artillery Battalion. These batteries, on 5 March 1945 (Monday), were located approximately 1500 yards from the town of Lank Latum, Germany (R6), which the Americans had captured the preceeding Friday (R30). Sometime during the afternoon of this date both accused came to the home of Fraulein Helene Hannen, at Lang Dusseldorf Street 56, Lank Latum, Germany, ostensibly to search the house. Her parents and one Frau Mattes were also present when they entered. Accused Meeks indicated by means of gestures that he wanted to sleep with Frau Mattes and when she said "No", Meeks said " If okay, then good, if no okay", at the same time pointing to his gun. About three to five minutes later Fraulein Hannen, at her mother's suggestion, left and went to a neighbor's house. Accused made no further attempt to have intercourse with any of the women in the house and after they drank two bottles of wine, they left (R44-46).

About 1445 hours that afternoon both accused appeared at the home of Heinrich and Gertrude Heydkamp at Lang Dusseldorf Street, Number 62, Lank Latum, Germany. Their

small son, Frau Alvina Walter and Frau Eva Maria Mostertz also lived in this house (R6,7,8,9,30,34). Frau Heydkamp and her husband were in the hall of their house when accused came to the door and she opened it to admit them (R8,30). Martin was carrying a double-barrelled shot gun and Meeks a gun about 75 centimeters long (R32). After being told there were no weapons in the house, accused Martin went into the kitchen with her and Meeks went into the cellar with her husband. Frau Walter, the children, and Frau Mostertz were in the cellar at this time and after Herr Heydkamp showed Meeks all the cellar rooms, he went back upstairs while Meeks remained in the cellar with the women (R8,30). After some conversation with Meeks, which she did not understand, he touched Frau Mostertz on the breast. This frightened her and pushing him away, she told him to go upstairs, explaining that she was married and pointing to her ring. She then went upstairs to the kitchen and Meeks followed right behind her (R15,16,35).

Meanwhile Martin drank a glass of wine and attempted to "make conversation" with Frau Heydkamp in the kitchen. Her husband soon returned from the cellar, followed shortly by Meeks and Frau Mostertz (R8,31). At the direction of Frau Heydkamp, Frau Mostertz brought a chair from the bedroom and offered it to Meeks, who insisted that she sit on it. Meeks then sat down next to her on the same chair and poured her a glass of wine, from which she "only took a little sip". Each accused drank not more than one glass of wine at this time, although Meeks was so drunk "his head rolled around on his shoulders and his eyes" and he was in a stupor. Martin was drunk "but he held himself, his drink, pretty well" and he "seemed to be the more sensible or sober of the two" (R8,9,12,16,17,31,32). Meeks placed his arm around Frau Mostertz's waist and put his left hand on her breast. She tried to push him away but he took hold of her apron and held her fast. She asked the Heydkamps what she should do but they did not answer, so she told the accused she had to go shopping for bread. Meeks, however, did not leave her alone but rather took her on his lap and held her tightly. At three o'clock Frau Hedykamp left to go and buy bread, as civilians were only permitted on the street between three and foud o'clock in the afternoon. Frau Mostertz said to her "Stay here, I'm afraid to be here alone" but she did not answer and went out into the street. She also appealed to Herr Hedykamp to stay in the kitchen so that she would not be all alone. Martin then motioned to him to leave the kitchen through the door, which was open, and when Hedykamp closed the door Martin again Motioned for him to get out.

He went outside and stood near the kitchen door and shortly thereafter Martin came out bringing with him the Hedykamp's small son. At this time he heard Frau Mostertz yelling "Help me, he is holding me down" (R9,10,16,31). Martin went back into the kitchen and Herr Hedykamp heard the key turn in the lock. He told his wife to run into town and look for some American soldiers and then he went down into the cellar. While there he heard Frau Mostertz yell twice and she also moaned for "quite some time". Frau Mostertz was alone with accused for "a good half hour". Hedykamp did not interfere with accused "because they were armed. Even if I was able to overcome these two men afterwards I would be sitting here today as the accused if I did overcome them. I know what it is about, I was in the army of occupation before" (R31,32,33,35).

After Martin left the kitchen to go outside Frau Mostertz tore away from Meeks and stood up. She got as far as the door but Meeks held her tightly by the arm and she could not get away. He held her like that until Martin returned, pushed her inside and closed the door. She was then alone with both accused and she pleaded with them to leave her alone, telling them she had to go shopping. Martin came up to her and said "fick,fick" and she told him "For God's sakes, leave me alone". Martin repeated these words and again she asked him to leave her alone, whereupon he picked up his gun and pointed it at the center of her chest. She kneeled down and begged him to leave her alone but Martin pushed her into the pantry. He then grabbed her by the arms and out of fright she laid down on the pantry floor. Martin opened his trousers, laid down beside her and pulled her underpants down below her knees, where they remained on one of her feet. He inserted his finger in her rectum, then in her vagina, moving it around in there, causing her to scream. He next took out his penis, pushed her legs apart, laid on top of her and attempted to penetrate her vagina. She struggled, shaking her legs back and forth, and accused made many attempts to effect penetration. He finally succeeded in accomplishing his purpose to the extent of about seven centimeters. During all of this Meeks remained in the kitchen and when Martin "was finished he stood up, and the other one came in". She remained on the floor and Meeks approached her with his penis exposed. He laid on top of her and "He tried to put it in continuously, and I kept resisting him. It touched my vagina". Meeks finally succeeded in gaining penetration to the extent of about one and a half inches and remained with her about ten minutes. Meanwhile Martin had removed all of his clothing and when Meeks got up, Martin returned to her and again placed his finger in her vagina causing her to suffer pain. He then tried to put his penis in her vagina and despite her struggles he succeeded in penetrating her

T1217

to the point of a few centimeters. At some time during Martin's second attempt, an unknown enlisted man entered the room and immediately departed. She continued to struggle "until he came" and then Meeks, who had remained in the pantry, came over with his penis out and laid himself on top of her. He again penetrated her "a little bit" although she continued to struggle. At this point three soldiers entered the room and said something to both accused. Meeks leaped up and Frau Mostertz sprang to her feet "and started crying". One of the soldiers could speak German and in response to his question she told him what had happened. This soldier told her to dress herself and all of them, including both accused, left the house. She did not at any time give either accused permission to have intercourse with her (R18-27). On cross-examination, Frau Mostertz testified that when she first told an American officer what happened to her, she stated that both accused were unsuccessful or "were not altogether successful" in having intercourse with her "because of my struggling" (R28,29).

When Frau Hedykamp left the kitchen and went outside she met Fraulein Hannen and asked her where she could get help. While the latter went to obtain assistance she remained in the street near the Hannen's house until Fraulein Hannen returned with a soldier (R10).

As a result of a report made to him about 1530 hours, on 5 March 1945, Warrant Officer (Junior Grade) Bernard J. Miezwa and two enlisted men went to a house in Lank Latum, Germany. They entered through a side door and saw both accused and a woman in a small room off the kitchen. Meeks was lying on top of the woman, whose dress was up above her waist. She was lying flat on the floor with her face up and her legs straight out. She was crying and sobbing at the time. His head and chest were directly over her head and chest, his knees and legs were stretched out on the floor and his buttock was seen to go up and down, about a foot, three or four times. Martin was sitting on the floor entirely dressed, either putting on or taking off his shoes. The Warrant Officer ordered Meeks to get up and told Martin to finish putting on his shoes as he was taking him into custody. Martin inquired if he was a warrant officer and when he received an affirmative answer, he then said "I would like to get you". A bayonet, eight or ten inches long, was then taken from Martin. Meeks said, "I suppose we'll get six and six for this" and Martin said, "Well, I'm in restriction, so I'll probably get more". When Meeks stood up his underwear and pants were down to his knees. The woman stood up and entered the next room. When they finished dressing the officer marched them down to "the P.W. point" and while on the way, Meeks threw a few bottles away saying, "You won't be

able to get me for this". He wanted "to take the rap for the two of them" and asked the officer to release Martin. When the officer refused to do this Meeks inquired if the officer would shoot "if he would take off over the field". When told he would, both accused changed their minds and went along. The officer recovered a carbine from the room where he found accused and a shotgun was seen in the kitchen. Martin's speech was a little thick and for the first seven hundred yards of this march both accused staggered quite a bit and then straightened out and "went along pretty good" (R36-39,42).

4. Accused Martin, after his rights as a witness were explained to him (R46), was sworn and testified substantially as follows:

On the afternoon of 5 March 1945, his battery was located in a chateau outside of Lank Latum, Germany. That morning he and Meeks went to Lank Latum. There they went in a wine house, where the proprietress gave them some wine to drink. In all they consumed three bottles of wine at this place and when they started to leave the proprietress gave him five or six bottles and Meeks received about six or seven bottles of wine. Putting the wine in their trousers and jackets they crossed the street and entered a beer garden where they drank three bottles of cider and a glass of beer each. They started back out to camp, stopping at a farmhouse, where they drank two bottles of hard cider and a bottle of red wine. Meeks picked up a shot gun at this house and he also carried a carbine, but Martin was unarmed except for a trench knife. They proceeded to another house where a blond haired girl /Fraulein Hannen/ lived and here they drank two more bottles of wine. The next thing he remembers is being outside a house where a warrant officer was standing at the door. He had walked across a muddy field and took off his shoes to scrape the mud off them. He has no recollection of ever having any relations with Frau Mostertz although she was in the same room of the house where he saw the warrant officer. He remembers walking a short distance with the warrant officer and then getting in a truck that carried them to their organization. When they arrived there a woman /Frau Mostertz/ was with them and they went to Colonel Berlin's office, where three captains were also present (R47,48).

5. Accused Meeks, after his rights as a witness were explained to him (R50), was sworn and testified in substance as follows:

On 5 March 1945 he and Martin went into Lank Latum, Germany and drank three bottles of wine in a wine shop. He left there with seven bottles of wine and they went across the street to a beer parlor or beer garden where they drak some more wine, cider and beer. Leaving there he was carrying wine and cider and he cannot recall where they went although he does remember picking up a shot gun. He could not remember being at

either the Hannen or Heydkamp homes. He does recollect walking down a street with a warrant officer and throwing away some wine. The next recollection he has is of getting on a truck and unloading at the battalion command post where Colonel Berlin "and these people they brought along" were present. At the command post "this guy that could speak German, he said that Martin held a shotgun on this woman and I screwed her. Martin said, 'It isn't so', and I said it was a dam lie and Captain Hammond said 'Shut up'" (R51,52).

Meeks' battery commander testified that he was in the battalion command post about 1745 hours on 5 March 1945 when both accused were brought there. He was called to Colonel Berlin's room where the Colonel was questioning both accused and Frau Mostertz. Meeks was considerably bolder than normal and Martin more loquacious than usual. He could not smell any liquor nor detect any faltering in their walk. When one of Frau Mostertz's remarks was translated Martin said, "It wasn't so, it was a lie". In his opinion these men were not "in such a state of sobriety" that they could not tell right from wrong (R54).

6. The uncontradicted testimony of the prosecutrix, corroborated as to accused Meeks by the testimony of an American warrant officer, establishes that both accused had carnal knowledge of Frau Mostertz on the date alleged in the Specification of the Charge. Neither accused, in his sworn testimony at the trial, categorically denied having intercourse with her. Both testified they could not remember the events that occurred after they reached her residence. Accordingly the first of the essential elements of the crime of rape is clearly established by the evidence.

Whether Frau Mostertz consented to the acts of intercourse or whether they were accomplished by force and without her consent presented an issue of fact, the determination of which rested exclusively with the court (CM ETO 3197, Colson et al). The finding of non-consent as to both accused is fully supported by her testimony, which is corroborated by others, who heard her screams and, especially by the American warrant officer who testified she was crying and sobbing, when he discovered Meeks having sexual intercourse with her. The findings of the court are amply supported by substantial evidence of all the essential elements of the crime of rape (MCM, 1928, par.148b, p.165).

7. The charge sheet shows that accused Meeks is 27 years of age and enlisted 9 July 1940 at Jacksonville, Florida, and accused Martin is 25 years of age and enlisted 17 October 1939 at Fort Hayes, Columbus, Ohio. Meeks had no prior service and Martin served with Battery D, 136th Field Artillery Battalion from 19 July 1938 to 17 October 1939.

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

9. 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 15 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Corporal DAVID M. MEEKS (14000019), Battery C, and Private First Class CHARLES P. MARTIN (6668322), Battery A, both of 78th 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 sentences, as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11217. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11217).

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

(Sentence as commuted ordered ecexecuted. GCMO 366, ETO, 30 Aug 1945).

11217

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

BOARD OF REVIEW NO. 3

16 JUN 1945

CM ETO 11230

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ARNOID L. VALENZUELA (39286051), 2814th Engineer Petroleum Distribution Company	Trial by GCM, convened at Mannheim, Germany, 3 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 on the following charges and specifications:

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

Specification: In that Private Arnold L. Valenzuela 2814th Engineer Petroleum Distribution Company, did, at Grunstadt, Germany, on or about 9 April 1945, forcibly and feloniously against her will have carnal knowledge of Frau Hedwig Schrother.

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

Specification: In that * * * did, at Grunstadt, Germany, on or about 9 April 1945, with intent to do her bodily harm, commit an assault upon Frau Emilie Fischer by striking her on the head with a dangerous weapon, to wit, a carbine.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court-martial for failure to repair to his properly appointed place of assembly for drill in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

At about 2200 hours, 9 April 1945, accused came to the home of Mrs. Emilie Fischer in Grunstadt, Germany. Mrs. Fischer was in the wine business and accused had been to her house earlier in the evening in search of wine (R9,11,16,18,20). When he returned at 2200 hours, he came in a jeep which was regularly assigned to him as a driver, was wearing a helmet and carrying a flashlight and a carbine (R8,10,12-13,16,20,26). He again demanded wine, and after threatening those present with his carbine, pointed the gun at Mrs. Fischer and indicated that she was to accompany him to the cellar. She refused and went outside. Accused followed her and put his rifle against her back, trying to push her toward the wine cellar. She refused to go and started to yell. He then fired a shot. Mrs. Fischer stumbled and fell and as she tried to get up, accused struck her on the head with the butt of his rifle. Her head was cut and bled profusely (R7-8,10,12,16-17). Mrs. Fischer then made two trips to nearby military headquarters for the purpose of making complaint. When she returned from the first trip at apparently about 2240 hours, accused's vehicle was still there. By the time she returned from the second, which was sometime before midnight, accused had left (R18,19).

After the episode with Mrs. Fischer, accused returned to the house and, pushing aside the other persons present, demanded that Mrs. Hedwig Schrother, a housemaid, accompany him to the wine cellar. He pushed her with his rifle and together they went into the yard (R8,20-21). She tried to leave, indicating to him that she did not have the key to the cellar, but he "showed" her into the garden. She attempted to yell, but he covered her mouth with his hand and prevented her from getting away by holding his rifle to her breast. He then tore off her pants and nightshirt, took off

the rest of her clothes, and had intercourse with her. After the intercourse, she tried to run away, but he held her hands to her back and forced her to take his penis in her mouth. She then tried again to escape but he pushed her down and again had intercourse with her. Altogether, intercourse in the normal way was repeated five times and he twice forced her to take his penis in her mouth. Throughout he kept his rifle next to him and threatened her with it when she attempted to escape. When he finished, he forced her to clean his penis with her nightgown. She then pushed him and when he fell, she ran into a shed and put her nightgown on. All of this took about 15 minutes. She did not cry out for fear of being shot, but she resisted and tried throughout to get away. Although the ground was rocky, she had no marks on her body. She remained in the shed for awhile and then went upstairs. This was at about 2300 to 2330 hours. Accused's jeep was still there but sometime before midnight it left (R8-9,13,15,20-23, 25-28; Pros.Exs.1 and 2). Early the next morning she found a steel helmet and a flashlight in the yard, as well as the rest of her clothing. She then took the helmet and flashlight to the military headquarters and reported the number of the jeep which had been at the house the night before. She also visited a doctor (R19,23-25,33; Pros.Ex.3).

The guard on duty at the gate of accused's organization from 2000 to 2200 hours 9 April 1945 testified that accused tried to leave the area at about 2115 hours, but being intoxicated, was disarmed and sent to his quarters in custody of another member of the organization. At about 2140 hours, a jeep with only one occupant left the area (R29-30). The guard on duty from 2200-2400 hours stated that a jeep with one occupant entered the area at about 2300 hours (R32). The jeep regularly assigned to accused bore the same number as that which was observed at the Fischer house (R13, 34-35).

Mrs. Fischer and Mrs. Schrother identified accused at the military government office the day after the incidents complained of (R35). Accused at this time was wearing a helmet which he admitted was not his own. He stated in response to a question that he "guessed" he lost his own and when asked whether the helmet found at the Fischer house was his, replied either that he "guessed it was his helmet or that it was his helmet" (R35-36).

4. Accused, being warned of his rights by the law member, elected to remain silent (R42). Evidence for the defense showed that accused went out for wine early in the evening and shortly afterwards returned to camp with some. At about 2100 hours he had an argument with the guard at the gate and a friend was instructed to take him back to his quarters. The friend left him at the entrance to the quarters at about 2130 hours, at which time accused appeared to be rather sick (R37-38). At 2230 hours he entered his quarters. He showed signs of having been drinking and was noisy and "staggering around" (R38-41).

5. The prosecution's evidence in this case is uncontradicted except insofar as it indicates that accused was present at the Fischer house after 2230 hours, the time fixed by the witnesses for the defense as the moment of his return to his quarters. There is no very strong conflict of evidence even in this respect, however, since the time of the accused's departure from the house as fixed by the prosecution's witnesses was based principally on estimate and may well have been sufficiently earlier than stated to eliminate in large part the apparent inconsistency in the evidence. In any event is is clearly established and not denied that accused was present at the house for sometime after 2200 hours and he was positively identified as the assailant of the two women by four witnesses. Under the circumstances therefore, there is sufficient substantial evidence to support the court's determination of the factual issue raised and such determination therefore may not be disturbed (CM ETO 9544, Rapolas, et al).

All elements of the offenses of rape and assault with intent to do bodily harm with a dangerous weapon are amply proved and the record of trial is therefore legally sufficient to support the findings of guilty of the specifications and charges (CM ETO 9544, Rapolas, et al). Evidence of the acts comprising the actual rape and assault consists principally in each case of the testimony of the women respectively involved. In both instances, however, their testimony presented an essentially plausible and consistent story and finds corroboration in certain independent evidence, notably that of the condition of Mrs. Schrother's clothes, the scalp wound of Mrs. Fischer and the early complaint made to appropriate authority. The court therefore was clearly justified in giving credence to their testimony and in reaching its findings of guilty.

The law member improperly excluded questions by the defense, addressed on cross-examination to the prosecution's witness, Rudiselle, concerning the witness' status under the Nazi regime. These questions under the circumstances were proper for purposes of impeachment on ground of bias or prejudice (MCM 1928, par.124b, p.134). No prejudice to accused resulted however since the witness' testimony was unimportant except inso far as it shows that it was he who took the number of the jeep at the Fischer house. Accused's presence at the house is sufficiently established by other evidence to render even this phase of his testimony unessential.

6. The charge sheet shows that accused is 20 years of age and was inducted 27 January 1943 at Los Angeles, California. 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 the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b (4),3b).

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sherman Judge Advocate

B. N. Mewey Jr. Judge Advocate

11230

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

BOARD OF REVIEW NO. 1

25 AUG 1945

CM ETO 11231

U N I T E D S T A T E S	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private GEORGE MITCHELL (34153238), 562nd Port Company, 397th Port Battalion	Trial by GCM, convened at Marseille, France, 26, 27 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George (NMI) Mitchell, Five Hundred Sixty-Second Port Company, Transportation Corps, did, at Toulon, France, on or about 27 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one, Robert Hardin, Boatswain Second Class, 1040 Construction Battalion, United States Navy, a human being, by shooting him with a pistol.

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

Specification. 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, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence, but due to special circumstances in the case recommended that, if confirmed, it be commuted to confinement at hard labor for the term of accused's natural life, and forwarded the record of trial 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 and the recommendation for clemency by the convening authority, commuted the sentence to dishonorable discharge from the service, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

Accused, Private Robert Fuller, and Private Frank Jones, all negro soldiers and members of the 562nd Port Company, were in the Bar de la Flotte, in Toulon, France, at about 2100 hours on 27 September 1944 (R22,29,56). At this time there were 20 or 30 persons in the bar (R56), most of them negroes (R57) and including at least two or three white sailors (R30). One of these sailors was Boatswain's Mate, Second Class, Robert J. Hardin, the deceased (R15), who asked Jones where he was from. Jones replied "Louisiana". Hardin then said that he was from Mississippi and where he came from "niggers don't drink with white people". Another sailor grabbed him by the arm and took him to a nearby table. Jones finished his beer and was starting out of the door when Hardin pulled a pistol out of his pocket. The gun went off and Jones was struck on the head behind his right ear (R23,27,30). The bullet knocked Jones down and rendered him temporarily unconscious (R30). He then grabbed Hardin's right arm, and Fuller took the gun from the sailor (R30,31,37,38). According to the owner of the bar, three negro soldiers held Hardin on the ground (R60). Everyone then left the barroom (R57). Hardin went to a back room (R60,130). Between 30 seconds and a minute after Hardin left, three American soldiers (accused, Fuller and Jones) re-entered the bar one by one and went straight to the back room (R61).

When Hardin left the barroom, he went through the kitchen and back room into a water closet (R130). Shortly afterwards he was seen standing still near the center of the back room, almost directly in front of accused, about three feet away. Fuller was standing about two feet to the right of accused. Jones stood about five feet behind Fuller (R33, 34,41).

According to the Frenchman who owned the bar, Hardin's hands were up and there was nothing in them (R58,59,61). Jones testified that one of Hardin's hands was by the side of his body (R135), and that he did not see a chair or anything else in Hardin's hands (R33,134,135). Two shots rang out. Hardin shouted and fell to the floor (R34,35,43,59).

Hardin died about 2205 hours (R16), the direct cause of his death was immediate internal hemorrhage caused by a bullet penetrating his aorta (R20).

After an explanation of his rights under Article of War 24 (R67,68,103), accused made and signed a written statement that the sailor, after telling Jones that "niggers" did not have any business in the bar at that time, pulled a gun out of his field jacket pocket and shot Jones in the head. Then, when almost everybody had run out of the bar, the sailor said to accused, "I'm going to kill all you Goddam niggers", and started toward him with the gun, which accused caught by the muzzle and twisted out of his hand. Accused said to Fuller, "Let's go out the back way" and they went through the kitchen to the back room.

> "The sailor started after me with a chair, Fuller did not have any gun in his hand. The sailor had the chair raised ready to hit me. I told him not to come up on me with the chair. He continued walking towards me with the chair raised. I was excited. I was afraid he might hit me. I saw him shoot Jones a little while before. I still had the sailor gun in my hand. I again told him not to come closer. I pulled the trigger. A shot went off. He continued towards me with the chair. I shot again. This time he fell on his knees. Then I and Fuller ran out the door" (Pros.Ex.6).

The Frenchman owning the bar testified that there was a stack of chairs in the room but could not answer a question as to whether the chairs were there on the night in question (R64). His wife did not notice a chair lying on the floor close to the body of Hardin immediately after the shooting (R133).

4. Accused, after his rights as a witness were explained to him, elected to testify as a witness in his own behalf (R73,74), substantially as follows:

He was talking with Fuller, Jones, and a Private John Hall at the bar. After Fuller and Hall walked out the front door, the sailor

named Bob walked to the bar and asked Jones where he was from. Jones answered that he was from New Orleans, Louisiana. The sailor said he was from Mississippi and where he came from "niggers" could not drink in the bar with him. Jones and the sailor then engaged in an argument (R76). Bob pulled a gun out of his field jacket, shot Jones through the head, and told accused that "he was going to kill all of us goddam niggers". Accused took the gun from the sailor and pushed him in a corner by a table (R77). Jones staggered to the door, met Fuller, who was coming back into the bar, and asked him for his gun, but Fuller refused, saying it would do him no good as he had no bullets (R78). Accused then told Fuller "let's get out the back way", and went through the kitchen into the back room (R79). Accused opened the door of the latrine, saw nothing but the commode, closed the door, and started walking towards the front to get out (R80). When he was about six feet away from the latrine door, he saw Bob pick up a chair and start walking toward him (R81). Bob said, "Give me my gun" and accused replied, "Don't come up on me with that chair or I'll give you the gun". Accused again told Bob not to come up on him, but the sailor advanced with the chair raised over his right shoulder and accused backed up against a clothes tree (R82). When Bob was about six feet from him, accused fired a shot but Bob continued coming toward him. About two or three seconds after the first shot, accused fired a second shot and Bob dropped the chair and fell to his knees (R83). He was fearful that Bob might hit him with the chair or try to kill him. He was afraid of Bob because he had seen him shoot Jones through the head and had heard him say he was going to kill all "niggers" (R84). The gun he shot Bob with was an Italian Beretta, which he had taken from him after Jones was shot (R84,85). He did not intend to kill Bob, but did it in self-defense (R92).

Witnesses for the defense testified that, after the first shot was heard, Jones rushed out of the bar, said he had been shot, and asked Fuller for his gun (R106,112), but Fuller refused to give it to him (R112). Fuller testified that this conversation took place at the edge of the outside door and that he re-entered the bar and saw accused in the middle of the kitchen going toward the door of the back room (R113).

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).

It is undisputed that accused shot deceased in the Bar de la Flotte, at Toulon, France, on 27 September 1944, thereby causing his death. Accused, in his pre-trial statement and his testimony at the trial, admitted shooting the deceased, but asserted that the sailor was advancing upon him with an upraised chair when he fired. This assertion is not supported by any other evidence. Neither Jones nor the French proprietor, each of whom was in a position to see, saw a chair in deceased's hands just before the shooting, nor did the proprietor's wife notice a chair near deceased's body immediately after the shooting. The credibility of the witnesses and the question of whether accused shot in self-defense, were for the determination of the court (CM ETO 3180, Porter; CM ETO 3932, Kluxdal; CM ETO 4640, Gibbs; CM ETO 9410, Loran; CM ETO 11178, Ortiz; and authorities cited therein), and its determination that accused killed deceased with malice aforethought and not in self-defense is sufficiently supported by competent, substantial evidence. While accused may well have been put in fear by the previous conduct of deceased, the homicide would not be justifiable without an overt act or hostile demonstration on the part of deceased indicating an impending purpose, real or apparent, to do great bodily harm to accused or to cause his death, and inducing an honest belief, based on reasonable grounds, that deceased was about to execute the threats and that accused was in imminent peril of great bodily harm or loss of life. A real or apparent ability to do great bodily harm or take life must be coupled with the act or demonstration (CM ETO 5451, Twiggs; 40 CJS, sec.126, pp.1009,1010).

Whether there was sufficient cooling time and whether accused acted under heat of passion or with malice, were under this evidence essentially issues of fact within the exclusive and peculiar province of the court (CM ETO 4640, Gibbs, and authorities cited therein).

6. The charge sheet shows that accused is 23 years five months of age and was inducted 22 October 1941 at Camp Livingston, Louisiana. 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 suffident 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).

Wm. J. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

1st Ind.

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

1. In the case of Private GEORGE MITCHELL (34153238), 562nd Port Company, 397th Port 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 11231. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11231).

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

(Sentence as commuted ordered executed. GCMO 400, USFET, 10 Sept 1945).

11231

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

BOARD OF REVIEW NO. 1

14 JUN 1945

CM ETO 11233

U N I T E D S T A T E S	)	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Second Lieutenant ELIOT J. MELIS (O-558048), 336th Harbor Craft Company	)	Trial by GCM, convened at Ghent, Belgium, 31 March 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

---

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 94th Article of War.

Specification: In that Second Lieutenant Eliot J. Melis, 336th Harbor Craft Company, did, at Ghent, Belgium, on or about 21 February 1945, feloniously take, steal, and carry away, 2 cans of peanuts of the value of about $0.50, 1 carton of cigarettes of the value

of about $0.45, 2 pair heavy wool socks of the value of about $0.96, 1 pair of snow boots of the value of about $9.00, 1 rain coat of the value of about $6.84, 1 fur lined jacket of the value of about $8.36, 2 capes snow artic parkas of the value of about $48.60, and 2 cape liners of the value of about $9.35 a total value of about $84.06, property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 96th Article of War. (Nolle prosequi)

Specification: (Nolle prosequi)

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Channel Base Section, Communications Zone, European Theater of Operations, approved only so much of the findings of guilty of the Specification and the Charge as involved a finding of guilty of larceny, two cans of peanuts of the value of about $0.50, one carton of cigarettes of the value of about $0.45, two pairs heavy wool socks of the value of about $0.96, one pair of snow boots of the value of about $9.00, one rain coat of the value of about $6.84, one fur-lined jacket of the value of about $8.36, two capes snow arctic parkas of the value of about $28.00, and two cape liners of the value of about $9.35, a total value of about $63.46, property of the United States furnished and intended for the military service thereof, approved the sentence, and forwarded the record of trial for action under Article of War 48. Six of the ten members of the court signed a recommendation for clemency. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deemed wholly inadequate punishment for an officer guilty of such a grave offense, 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.

11233

3. The evidence for the prosecution summarizes as follows:

On 20 February 1945 between 2300 and 2400 hours, accused was stopped on a street in Ghent, Belgium, by military police, who asked him what was in a large bag he was carrying. Accused responded, "It's none of your business". They looked into the bag and found the articles enumerated in the Specification of Charge I. He told them, upon questioning, that these articles had not been issued to him and that he got them "from the docks" (R7,11). The articles were property of the United States, furnished and intended for the United States military service (R16-18), were at least of the value shown in the findings as approved by the reviewing authority (R18), and were similar to articles being unloaded on or about 20 February from the "Richard H. Lee", a ship in the Port of Ghent (R16). An unidentified person in uniform was seen taking what appeared to be a bundle of clothing from a hold of the "Lee" on the night in question (R14,15).

The investigating officer testified as follows concerning an oral statement accused voluntarily made to him: Accused stated he could not explain why he took the articles other than to say that he believed he must have been mentally overworked and overtired and had not been thinking clearly about what he was doing. He collected the articles which had been lying around the hold of the ship, put them in a bag, and openly removed the bag from the ship around 2200 hours or later. He was walking to his billet with the bag on his shoulder when the military police stopped him. Accused further explained why he had built up in his mind a feeling that he was doing nothing wrong by his actions. He had given some of his personal clothing to a number of enlisted men who needed it but could not otherwise obtain it. According to the mental attitude he developed, he did not look upon the things that he took as personal property of an individual but as items that were destined by the government to be used for the war effort. He had tried unsuccessfully to buy items of clothing which he needed (R22).

4. Witnesses for the defense testified that accused was the ship's officer of the "Lee" on the night of 20 February (R24), that he had tried to order clothing from the officer's clothing store but there were few items available (R25), and that he had a very good character (R26-28).

Accused, after his rights as a witness were explained to him, elected to make a sworn statement and testified that after he was transferred to the 336th Harbor Craft Company, he did not have the proper clothing at any time to perform his duties efficiently, and that he had tried to purchase such clothing but without success (R30).

5. The evidence in the record fully sustains the court's findings that accused took and carried away the property alleged in the Specification of Charge I, that the property belonged to the United States and was furnished and intended for the military service thereof, and that he did so with the intent to steal, that is, with a fraudulent intent to deprive the United States of its property in the goods. It also fully sustains the court's findings, as approved by the reviewing authority, as to the value of the goods (CM ETO 7248, Street; CM ETO 9342, Wells). Accused's putative defense is obviously inadequate. Need for the property, or unsuccessful attempts to acquire it through legitimate channels, cannot, of course, justify the larcenous taking of government property.

6. The charge sheet shows that accused is 28 years six months of age, that he was an enlisted man from 5 September 1942 to 12 October 1943, was appointed a warrant officer (junior grade) on 13 October 1943, and was commissioned a second lieutenant on 3 August 1944. 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 as approved and the sentence.

8. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for violation of Article of War 94. 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. Franklin Peters Judge Advocate

Wm. T. Burnett Judge Advocate

Edward L. Stevens Jr. Judge Advocate

11233

(48)

1st Ind.

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

1. In the case of Second Lieutenant ELIOT J. MELIS (O-558048), 336th Harbor Craft Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, 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 11233. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11233).

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

(Sentence ordered executed. GCMO 246, ETO, 8 July 1945).

11233

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

BOARD OF REVIEW NO. 1 16 MAY 1945

CM ETO 11237

UNITED STATES	FIRST UNITED STATES ARMY
v.	
Private WILLIAM H. MOUDY (35371957), 97th Evacuation Hospital (Semi-Mobile)	Trial by GCM, convened at Burg, Germany, 23 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for eight years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. There is no maximum limit stated in the Table of maximum punishments (MCM, 1928, par.104c, pp.96-101) for the offenses alleged in Specifications 1, 2, 3 and 5, Charge II. The penalty prescribed in Sec.194, Federal Criminal Code (18 USCA 317) is not applicable. The most closely related offense is that of larceny. The maximum punishment for each offense alleged in Specifications 1 and 2 includes confinement at hard labor for five years; that for each offense alleged in Specifications 3 and 5 includes one year's confinement (CM 234468, Rhea 20 B.R.399). The sentence imposed is therefore within legal limits.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

AGPO 2-45/19M/C504ABCD

11237

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

BOARD OF REVIEW NO. 2

25 AUG 1945

CM ETO 11252

U N I T E D S T A T E S	3RD INFANTRY DIVISION
v.	Trial by GCM, convened at Sainte-Marie-Aux-Mines, France, 9 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DANIEL D.SABATINO (32787697), Company L, 7th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Daniel Sabatino, Company "L" 7th Infantry did, near Montefurin, France, on or about 25 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Marseille, France, on or about 10 December 1944.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty, except the words "was apprehended", substituting therefor the words "returned to military control". Evidence was introduced of one previous conviction of accused by court-martial which was read to the court by the trial judge advocate but not attached to the record as an exhibit. 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. For the prosecution, there was introduced in evidence without objection an extract copy of the morning report of Company L, 7th Infantry, dated 25 August 1944 "Vicinity of Montefurin", (Pros.Ex.A) showing accused "fr. duty to A.W.O.L. (straggling) 25 Aug. 44" (R6). The 3rd Division was in combat in France from 15 August 1944 being relieved for the first time in the following October. On 11 January 1945, accused being first informed of his rights therein, made a statement to the officer investigating charges against him (R7) in which he said he had been assigned to Company L, 7th Infantry, as a rifleman before the landing in France. He stayed with them a few days then hid in a building when they moved out because "he was nervous", then wandered around France until he was apprehended in Marseille, France, in December. He "didn't want to stay with his company because he couldn't * * * stay up on the front lines". On 25 August 1944, the 7th Infantry and particularly L Company was "on the line", they were not relieved (R8).

A stipulation (Pros.Ex.B) signed by the prosecution, defense counsel and by accused was received in evidence to the effect that if Private H. Davis, 73rd Military Police Company, were present he would testify that on or about 10 December 1944, accused returned to military control at Marseille, France.

4. For the defense, accused's former platoon leader testified that accused had never given him any trouble and in his opinion was a good soldier (R11). Defense counsel read an unsworn statement for accused, reciting in detail accused's experiences, stating that on 25 August when the "company pulled out to move up to the front and I was getting my pack and I was on my way to catch up to the company but could not find them". He then heard the artillery and saw some flashes, "got scared and turned around" (R14).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty or to shirk important service"(MCM, 1928, par.130a, p.142).

The uncontradicted evidence as well as accused's admissions show that he absented himself from his company without authority when they "pulled out to move up to the front", and that he became scared when he heard the artillery and saw the flashes and left. His intent in so doing is apparent and is confirmed by his long absence. The court's findings of guilty are fully supported by the evidence (CM ETO 6549, Festa; CM ETO 13292, Kazsimir).

6. The charge sheet shows accused to be 20 years seven months of age. Without prior service he was inducted 1 February 1943 at New York City.

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 (Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

2 JUN 1945

CM ETO 11256

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Gondenbrett, Germany, 11 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	
Second Lieutenant RODGER J. NUNEZ (O-1062948), Company G, 8th Infantry	)	

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

---

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

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

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

Specification: In that Second Lieutenant Rodger J. Nunez, Company G, 8th Infantry, having received a lawful command from Lieutenant Colonel George L. Mabry, Jr. 8th Infantry, his superior officer, to report to his organization, Company G, 8th Infantry, for duty, did near Olzheim, Germany, on or about 15 February 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

11256

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 term of his natural life. The reviewing authority, the Commanding General, 4th Infantry Division, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

On 15 February 1945, accused reported to Lieutenant Colonel George L. Mabry, Jr. Commander of the Second Battalion, 8th Infantry, which was then at Alzheim, Germany, and requested permission to speak to him in private. Accused's company, Company G, was then on the right sector of the battalion and receiving artillery and mortar fire, while patrol activity occasioned small arms and long range machine gun fire. Three nights previous, G Company had repelled a counter-attack mainly with small arms fire. Upon accused's request being granted, he informed Colonel Mabry that he could not continue to take combat service and could not lead his men forward due to his nervous condition and a leg ailment. He further stated that while hospitalized as a non-combat casualty in January 1945, he appeared before a board of officers to determine whether he was fit for "full field duty" and the board classed him fit for such duty. Colonel Mabry explained that his hands were tied and any officer or enlisted man turned over to him for full field duty would perform full field duty. Accused said he just could not take it any more. Further discussion ended with accused's statement that he could not perform full field duty. Colonel Mabry directed him to report to G Company for full field duty. Accused said he could not do it. Colonel Mabry called in one of his staff officers and in his presence repeated his order to accused, who replied "I will not go". Accused was then placed in arrest and the staff officer was instructed to escort him to the rear and place him in confinement to await trial. Accused did not appear to be disabled (R4-6, 7,8).

4. For the defense, the following copy of letter of commendation was offered and received in evidence without objection:

"HEADQUARTERS
SHIPMENT GJ 555

9 November 1944

TO WHOM IT MAY CONCERN:

This is to state that Lieutenant Rodger J. Nunez acted as provisional company commander of Company "G" on overseas Shipment GJ 555. During the period of this movement the discipline maintained by Lt. Nunez's company was exceptional and morale was very high. Training was unusually well conducted. The condition of quarters and equipment was far above average.

My rating of this officer for this assignment is'Superior'.

JAMES B. SPAULDING
Lt. Col., Commanding"

(R9; Def.Ex.1)

Report by Major Meyer H. Maskin, M.C. Division Psychiatrist, dated 16 February 1945, concerning accused was also offered and received in evidence without objection. This recites that accused

> "displays evidence of personal immaturity and instability which in my opinion disqualify him from assuming the initiative and responsibility that must be assumed by leadership in combat",

that his ankle complaints arise from similar psychologic causes and that there is "insufficient symptomotology to warrant medical disposition and reclassification is therefore recommended" (R9; Def. Ex.2).

5. After his rights were explained (R8), accused commenced his testimony, but was overcome by his emotions after uttering a few words. Following a short recess, defense counsel, at accused's request, made an unsworn statement in his behalf, which differed with prosecution's evidence as regards the offense alleged only in that it was accused's recollection that he did not make a flat or categorical refusal to Colonel Mabry, but said, "I am sorry, sir, I just can't do it" and while this may mean the same he wanted the court to understand that he did not deliberately violate any order with no consideration for his superiors. Accused led his platoon in combat until an ulcer of the foot, due to swelling and drawing, prevented him from keeping up with his platoon. He has had three and one-half years enlisted service in the Field Artillery and Air Corps and was commissioned in the Antiaircraft Artillery (R9).

6. All of the elements of the offense alleged were clearly shown and the court's findings of guilty were fully warranted (CM ETO 5196, Ford; CM ETO 4988, Fulton).

7. The charge sheet shows that accused is 29 years and five months of age and was commissioned Second Lieutenant 20 January 1944. Prior service is not shown.

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

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

B R Sleeper Judge Advocate

Malcolm C. [illegible] Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant RODGER J. NUNEZ (O-1062948), Company G, 8th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as 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 11256. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 11256).

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

(Execution suspended. GCMO 212, ETO, 15 June 1945).

11256

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 11257

U N I T E D S T A T E S)	9TH INFANTRY DIVISION
)	
v.)	Trial by GCM convened at Remagen,
)	Germany, 20 March 1945. Sentence:
First Lieutenant MORRIS C.)	Dismissal, total forfeitures
HINTT (O-1295376), Company)	and confinement at hard labor
B, 60th Infantry)	for life. United States Peni-
)	tentiary, 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 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 58th Article of War.

Specification: In that 1st Lt. Morris C. Hintt, Company "B", 60th Infantry, did, at vicinity of Zweifall, Germany, on or about 27 September 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and shirk important service,

11257

and did remain absent in desertion until he was apprehended by Provost Marshal, Oise Section, on or about 10 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification 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 shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to the provisions of 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 dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 27 September 1944 accused reported as a replacement officer to the battalion adjutant, 1st Battalion, 60th Infantry, at that time in contact with the enemy and attacking daily in the vicinity of Zweifall, Germany. The adjutant questioned accused, told him that "we were in contact with the enemy" and conducted him to the battalion commander at the battalion forward command post (R6). Subsequently, on the same date, accused was assigned to Company B, 60th Infantry and conducted by runner to the company commander of B Company (R7). Accused was thereafter absent without leave from 27 September 1944 until apprehended by the provost marshal, Oise Section, 10 January 1945 (R7-9).

After due warning, accused made a voluntary pretrial statement to the investigating officer, which was reduced to writing and signed and sworn to by accused, admitting that a short time after reporting to B Company he caught a ride "toward Eupen or Rotgen", finally going to Liege and thence to Namur, where he applied to Military

Police for a ride to his organization, "but it was not available" (R8-11). He left his organization because he had many things on his mind (R11). He attempted during his absence, to secure assistance in working out his difficulties, in which connection, he wrote many letters home and sought unsuccessfully to enlist the aid of the Red Cross (R11-12).

4. The only evidence for the defense was the testimony of accused that when he left his organization, he knew no one in the Division; that he now realized his mistake and, if given an opportunity, "would be willing to accept anything, anywhere" (R15).

5. The uncontradicted evidence establishes the hazardous duty alleged, accused's knowledge of it at the time of his departure, and his avoidance of participation therein as the result of his unauthorized absence of three and a half month's duration, terminated by apprehension. The showing thus made supports the court's inference that accused's absence was initiated for the purpose and with the intent of avoiding combat, and sustains the findings of guilty as charged.

6. The charge sheet shows that accused is 28 years two months of age; that he enlisted 23 April 1941 and was commissioned second lieutenant of Infantry 5 October 1942.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 48). 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

(64)

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 First Lieutenant MORRIS C. HINTT (O-1295376), Company B, 60th 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 11257. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11257).

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

(Sentence as commuted ordered executed. GCMO 285, ETO, 26 July 1945).

11257

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

BOARD OF REVIEW NO. 3 10 AUG 1945

CM ETO 11258

U N I T E D S T A T E S	9TH INFANTRY DIVISION
v.	Trial by GCM, convened at Monschau, Germany, 16 February 1945.
Private CARMELO R. PERGOLIZZI (32723422), Company F, 60th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U.S. 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 69th Article of War.

Specification: In that Private Carmelo R. Pergolizzi, Company "F", 60th Infantry, having been duly placed in arrest at Elsenborn, Belgium on or about 1 November 1944, did, at Elsenborn, Belgium, on or about 0700 hours, 5 November 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: (Nolle prosequi)

Specification 2: In that * * * did, near Elsenborn, Belgium, on or about 5 November 1944, desert the service of the United States by absenting himself without leave from his organization with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion until he surrendered himself at Paris, France, on or about 9 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 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 shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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 on 1 November 1944 accused was a member of Company F, 60th Infantry, which was then carrying on a training and rest and rehabilitation program about 1½ miles from Camp Elsenborn, Belgium. The purpose of the program was to train new reinforcements and reorganize the company, which had just returned from a campaign, into an efficient fighting unit. On 1 November the company commander picked up accused at the regimental personnel section and placed him under "arrest and confinement" within the company area, at the same time showing him the mess tent, latrine and

his sleeping quarters, a shack about twenty yards from the company command post, in which the company communications sergeant and two privates first class also slept. Accused stated at the time that he understood he was confined to this area (R6-7,10). He was not armed and no rifle was issued to him (R9).

During 1 and 2 November the company continued its training program. On 2 November the platoon leaders were instructed to advise their men that within three days the company would be moving into a position in the line. On 3 and 4 November preparations were made by the company for the move away from the area (R7-8). Between 1 and 5 November accused asked the other occupants of his hut "all kinds of questions" about "what it was like up on the front lines". He also stated

> "that he did not intend to sweat out this war by facing Jerry bullets, that it was nice and warm in the rear, that the food was good and a fellow would be able to live like a king back there" (R11,14).

On 4 November accused and the members of the company present in his hut discussed the impending movement of the company on the following morning "up to the lines" to "relieve a front line outfit" (R10,13).

At 0445 hours on 5 November accused was present when the other occupants of the hut arose. However, after breakfast, which was held at 0500 hours, he was not present in or around the hut. A search was made for him but he was not found (R11-12,14). He had not been released from arrest (R8). The company thereafter left the area by truck on 5 November, and relieved a unit in the front lines, occupying a holding position and remaining there from 5 to 12 November, during which time several patrols were sent out. "There was firing back and forth", and a few rounds of artillery fire were dropped on outposts of the regiment which were in position (R8,12,14). Accused was not present with his company from the morning of 5 November until 29 December 1944, when he was returned under armed guard (R12,15).

It was expressly stipulated between accused, defense counsel and the prosecution that accused surrendered himself to military authorities at Paris, France, on or about 9 December 1944 (R16).

4. After his rights as a witness were fully explained to him, accused elected to make a "sworn statement" (R17-18). He joined the air cadets with the intention of becoming a pilot because he has a phobia or fear of seeing dead bodies, the sight of which gets him "all upset inside". He was eliminated from the cadets without prejudice and was transferred to the infantry. He decided to make the best of it, but tried to get out of the infantry while he was in replacement channels. Although he received some sympathy from an army doctor, he finally decided it was impossible for him to get out. After he was sent to Company F, he testified:

> "Not realizing the seriousness of what I was doing, I took off. This was with the intehtion of -- and this was only because of the lack of knowledge of the seriousness of what I was doing and without having the intention of doing it -- so that I could be tried and face the court and explain to the court my problem, this phobia that I have of seeing dead bodies, to explain to them why I did this, and to try to go into reconnaissance work or something else, just so's I would not have to be near all those dead bodies. I was always this way. When I was an altar boy, I could not take part in requiem masses because I could not stand the sight of dead bodies " (R18-19).

On the night of 4 November he was aware that his company was preparing to move forward into the line. He did not know they were going into combat and thought they were going into a defensive area, but he knew they would be in contact with the enemy. He did not make the statement about not intending to "sweat out Jerry bullets", and did not recall what he said about the rear areas. All he wanted was something like reconnaissance work, "because I knew that I couldn't stand it up front". He would like another chance to prove himself in a front-line company, however, "because I am more concerned over the punishment which I am going to get than over my personal feelings in the matter". He had had the Articles of War read to him on more than one occasion and understood them, but he "did not know what I was doing" when he left his organization (R18-21).

The defense introduced in evidence extracts from accused's service record showing five "excellent" and three "unknown"character ratings, and two "excellent", three "satisfactory", and three "unknown" efficienty ratings (R21-22, Def.Ex.1).

5. The evidence shows that after accused had been placed in arrest in the company area by his commanding officer on 1 November 1944, he left the area and his organization on the morning of 5 November without having been released, thus breaking his arrest as alleged in the Specification of Charge I. The evidence also shows that at the time he absented himself on 5 November he had full knowledge that his company was to move that day into a position on the line. Indeed, he admits such knowledge, although he testified that he thought the position would be a defensive one. Other testimony shows that prior to absenting himself he made a statement "that he did not intend to sweat out this war by facing Jerry bullets", and indicated a preference for the rear areas. In effect, he admits he left because of a fear or phobia of having to look at dead bodies. He remained absent without authority for 34 days. Such evidence constitutes abundant justification for the court's finding that he left his organization with the intention of avoiding hazardous duty and shirking important service as alleged in Specification 2 of Charge II (CM ETO 7339, Conklin; CM ETO 7413, Gogol; CM NATO 1259, III Bull.JAG 7).

The fact that accused was in a temporary status of restraint did not render him immune from such hazardous duty or important service which his commanding officer might have seen fit to impose upon him at any time and clearly did not preclude the commission by him of the alleged offense of desertion (CM ETO 7339, Conklin; CM ETO 8300, Paxson).

6. In the absence of a direct attack upon the specification or a showing of prejudice to accused, the failure of Specification 2 of Charge II to allege the specific nature of the hazardous duty or important service which accused intended to avoid, in conformity with the approved form, clearly was not such a material error as to require disapproval of the finding of guilty (cf. CM ETO 5117, DeFrank; CM 245568, III Bull.JAG 142).

7. The charge sheet shows that accused is 20 years and seven months of age, and was inducted 19 January 1943. No prior service is shown.

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

9. The penalty for 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

(ON LEAVE) Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of Private CARMELO R. PERGOLIZZI (32723422), Company F, 60th 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. As it does not appear that being held in association with the prisoner will be detrimental to misdemeanants and military offenders, nor that the purposes of punishment demand penitentiary confinement, I recommend that the designation of the place of confinement be changed from the U.S. Penitentiary, Lewisburg, Pennsylvania, to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this endorsement. The file number of the record in this office is CM ETO 11258. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 11258).

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

(Sentence ordered executed. GCMO 356, USFET, 28 Aug 1945).

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

BOARD OF REVIEW NO. 3 17 JUL 1945

CM ETO 11265

U N I T E D S T A T E S	)	78TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bonn, Germany, 31 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant JOHN J. MURRAY, JR. (O-927355), Company G, 310th Infantry	)	

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

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

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

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

Specification 1: (Disapproved by the reviewing authority)

Specification 2: In that Second Lieutenant John J. Murray, Jr., Infantry, Company G, 310th Infantry, having received a lawful command from Major Henry H. Hardenbergh, Jr., his superior officer, to move forward along with Company G, 310th Infantry,

to engage the enemy in combat, did at Bechlinghoven, Germany, on or about 21 March 1945, willfully disobey the same.

CHARGE II: Violation of the 75th Article of War.

Specification: In that * * * did, at or near Bechlinghoven, Germany on or about 21 March 1945 misbehave himself before the enemy, by refusing to advance with his command, which had then been ordered forward by Major Henry H. Hardenbergh, Jr., to engage with the German forces which forces the said command was opposing.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present 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 term of his natural life. The reviewing authority, the Commanding General, 78th Infantry Division, disapproved the finding of guilty of Specification 1 of Charge I, 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 the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that accused reported to the commanding officer of Company G, 310th Infantry, on 19 March 1945 near Bechlinghoven, Germany, while the company was located on a hill it had taken the preceding day (R6). He had not been in combat before (R8). During the early morning of 21 March, the company was in billets in another position to which it had withdrawn, and had orders to move to an assembly area and be prepared to attack and capture a German town at daylight (R6-7,12). The order of march had been given the night before (R10). The company commander told accused to check his platoon and get them on the road in the designated formation, ready to move out. Accused said he was not going out with them, because he had seen some wounded and "it had preyed on him during the night so much that he just couldn't make it" (R7,8).

He seemed normal and rational and "showed no indications of nervousness or anything of that type" (R7). The company had been subjected to some harrassing artillery fire in forward positions, and one casualty from another company had been brought past accused's position the morning after he joined the company (R8). The company commander explained to accused "the position he was placing himself in", and the executive officer also talked with accused, but he continued to refuse to go, and was ordered by the company commander to battalion headquarters under arrest. Within thirty minutes after this conversation, and just before daylight, the company marched to the line of departure, took up positions and attacked the enemy (R7,9,12).

Accused reported to his battalion commander, Major Hardenbergh, at the battalion command post while it was still dark. Major Hardenbergh explained the seriousness of his refusal to go with his company, but accused said he "just couldn't stand it, that he had seen several men shot up, with their arms and legs blown off and that it was more than he could stand and he would just not go." Accused "seemed to be scared and extremely nervous", but he was rational and knew what he was doing. He was not hysterical. In removing a grenade from his belt, he dropped it to the floor where it exploded. Major Hardenbergh gave accused "a direct order to go", or more specifically an order "to go forward with his company to the assembly area". Accused refused to go (R11-13).

After the defense had rested, the prosecution introduced what was termed "an official report of the division psychiatrist", relating to accused, dated 27 March 1945. The defense objected only on the ground that the document did not show accused's serial number and middle initial. The document was received and was limited by the law member to statements by the psychiatrist as a result of his examination. The report showed a diagnosis of "Psychoneurosis, Personality Disorder, Schizoid Personality. (A lone-wolf type of person with marked feelings of inferiority)". The conclusion of the report was that accused was sufficiently sane to conduct or cooperate in his defense, and was able at the time of the alleged offense "both to distinguish right from wrong and to adhere to the right" (R19-20; Pros.Ex.C).

4. After having his rights as a witness explained to him, accused elected to testify under oath (R14). He was twenty years of age and was inducted into the Army 18 September 1942. He had attended a military school. He was a private first class before he attended Officer Candidate School at Fort Benning, Georgia, where he was commissioned 30 January 1945. He first reported with the 78th Infantry

Division overseas on or about 18 March 1945. On 21 March he had little control over himself, and was "very upset" because of conversations he had with the men in the company, the confusion, and things he had seen. He had expected to lead a platoon in combat but, in his words:

> "Up on the line the way /things/ were being done was almost in direct contradiction to the way I had been told to do them. * * * The men were dug in and they had very poor positions. * * * They had no field of fire. They were poorly distributed. There were only approximately fifteen men in the platoon. The weapons were all shot. They had no rifle grenades. They had no grenade launchers. The men were in bad condition. I didn't know where I was. I didn't know what hill we were on. * * * We didn't know who was on the left and who was on the right. We didn't know exactly where the adjoining outfits were. * * * We didn't know what was going on. * * * We were told to expect the First Division to come through the line and they never came. We waited and waited. We were getting ready to go out that night and nobody knew where the Third Platoon was. They could have been captured. We never knew where they were. We waited around for about an hour to find one platoon of men. We had no communication. The radio was out" (R16-17).

By the evening of 20 March he "was confused and I didn't know what I was doing". He had knowledge of the statements he made to his company and battalion commanders, and knew who they were at the time. He did not understand what Major Hardenbergh told him as to the results of failing to obey the order, but he heard Major Hardenbergh tell him "to assume command of /his/ platoon and advance with them". The medical officer sent him to the clearing station, but he did not know why (R14-19).

Without objection from the prosecution, the defense introduced in evidence "admission and disposition rosters" of the 78th Clearing Station, showing that accused was admitted on 21 March 1945 with a slight condition of exhaustion, and remained until 27 March, at which time he was returned to duty (R14; Def.Exs.A and B).

5. a. With reference to Specification 2 of Charge I, the evidence shows that on 21 March 1945, accused received a direct order from the

battalion commander "to go forward with his company to the assembly area". The Specification alleges that the order was "to move forward along with Company G, 310th Infantry, to engage the enemy in combat". It thus appears that there is a variance between the allegation and proof as to this Specification. However, the real substance of the two orders appears to be the same, that is, to go forward with his company. The Specification adequately informed accused of the charge he was required to meet. Accused's testimony shows that he fully understood that the order was to advance with his platoon and company for the purpose of engaging in combat with the enemy. This relatively immaterial variance did not prejudice the substantial rights of accused (CM ETO 7549, Ondi; CM ETO 2921, Span; CM 233780, Bentley, 20 B.R. 127 (1943)). The fact that accused was under arrest at the time the order was given did not make the order illegal since the order constituted a constructive release from the arrest (CM 256909, III Bull. JAG 380). The evidence clearly shows that accused willfully disobeyed the command, and the finding of guilty is fully supported by the evidence.

b. With respect to the Specification of Charge II, it is shown that accused's company had taken a hill position only two days before accused joined the company. Harrassing artillery fire was being directed upon the forward positions of the company. The evidence clearly shows that accused was "before the enemy", and his willful refusal to take command of his platoon and advance with the company to attack the enemy, as alleged and proved, constituted misbehavior within the meaning of Article of War 75 (MCM, 1928, par. 141a, p.156; CM ETO 6694, Warnock). He was properly convicted of both specifications since his conduct showed two separate offenses and violations of both Articles of War 64 and 75 (CM ETO 6694, Warnock, supra).

6. The admission into evidence of the "psychiatric report" concerning accused, without any identification by any witness, constituted error, but not such as could have prejudiced accused in any manner. No issue of insanity was injected into the case, since there is no evidence that accused was at any time insane or incapable of adhering to the right (CM 231963, Hatteberg, 18 B.R. 349 (1943)). There is evidence that accused acted normally when he talked with his company commander and he was rational when he talked with the battalion commander. The fact that he appeared to the battalion commander to be scared or nervous, and the fact that he was admitted to a clearing station for exhaustion on the same day, fail to raise an issue of insanity. The court had the opportunity to observe accused and hear him testify, and was warranted in determining whether any doubt as to his mental responsibility existed at any time (CM 124538, Dig. Op. JAG, 1912-40, sec.395(36), p.225).

7. The charge sheet shows that accused is twenty years of age, and enlisted 18 September 1942 at New York, New York. He was commissioned 30 January 1945. No prior service is shown.

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

9. Dismissal and confinement at hard labor are authorized punishments for violation of the 64th and 75th Articles 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).

B N Cooper 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. 17 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant JOHN J. MURRAY, JR. (O-927355), Company G, 310th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as modified, and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I concur in the recommendation of the Theater Staff Judge Advocate that another thorough psychiatric examination by competent psychiatrists be made. I recommend that a board of medical officers, to include experienced psychiatrists, be appointed for the purpose of inquiring into and reporting upon the mental responsibility of accused at the time of the offenses of which he has been found guilty.

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 11265. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11265).

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

(Sentence ordered executed. GCMO 545, USFET, 3 Nov 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 11267

17 MAY 1945

U N I T E D S T A T E S)	97TH INFANTRY DIVISION
)	
v.)	Trial by GCM, convened at APO 445, U. S. Army, 21 April 1945.
)	
Private First Class JOHN FEDICO (33016942), Company H, 387th Infantry)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class John Fedico, Company "H", 387th Infantry, did, at Hennef, Germany, on or about 10 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Josephina Loch.

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

introduced of one previous conviction by special court-martial for forging a pass 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 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. Clear, uncontroverted evidence, including accused's testimony, establishes that at the time and place alleged he engaged in sexual intercourse with Frau Josephina Loch. The only issue was whether she voluntarily consented to the intercourse, as accused testified, or whether she submitted thereto against her will and under fear of her life or of bodily harm caused by accused, who was armed with a pistol, as testified by her. Her testimony against accused on this issue was clear and convincing and was substantially corroborated. The factual issue was for the exclusive determination of the court, whose findings of guilty are supported by competent, substantial evidence and will therefore not be disturbed by the Board of Review upon appellate review (CM ETO 7252, Pearson and Jones; CM ETO 6042, Dalton; and authorities cited in those cases).

4. a. The record shows (R1) that the trial took place only two days after the charges were served on accused. The prosecution stated in the presence of accused at the trial that the latter expressly consented to trial at that time and that urgent military necessity required it (R3). The record does not indicate that the substantial rights of accused were prejudiced in any degree. Due process of law was duly observed (CM ETO 8083, Cubley; CM ETO 8732, Weiss; and authorities therein cited).

b. Lieutenant Colonel Julian R. Alford, Adjutant General of the 97th Infantry Division, by command of the commanding general, referred the case to the trial judge advocate for trial. Colonel Alford was appointed and sat as a member of the court (R1). His act in referring the case for trial was purely administrative and in the absence

of challenge (R2) and of indication of injury to any of accused's substantial rights, this irregularity may be regarded as harmless (CM ETO 8451, Skipper, and cases therein cited).

5. The charge sheet shows that accused is 31 years eight months of age and was inducted 10 April 1941 at Altoona, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

20 JUN 1945

BOARD OF REVIEW NO. 1

CM ETO 11269

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM convened at Luneville, France, 13 February 1945. Sentence: To be hanged by the neck until dead.
Private TOM GORDON (34091950), 3251st Quartermaster Service Company	

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 charges and specifications:

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

Specification: In that Private Tom Gordon, 3251st Quartermaster Service Company, did, at Marseille, France, on or about 12 November 1944, with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation kill one Corporal Laurence Broussard, 3251st Quartermaster Service Company, a human being by shooting him with a rifle

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

Specification: In that * * * did, at Marseille, France on or about 12 November 1944, with intent to commit a felony, viz murder commit an assault upon

Corporal Willie J. Best, 3251st Quartermaster Service Company, by willfully and feloniously shooting the said Corporal Willie J. Best, 3251st Quartermaster Service Company in the leg with a rifle.

CHARGE III: Violation of the 61st Article of War

Specification: In that * * * did, without proper leave absent himself from his camp at Marseille, France, from about 12 November 1944 to about 13 November 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 all charges and specifications. Evidence was introduced of two previous convictions, one by summary court for violation of standing order by wrongfully entering a house of prostitution in violation of Article of War 96, and one by special court-martial for absence without leave for 17 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, 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 the execution thereof pursuant to Article of War 50½.

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

At about 0130 hours on 12 November 1944 accused was cursing and talking loudly in his barracks (R11), located in Marseille, France (R5). He was "raising Sam" and said, among other things, "I ain't done nothing, and I can't get a pass" (R37). First Sergeant Otto McQueen told him to "shut up" or he would lock him up in the stockade, and accused responded that he "didn't give a damn". Sergeant McQueen sent Private First Class Wilson Hawkins to get the corporal of the guard (R11,37). At this time it seemed to Sergeant McQueen that accused had been drinking, but he answered correctly and appeared to know what he was doing (R16). The sergeant testified that accused recognized him as the first sergeant and kept quiet after the order was given. Accused was not staggering, his speech was clear and distinct, and the first sergeant could not smell liquor on his breath. Sergeant McQueen testified that he thought accused had the use of his faculties (R19).

Unable to find the corporal of the guard, Hawkins returned to the barracks and met accused in the middle aisle going toward the kitchen. Accused was crying and said, "I wish I had a pistol, I'd kill all of these rotten mother fuckers" (R38). Water was running out of his eyes and, according to witness, he "was snuffing like this: 'sniff-sniff'" (R39).

He was walking down the middle aisle of the barracks in a perfectly straight line at a normal pace and not staggering (R40). About fifteen or twenty minutes later Hawkins heard three shots (R38,39).

Between the hours of 0100 and 0200 Private Dock King heard accused's voice in the barracks saying that he "was going to kill the first son of a bitch that raised cain that night", then mentioning the name of Broussard in a rough, cursing manner (R24,25). King did not remember the exact language, but it was something like "I'm going to kill the first son of a bitch that raises hell with me, and I bet it will be Broussard". King testified also that he could tell by the voice of accused that he had been drinking that night (R26).

In the early morning of 12 November Corporal Willie J. Best saw accused apparently looking at the names on the top of the lockers in the barracks (R46), and heard him cursing, saying "the non-comms wasn't any good in the company". Afterwards, between 0100 and 0200 hours, three shots were fired (R47).

In the barracks in question, there were two rows of double-decker bunks in a north and south line. The rows were separated by a middle aisle. The north side of the barracks was closed by a wall, the south side was open. On the east and west sides were rows of wooden lockers, 6 feet high, opposite the beds. The bunk of accused was the first, or northernmost, in the row on the east side. The bunk of Private John D. Brown was the fifth in the same row, Private James Johnson's was the sixth, and Corporal Laurence Broussard's the seventh. Corporal Willie J. Best's bunk was the last, or 19th, bunk in the western row (R5-10,Pros.Ex.A).

Between 0130 and 0200 hours Private Johnson, who was sleeping in an upper bunk (Corporal Broussard sleeping on the bottom bunk of the adjacent double-decker to the south), was awakened by a shot, and immediately saw accused standing at the end of his Johnson's, bunk, holding a .30 caliber, 1903 rifle with its barrel at hip level parallel to the ground. Accused was facing down the aisle toward the open or south end of the building. Johnson grabbed the rifle and tusseled with accused, who was able to hold the rifle during the tussle. He pushed away Johnson, who slipped, then got up, and hid behind a column (R42-44).

Between 0130 and 0200 hours Private First Class Booker T. McCullough was standing by his bed at the rear end of the barracks and heard a shot fired. He saw accused standing in the middle aisle near Broussard's bed, approximately eight feet away, then saw him move toward the back of the building. Broussard was in bed at that time. Accused,

armed with a United States Army .30 caliber, 1903 rifle, tussled with Johnson, jumped away fired a second shot, and reloaded the rifle. He then went down the aisle, fired at Corporal Best, hitting the latter in the thigh, and continued toward the kitchen with the rifle at half port arms. He was walking fast in a straight line and was not staggering. McCullough testified that he did not think accused was drunk when he saw him fire the second and third shots. Accused was the only one there with a rifle (R27-35).

Private First Class John D. Brown was sleeping in his bunk and heard a shot which glanced off the bottom of his bed and struck him in his buttocks. He saw accused standing at the foot of his bed with a rifle held at port arms. He then heard Broussard holler, "Come over and do something for me. I'm shot". Then another shot was fired and he heard Best say, "I'm shot too" (R50-52).

Corporal Willie J. Best was lying in the upper bunk of the double-decker bed at the open end of the barracks, when he heard two shots. He arose, got behind a post and saw accused coming toward him holding a 1903 rifle. Accused took a bead on him and fired, the bullet striking Best in the thigh. Corporal Best was evacuated to a hospital, where he remained for about 65 days. He saw no other persons with weapons around the barracks at that time (R47-49).

After hearing three shots, Private Floyd Green saw accused, who was carrying a 1903 rifle, running out of the barracks in a straight line. Prior to this time, witness had seen no one else with a gun of any type in the barracks (R56-57).

After the firing, Corporal Broussard was found to be bleeding, apparently in a serious condition (R13), his body lying at the side of his bunk (R57). Examination of Broussard at a station hospital at 0300 hours on 12 November revealed that he had a gunshot wound perforating his abdomen. On 18 November Broussard died, the immediate cause of his death being the wound (R62; Pros.Ex.D).

Accused was absent without leave from his camp from 0200 hours on 12 November until he was returned to military control on 13 November (R13,60,61; Pros.Exs.B and C).

4. The evidence for the defense was substantially as follows:

Private Jesse Wallace saw accused at about 0030 on 12 November for from five to ten minutes, during which time they had a drink together. Accused was very drunk, staggered when he walked, and was lying across a weapons carrier when Wallace left him. He did not seem to know what he was talking about and his statements made no sense to Wallace, who was

"pretty drunk" himself. Accused was playing "dozens" at the weapons carrier, and talking "nasty words" (R63-67).

Major Alfred O. Ludwig, psychiatric Consultant, Office of the Surgeon, Seventh Army, estimated that accused's mental age was around nine years. He thought, however, that accused would be able to determine right from wrong and adhere to the right, and would know it was wrong to shoot and kill another man (R68,69).

Accused, after his rights as a witness were explained to him, elected to make an unsworn statement, substantially as follows:

He came off guard about eight o'clock and asked for a pass to go to town. After supper one McNichols asked him to go with him to get a drink. They stopped at a bar and had some drinks there, then went to another bar and had more drinks. Later they drank some more. They went to another bar and drank more drinks. At this bar two French ladies bought drinks, then he bought some. One of the ladies gave him a cigarette. He began to smoke it, passed out, and did not know anything that happened. The next thing he remembered was in the afternoon of the next day when he woke up lying by a wall on an old piece of carpet. He did not know what happened, nor how he came to be there. He went to a military police headquarters, told them he was absent without leave, and they said they believed he had shot someone. He thought they were "kidding" and did not know definitely about the shooting until a colonel told him about it. He remembered nothing about the shooting (R70).

5. Charge I:

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

In addition to the implications of malice arising out of accused's acts, there is in the record ample evidence of express malice and intent to kill, consisting of statements he made prior to the shooting, including his wish that he had a pistol so that he could kill, and his statement something like, "I'm going to kill the first son of a bitch that raises hell with me, and I bet it will be Broussard".

Although no witness testified that he saw accused actually fire the first shot, the Board of Review believes that competent, substantial

evidence establishes beyond any doubt that accused fired the shot which caused Corporal Broussard's death. This conclusion inevitably flows from the evidence.

b. The only serious question raised in the record is the question of drunkenness, so often involved in violent crimes of this kind. The evidence showed that accused was drinking prior to the shooting. Was accused intoxicated to such a degree at the time of the homicide that he was incapable of entertaining malice aforethought, which is an essential element of murder?

Eyewitnesses testified as follows regarding the condition of accused at or about the time of shooting from the point of view of intoxication:

Sergeant McQueen testified that accused recognized him as the first sergeant and obeyed his order to keep quiet; that accused appeared to know what he was doing and to have the use of his faculties; that his speech was clear and distinct, and that he did not stagger. Hawkins stated that water was running out of accused's eyes and that he was sniffing, but he was walking in a perfectly straight line and was not staggering. According to Johnson, accused pushed him away during the tussle and was able to hold onto the rifle. McCullough testified that he did not think accused was drunk when the second and third shots were fired, and that accused walked fast in a straight line without staggering. Corporal Best declared that accused drew a bead on him before firing the rifle. Green saw accused after the shooting running out of the barracks in a straight line. From the evidence of absence without leave, it is shown that accused managed to make good his escape. On the other hand, Wallace, a witness for the defense, testified that at about 0030 hours accused was very drunk, that he staggered and was lying across a weapons carrier. Accused in his unsworn statement said that he had had many drinks earlier in the evening, had passed out in a bar, and did not remember anything that happened between then and the next afternoon.

Notwithstanding the evidence for the defense, prosecution's evidence forms a body of substantial evidence that supports the court's findings 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 to support the court's finding that accused was guilty of murder under Article of War 92 (CM ETO 1901, Miranda; CM ETO 6229, Creech).

Charge II:

By the same reasoning, competent substantial evidence sustains the court's findings of guilty of assault upon Corporal Best with intent

to commit murder under Charge II, including its finding that accused was not so intoxicated as to be unable to entertain such intent (CM ETO 2672, Brooks). This question was for the sole determination of the court under this state of evidence. Accused is shown to have drawn a bead upon Best and then fired. The evidence would have sustained a finding of murder, had Best died as a result of his wound. Absent the fact of death, accused's guilt of the crime of assault with the intent to commit murder is an automatic legal consequence (CM ETO 2899, Reeves; CM ETO 10860, Smith and Toll).

Charge III:

The evidence clearly proves, and accused in his unsworn statement in effect admits, that he was absent without leave, as alleged under Charge III.

6. The charge sheet shows that accused is 29 years old and was inducted 6 May 1941 at Fort Jackson, South Carolina. 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 murder is death or life imprisonment as the court-martial may direct (AW 92).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations 20 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army

1. In the case of Private TOM GORDON (34091950), 3251st Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 11269. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 11269).

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

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

(Sentence ordered executed. GCMO 235, ETO, 29 June 1945).

11269

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

BOARD OF REVIEW NO. 2 11 AUG 1945

CM ETO 11271

U N I T E D S T A T E S	)	XII TACTICAL AIR COMMAND
	)	
v	)	Trial by GCM, convened at Headquarters
	)	42nd Bomb Wing, APO 374, U. S. Army,
Second Lieutenant WILLIAM	)	3 February 1945. Sentence: Dismissal,
M. O'HARA (O-684400), 443rd	)	total forfeitures and confinement at
Bombardment Squadron (M),	)	hard labor for three years. No place
320th Bombardment Group (M)	)	of confinement designated.

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.

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

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

Specification 1: In that Second Lieutenant William M. O'Hara, 443rd Bombardment Squadron, 320th Bombardment Group (M) AAF, did, at Alto, Corsica, at 0815 hours, on or about 4 November 1944, fail to repair at the fixed time to the properly appointed place of assembly for briefing for a combat mission.

Specification 2: In that * * * did, at Alto, Corsica, at 1015 hours, 4 November, fail to repair at the fixed time to the properly appointed place for take-off on a combat mission.

Specification 3: In that * * * did, at Alto, Corsica, at 1200 hours, on or about 4 November 1944, fail to repair at the fixed time to the properly appointed place of assembly for briefing for a combat mission.

Specification 4: In that * * * did, at Alto, Corsica, at 1400 hours, 4 November 1944, fail to repair at the fixed time to the properly appointed place for take-off on a combat mission.

Specification 5: In that * * * did, without proper leave, absent himself from his post at Alto, Corsica, from about 2400 hours, 3 November 1944 to about 1630 hours, 5 November 1944.

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

Specification: In that * * * was, at Bastia, Corsica, on or about 4 November 1944, drunk in uniform in a public place, to wit, the O.K. Bar.

(Charge sheet dated 18 November 1944)

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty)

(Charge sheet dated 16 December 1944)

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

Specification: In that * * * did, at Aiserey, France, on or about 15 December 1944, wrongfully take and use without proper authority, a certain motor vehicle, to wit, one ¼ ton 4 x 4 truck, property of the United States, of a value of more than $50.

(Charge sheet dated 13 January 1945)

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

Specification: In that * * * was at Dijon, France, on or about 8 January 1945 in a public place, to wit, Allied Officers Club, Dijon, drunk and disorderly while in uniform.

11271

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

Specification: In that * * * did, without proper leave, absent himself from his proper station at Aiserey, France, from about 1400 hours 8 January 1945 to about 2025 hours, 8 January.

He pleaded guilty to Specifications 1 and 5, Charge I, to the Specification and Additional Charge on the charge sheet dated 16 December 1944 and to the Specification and Additional Charge II on the charge sheet dated 13 January 1945 and not guilty to all other charges and specifications. He was found not guilty of Specifications 1 and 2 of the Additional Charge on the charge sheet dated 18 November 1944, guilty of the Specification of Charge II on the original charge sheet, substituting the words "a cafe in the vicinity of the American Red Cross Club" for the words "the O.K. Bar", and guilty of all other 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 three years. The reviewing authority, the Commanding General, XII Tactical Air Command, approved only so much of the finding of guilty of the Specification of Charge II on the original charge sheet as involves a finding that the accused was at Bastia, Corsica, on or about 4 November 1944, drunk, 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. No place of confinement was designated.

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

Specifications 1, 2, 3, 4 and 5, Charge I. Accused is a second lieutenant and on 3 and 4 November 1944 was a member of the 443rd Bombardment Squadron, 320th Bombardment Group, which was stationed at Alto, Corsica (R9,10,11,15). As was customary in the organization, a mission schedule for 3 November 1944 was posted on its three bulletin boards (R10,11,15,17). This mission was not flown and about 2100 or 2130 hours on 3 November 1944, the mission schedule was changed to designate that the same personnel would fly on 4 November 1944. This was accomplished by changing the date to 4 November 1944 and the briefing time from 1015 hours to 0815 hours (R15,16; Pros.Ex.1). Accused was scheduled to attend briefing at 0815 hours and to fly as first pilot of ship No. 52 on a combat mission at 1015 hours, 4 November 1944 (R10; Pros. Ex. 1). The take-off time was not published in mission schedules for

reasons of security and weather conditions and to allow for late changes from higher headquarters. It was announced at briefing time and it was the understood procedure in the organization that when a man was scheduled for briefing he was also scheduled for take-off (R11,62). Accused was not present at the briefing on the morning of 4 November 1944 or at the take-off about 1000 or 1030 hours that morning and another pilot flew the mission in his place (R17,18). Although it was known accused was not in the squadron area at the time (R12) and that he had missed the earlier mission (R21), he was scheduled to attend a briefing at 1200 hours for a second mission that day. Take-off time was about 1400 hours and accused was designated as co-pilot of plane No. 67 (R10; Pros.Ex.2). The schedule for this mission was posted on the bulletin board about 1000 hours that morning and, although a search was made, accused could not be found in the officers' area (R21). He was not present at 1400 hours for the take-off of the afternoon mission and another officer was substituted in his place (R19,24). At about 1115 hours that morning another officer left accused in Bastia, Corsica, and proceeded to the field where he flew the afternoon mission, taking off about 1400 hours. Before leaving he told accused that he was scheduled to fly on the afternoon mission (R24). Pursuant to verbal orders of the commanding officer it was the responsibility of every flying officer, including accused, to read the bulletin board frequently and to be present at briefings and take-offs for missions on which he was scheduled to fly (R22;Pros.Ex.4). On 5 November 1944 an officer of accused's organization was sent to Bastia to bring him back to the base. He found accused in a cafe underneath the Red Cross Club in Bastia and returned him to camp about 1730 hours (R29). Accused did not have permission to be absent from his station from 3 November 1944 to 5 November 1944 (R12,22). The morning report of accused's organization was received in evidence showing accused from duty to absent without leave as of 2400 hours, 3 November 1944 and from absent without leave to duty as of 1630 hours, 5 November 1944 (R11,13;Pros.Ex.3).

Specification, Charge II. Between 1000 and 1100 hours on 4 November 1944, accused was seen in the Cafe Brassiere, next door to the American Red Cross Officers Club in Bastia, Corsica. At first he was "a little drunk" and after staying there for some while "he got drunker". He was wearing a green shirt at the time and was seen drinking "around a half dozen" drinks of vermouth and cognac (R24,26,62).

Specification of Additional Charge on charge sheet dated 16 December 1944. Accused's organization was located in Aisersy, France, on 15 December 1944 and that evening a one quarter ton, 4 x 4 truck, bearing number 2060519 was dispatched to Lieutenant Colonel Ashley E. Woolridge, who drove it to the chateau in Aisery where the officers of the 443rd Squadron were quartered. He parked it on the east side of the

building about 2130 hours and when he left the chateau about an hour later the vehicle was missing. He did not authorize anyone to use it (R40,42,44). That evening accused, another officer and an enlisted man got in a jeep that was parked at the officer's chateau, and drove around Aiserey for "not quite a half hour". Accused drove the vehicle for about five or ten minutes. They returned to the chateau, where accused and the other officer alighted, and the enlisted man drove the vehicle to a point near his quarters, left it there and went to bed. The next morning this enlisted man directed two officers to the vehicle that he and accused had used the night before. It was a one quarter ton, 4 x 4 truck, number 2060519 and was property of the United States assigned to the 320th Bombardment Group (M) (R41,42,43,45,46).

Specification of Additional Charge I on charge sheet dated 13 January 1945. About 1630 hours on 8 January 1945 a commotion was heard in the hall of the Allied Officers Club in Dijon, France. Lieutenant Bowers, on duty there, found accused staggering from one wall to another. He was heard to say "it didn't make a fucking bit of difference to him and calling someone a son-of-a-bitch". He was quieted down and turned over to another officer with the suggestion that he be removed from the club. About 15 minutes later accused entered the club office, walked over to the desk of Lieutenant Colonel Slingo, club manager, and asked for a room for the night. He was drunk but in an amiable mood. He was told no rooms were available and Lieutenant Bowers took him by the arm and got him out of the office. Another officer then took him out the front door of the building. About 1900 hours considerable noise was heard in the hall of the club and Lieutenant Bowers came out of a small room, where he was eating dinner, and found accused leaning up against the wall near the door leading to the downstairs bar. "His hair was messed up and he was rather muddy". At this time there were about 25 civilians and 75 military guests present. Accused was drunk and he was put out of the club. He returned in about four minutes and once more he was put out of the building. Again he reentered and this time he was confronted by Lieutenant Colonel Slingo, who had come out into the hall. Accused attempted to strike him but was prevented from doing so by an enlisted man who was present. He was forcibly removed from the premises and within a short while he was taken into custody by the military police (R47,48,50,51,52,53,58). He was wearing an American Army uniform and his insignia of rank (R49,55).

Specification of Additional Charge II on charge sheet dated 13 January 1945. Accused was not given permission to be absent from his organization from 1400 hours on 8 January 1945. The morning report of accused's organization was received in evidence showing accused from duty to absent without leave as of 1400 hours, 8 January 1945 (R61;Pros.Ex.7). He was taken into custody by the military police at Dijon, France, about 2230 hours on that date (R56,57).

4. Accused, after his rights as a witness were fully explained to him (R63), was sworn and testified in substance as follows:

While training in the United States he was involved in two flying accidents, as a result of which he is very nervous. When he is kept very busy, he is all right, but when he sits around with nothing to do he starts drinking, as this helps him forget about the accidents (R66). Specifications 1 and 2 of Charge I. He had been scheduled for this mission for about ten days, and each day the date on the schedule had been changed due to heavy rains. Each time it was changed the briefing time (1015 hours) had not been altered. It was still raining on the afternoon of 3 November 1944 and he and his "buddy" decided to go to town. They were going to spend the night there and return the next morning. It rained that night but when they woke up the next morning about 0700 hours there were no clouds in the sky. On their way back to camp they stopped at the enlisted men's Red Cross club and called the orderly room to see if the mission had taken off. The weather was so good that he knew they must have advanced the scheduled time of the mission in order to take advantage of the good weather. He was told by the clerk in the orderly room that the briefing time had been advanced from 1015 hours to 0815 hours and he knew that he could not get there that early. Knowing he would be replaced if he missed briefing, inasmuch as first pilots are not allowed to take off under such circumstances, he stayed in town. He did not feel there would be another mission that afternoon, because they had never had but one mission a day before, with the exception of "D" day (R67). Specifications 3 and 4 of Charge I. He was not present for briefing at 1200 hours on 4 November 1944 because he did not know he was on that mission. It was the second time, within his knowledge that two missions had been scheduled for one day and he was charged with being absent without leave for that period. He pleaded not guilty to these specifications, because he could not understand how they could "schedule me for fifty things" if they knew he was absent without leave. He did not appear for the take-off at 1400 hours on that day because he did not know he wasscheduled for that mission (R67,68). Specification 5 of Charge I. He stayed in town on 4 November 1944 and that night he drank heavily. He does not remember much of what happened until the next day (R68). Specification of Charge II. He was not in the O.K. Bar at Bastia, Corsica, on 4 November 1944. Specification of Additional Charge on charge sheet dated 16 December 1944. He had been grounded since the trouble in Corsica and had nothing to do but sit around in the chateau. He drank quite a bit the evening of 15 December 1944 and rode around a few minutes in the jeep. It was then brought back to the chateau and he did not know at the time that Private Eielson took it elsewhere. He rode in the jeep but did not drive it. Specification of Additional Charge I on charge sheet dated 13 January 1945. He was to be court-martialed and Captain West told him he ought to get a haircut before the trial. Captain Davis said he was going to the

hospital and feeling this was an excellent opportunity to take a hot bath, he went with him and took a hot shower. On the way back they stopped at the Post Exchange, so he thought he might as well get a haircut. Inasmuch as this was on Monday the barber shops were closed and he went to the Officers Club, thinking there might be a barber shop there, but there was none. He then went up to the bar and started to drink, and while there he began to commiserate with a friend of his, whose wife had recently passed away. The more he sympathized with this officer, the more he drank and he did not remember anything until he arose the next morning in the stockade (R70). Specification of Additional Charge II on charge sheet dated 13 January 1945. He was with the squadron doctor, when he went to the hospital and he was sure he would not be breaking restriction if he went with the doctor in the ambulance to take a shower. When he came to town he left the ambulance and he has nothing further to say about that (R70).

Captain Davis, accused's squadron surgeon, was called by the defense and after qualifying as a physician testified that on the basis of accused's behavior as a whole and a tendency towards alcoholism he thought he should be sent to a psychiatrist. It is his opinion that accused fell into the classification of having a mental disease /psychopathic personality/ and is a type that is prone to getting into many difficulties and becoming alcoholic. In his opinion punishment is of no value to this type of individual. Accused is able to understand the nature of the charges and to assist his counsel in the preparation and trial of his case; he can distinguish right from wrong and can adhere to the right but he does have a greater impulse to follow his own desires (R78,79,81, 82,83).

Major Erickson, Chief of the Neuro-Psychiatric Section of the 36th General Hospital, qualified as a psychiatrist and testified for the defense substantially as follows:

Accused is sane, can distinguish between right and wrong and is a case of a psychopathic personality or constitutional psychopatic state. Such persons get into conflict with society in various ways and have repeated trouble. Punishment is of little or no value to such individuals. The existence of a psychopatic personality would not prevent him from adhering to the right but he will have more difficulty doing so than an ordinary individual (R85,86,87).

5. Accused pleaded guilty to and the prosecution introduced substantial evidence of all the essential elements of the offenses alleged in Specifications 1 and 5, Charge I, the Specification of the Additional Charge, on the charge sheet dated 16 December 1944, and the Specification, Additional Charge II, on the charge sheet dated 13 January 1945. Hence,

the court's findings of guilty of the offenses charged therein are fully supported by the evidence in addition to accused's guilty pleas.

Accused's contention that he did not appear for the take-off at 1015 hours because he had missed the briefing for this mission and consequently would not be permitted to fly does not constitute a defense to his failure to appear for the take-off as scheduled. Likewise his explanation that he did not appear for the afternoon briefing and take-off because it was not customary to schedule two missions for the same day is without merit. There is substantial evidence of all the essential elements of the offenses alleged in Specifications 2, 3, and 4 of Charge I (MCM, 1928, par. 132, p. 146). With reference to the Specification of Charge II, the finding of the court as modified by the reviewing authority is adequately supported by the testimony that accused was drunk on the date and in the city alleged in the Specification as approved by the reviewing authority (MCM, 1928, par 152a, p. 187).

Concerning the offense charged in the Specification of Additional Charge I, on the charge sheet dated 13 January 1945, the record contains abundant testimony that accused was grossly drunk and highly disorderly in the officers' club at Dijon on the date alleged. His only explanation of these happenings was his statement that he had no recollection of the events that transpired after he commenced drinking. The findings of guilty of a violation of Article of War 95 are fully sustained by the evidence (MCM, 1928, par 151, p 186).

While accused has been specifically charged with failure to repair at four separate times, included within the period for which he was tried for absence without leave, it was not an unreasonable multiplication of charges in this instance. The manual for Courts-Martial prohibits joining charges for failing to report for a routine scheduled duty, such as reveille, with a charge of absence without leave, when such failure to report occurred during the period for which the absence without leave is charged (MCM, 1928, par 27, p 17). In the instant case the duties for which accused failed to repair were specifically scheduled duties of a most serious and important nature and can hardly be regarded as the type of routine duties contemplated by the prohibition in the Manual for Courts-Martial. With reference to this subject the 1921 Manual for Courts-Martial contains the following statement:

> "And so a person subject to military law should not be charged under A.W. 61 for failure to report for a routine duty at a time included in a period for which he is charged with absence without leave under the same article; otherwise when the duty is not a routine duty. Routine duties are those that are regularly scheduled, such as reveille, retreat, stables, fatigue, schools,

drills, and parades, but do not include practice marches or other previously specially appointed and important exercises of which the accused is chargeable with notice" (MCM, 1921, par 66, p 65)(Underscoring supplied).

Inasmuch as accused was bound by the notices posted ontthe bulletin board (CM 248497, III Bull. JAG 233), he was chargeable with notice that he was scheduled for these duties and the important role that bombing missions play in modern warfare is not open to serious question. It is clear that under the above quoted provision of the 1921 Manual for Courts-Martial the joinder of charges herein was proper.

6. The charge sheets show that accused is 26 years 4 months of age. He completed six years service in the United States Marines 26 August 1942 and was commissioned a second lieutenant, Army of the United States, 26 June 1943.

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

8. Conviction of an officer of an offense under either Article of War 61 or 96 is punishable at the discretion of the court and a sentence of dismissal is mandatory upon conviction under Article of War 95. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (Cir 210, WD, 14 Sept 1943, sec VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

102)

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 Second Lieutenant WILLIAM M. O'HARA (O-684400), 443rd Bombardment Squadron (M), 320th Bombardment Group (M), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The action does not designate the place of confinement. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11271. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11271).

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

(Sentence ordered executed. GCMO 350, ETO, 27 Aug 1945).

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

BOARD OF REVIEW NO. 1

10 OCT 1945

CM ETO 11306

U N I T E D S T A T E S	)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private ERNEST J. POUCHE (31432388), Attached-Unassigned, 352nd Replacement Company, 72nd Replacement Battalion	)	Trial by GCM, convened at Marburg, Germany, 2 May 1945. Sentence: Dishonorable discharge (suspended) total forfeitures and confinement at hard labor for 10 years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Ernest J. Pouche, attached-unassigned, 352nd Replacement Company, 72nd Replacement Battalion, did, without proper leave, absent himself from his station at or near Verviers, Belgium from about 4 February 1945 to about 28 March 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave from his organization at Camp Miles Standish, Massachusetts, for five days. He was sentenced

to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, but reduced the period of confinement to 10 years, ordered the sentence as thus modified duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 337, Headquarters Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army, 10 May 1945.

3. The evidence for the prosecution was as follows:

A corporal of Detachment 503, 3rd Replacement Depot, testified he was a classification specialist attached to the statistical section of the Depot (R7). He identified a roster entitled "Shipment GT - 111(a) Infantry Company "N" First Platoon," (which was admitted in evidence as Pros.Ex.A, the defense stating there was no objection), as a part of the records of the Depot kept in his possession at his section in the daily course of business. The roster contained the following entry:

"TM		LC		
0 31.	POUCHE, ERNEST J.	0	Pvt	31432388 Inf

521 (SS)" (Pros.Ex.A) (Underscored portions in ink).

On 4 February 1945, the mentioned shipment, which came from the 15th Replacement Depot, arrived at the 3rd Replacement Depot, where it went to the 352nd Replacement Company, 72nd Replacement Battalion. The roster indicated that accused departed from the 15th Replacement Depot because if he had not done so his name would have been "lined off" by that organization, as in the case of some names thereon. It also indicated that he did not arrive with the shipment because the zero under the troop movement and locator card columns (see supra) showed, respectively, that upon arrival of the shipment he did not answer when the troop movement called his name at roll call and that he never filled out a locator card "which every man does" (R7-8). The markings indicating accused's non-arrival followed standard procedures used in the 3rd Replacement Depot (R8-9).

The first sergeant of the 352nd Replacement Company, 72nd Replacement Battalion, testified that accused "is attached-unassigned to" that company. On 4 February, the shipment in question arrived at the company, then located at Verviers, Belgium. "We checked the roster and called the roll, and this man was absent from the shipment". Accused never reported to the company (R9), and was granted no pass, furlough or to the best of witness' knowledge, other permission to be

absent from the company from 4 February to 28 March 1945. The first time accused was "picked up" on the company morning report was 16 March 1945:

> "as of absent from the 15th Replacement Depot, attached-unassigned, not yet joined, as of the 4th of February 1945" (R10).

On 8 April the company received an "official report" that he was in the hands of military authorities as of 28 March (R9) and an entry showing such information was made in the morning report (R10).

A sergeant of the 233rd Replacement Company, 69th Replacement Battalion, testified that accused's organization was (on the date of trial) the 3rd Replacement Depot (R6). He knew accused since 5 April 1945, through the Depot Stockade where accused was received from the Depot (R7).

4. After his rights were explained, accused elected to remain silent. The defense offered no evidence (R11).

5. Accused was convicted of absence without leave from his station, with the 352nd Replacement Company, 72nd Replacement Battalion, from about 4 February 1945 to about 28 March 1945. The roster, being a properly identified official record kept in due course, with the system of entries therein fully explained, was competent evidence to show: accused's assignment to a shipment of men from the 15th Replacement Depot to the 3d Replacement Depot and thereafter to his alleged company; his departure from the 15th Replacement Depot and failure to arrive at the 3d Replacement Depot (CM ETO 10199, Kaminski). The first sergeant of the accused's alleged company was charged with the duty of knowing who was assigned to such company, and he testified accused was assigned thereto. The shipment arrived at the company 4 February, and accused was not with it. It was his duty to be with this company on such date and he was not there. His absence was therefore unauthorized and was presumed to have continued until return to military control was shown (MCM, 1928, par.130a, p.143; CM 189682, Myers, 1 B.R.179 (1930)). It was not proven terminated by direct evidence until 5 April when accused was in the depot stockade, but the hearsay testimony of prior return on 28 March as an appropriate judicial admission beneficial to the accused, was competent to establish termination of the absence (CM ETO 16936, Kempain; CM 199641, Davis, 4 B.R.145 (1932).

6. The charge sheet shows that accused is 24 years five months of age and was inducted 3 July 1944 at Boston, Massachusetts, 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 if of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

(106)

8. The designation of the Loire Disciplinary Training Center, LeMans, France, as the place of confinement is proper (Ltr., Hq. Theater Service Forces, European Theater, AG 252, GAP-AGO, 20 Aug.1945).

_____ Judge Advocate

(ON LEAVE) Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

16 OCT 1945

CM ETO 11356

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private GEORGE A. CREBESSA (36960394), Attached-Unassigned 234th Replacement Company, 90th Replacement Battalion	Trial by GCM, convened at Marburg, Germany, 2 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private George A. Crebessa, attached-unassigned, 234th Replacement Company, 90th Replacement Battalion, did, at or near Bad Neuenahr, Germany, on or about 14 November 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at or near Namur, Belgium on or about 12 March 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words, "Bad Neuenahr, Germany", substituting therefor respectively the words "Verviers, Belgium", 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 30 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, and ordered the sentence as thus modified executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 343, Headquarters Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army, 12 May 1945.

3. The evidence for the prosecution was as follows:

A sergeant of the 376th Replacement Company, 72nd Replacement Battalion, testified that part of a package of enlisted men, listed on a roster of troops coming from the 15th Replacement Depot to his company, arrived there (no date was specified). The roster, which was kept in the company files, was a record of the personnel who arrived and those who did not arrive at the company (R7; Pros.Ex.A). Entries were made thereon in accordance with a uniform procedure in witness' organization whereby a zero was placed opposite the names of all men who were found not to be present with an incoming package and after final check a freehand line was drawn through the name of each who did not arrive and whose name had not already been deleted by a ruled line) at the starting point (R8). A roll call was held when the package listed in Pros.Ex.A arrived, but accused did not accompany the package, as indicated by the freehand line which was drawn through his name at the Battalion assembly area (R7-8; Pros.Ex.A). The roster also shows a zero opposite accused's name thereon (Pros.Ex.A).

The first sergeant of the 234th Replacement Company, 90th Replacement Battalion, testified that he never knew accused, who never reported to that company. Witness did not know the reason for this. At one time, however, a Private Crebessa was carried on its rolls. On 14 November the company, then located at Verviers, Belgium, received a memorandum (not offered in evidence) from Headquarters 3rd Replacement Depot directing it to "pick up" 41 enlisted men in the company's morning report in a status of absent without leave, and appropriate entries were made on that day. Accused had no permission from the 234th Replacement Company to be absent therefrom (R9).

It was stipulated between prosecution, defense and accused that the latter "surrendered himself" at or near Namur, Belgium, on or about 12 March 1945 (R10; Pros.Ex.B).

4. After his rights were explained, accused elected to remain silent. The defense offered no evidence (R10).

5. Accused stands convicted of desertion from the 234th Replacement Company, 90th Replacement Battalion at Verviers, Belgium, commencing on or about 14 November 1944 and terminated by surrender at or near Namur, Belgium, on or about 12 March 1945. The vital question for determination is whether the evidence is legally sufficient to show the element of absence without leave, an essential element of the offense (MCM, 1928, par. 130a, p. 142). Absence without leave exists

> "Where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there" (Ibid.,par.132, pp.145-146).

The proof required is

> "(a) that the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (Ibid.,par. 132, p.146; CM ETO 527, Astrella).

All of the elements of the offense may be proved by circumstantial evidence, but the inference of guilt must be the only one which can reasonably be drawn from such evidence and mere conjectures and suspicions do not warrant conviction (CM ETO 527, Astrella,and authorities therein cited).

The testimony of the sergeant of the 376th Replacement Company and the roster (Pros.Ex.A) in that company's files indicate that accused was assigned to that unit from the 15th Replacement Company at some unspecified time, and likewise at a time unknown did not arrive. This evidence is disconnected from the offense charged, of absence from the 234th Replacement Company.

The testimony of the first sergeant of the 234th Replacement Company shows that on 14 November that company received a directive from the 3rd Replacement Depot, whose relation to accused is not shown to carry 41 enlisted men, including accused only inferentially, as absent without leave and that the company complied with the direction on that day. Accused

never reported to the company and had no permission from it to be absent. Knowledge of such an order, on the part of accused, will not be presumed. This is a companion case of CM ETO 11518, Rosati, and is controlled by the opinion therein to which reference is here made. For the reasons there stated, this conviction cannot be sustained.

In addition, it must be said that the competent evidence admits of a number of inferences which are at least as consistent with the hypothesis of innocence as with that of guilt: Accused may never have been attached to or directed to proceed to the 234th Replacement Company. He may have been attached but directed not to report thereto by reason of transfer to another organization or illness or other disability. He may have been delayed in reporting through transportation difficulties. In short, (1) there is no proof that he was required to be present with the company and (2) even assuming, arguendo, that he was absent therefrom, there is no basis for the inference that such absence was through his own fault (MCM, 1928, par. 132, pp. 145-146). The evidence fails to meet the standards required of circumstantial evidence because it is as consistent with innocence as with guilt (CM ETO 7867, Westfield, and authorities therein cited). The record of trial, therefore, in the opinion of the Board of Review, is legally insufficient to support the findings of guilty.

The foregoing is not inconsistent with the holding of the Board of Review in CM ETO 527, Astrella, where there was no question as to accused's membership in and absence from the organization alleged. The only question there was whether such absence was unauthorized. The Board held that such fact might properly be inferred from all the evidence, which clearly met the standards required of circumstantial evidence.

6. The charge sheet shows that accused is 23 years 11 months of age and was inducted 28 March 1944 at Fort Sheridan, Illinois, 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. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Wm. F. Sprow Judge Advocate

(ON LEAVE) Judge Advocate

James T. Allen Judge Advocate

113 5-6

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 13 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), ~~APO 757,~~ U. S. Army. APO 887

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 GEORGE A. CREBESSA (36960394), Attached-Unassigned, 234th Replacement Company, 90th Replacement 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. The proof in this case is a jigsaw puzzle with many missing pieces and the ones we have do not fit together. This case has received painstaking consideration, but it is far below any standard of proof which can be held legally sufficient.

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

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

(Findings and sentence vacated. GCMO 550, USFET, 27 Oct 1945).

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

BOARD OF REVIEW NO. 1 2 JUN 1945

CM ETO 11376

U N I T E D S T A T E S	)	87TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Jossnitz, Germany, 27,28 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private MOSES A. LONGIE (37028361), Headquarters Company, 607th Tank Destroyer Battalion	)	

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

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Moses A. Longie, Headquarters Company, 607th Tank Destroyer Battalion, did at Mechelgrun, Germany, on or about 18 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrud Lenk.

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

designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. The fact that an American soldier engaged in an act of sexual intercourse with Frau Gertrud Lenk at the time and place alleged in the Specification was proved by the prosecution beyond all reasonable doubt. With respect to the commission of the sexual act, the only question deserving consideration is whether the woman voluntarily consented to the act or whether she submitted under fear of her own life or bodily harm.

> "There is a difference between consent and submission; every consent involves submission, but it by no means follows that a mere submission involves consent" (52 CJ, sec.26, pp.1016,1017).
>
> "Consent, however reluctant, negatives rape; but where the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity) the consummated act is rape" (1 Wharton's Criminal Law (12th Ed., 1932), sec.701, p.942).

The question whether the victim, without intimidation of any kind, fully consented to the act of intercourse or whether it was committed by accused by force, violence, terrorization and against her will, was a question of fact within the exclusive province of the court. In the instant case there is substantial evidence that Frau Lenk was overcome by fear of death or bodily harm and that the submission of her body to the lust of an American soldier was not a free, voluntary act. Under such state of evidence the finding of the court will not be disturbed by the Board of Review on appellate review (CM ETO 3740, Sanders, et al; CM ETO 3933, Ferguson et al; CM ETO 4194, Scott; CM ETO 5363, Skinner).

b. The accused denied that he was the soldier who committed the rape and also denied that he was present in the Lenk house on the night 18-19 April 1945. In an attempt to corroborate accused's denials, the defense presented testimony to the effect he was in his company's bivouac area during the period when the crime was committed. Accused, however, was positively identified as the rapist by four witnesses, one of whom was the victim. In addition, a flashlight, which was at the scene of the crime at the time of its occurrence, on subsequent search was found in accused's bed roll. There was thereby created a sharp issue of fact which was within the exclusive

province of the court for resolution. The judging of the credibility of the witnesses, their tendency to testify falsely or honestly, the motives which prompted their testimony and the reconciliation and rationalization of the evidence were functions of the court as a fact finding body. The evidence supporting the court's finding that accused was the rapist is competent and substantial. Under such circumstances the finding, with which the Board of Review finds no cause to disagree, is final and binding on appellate review (CM ETO 3200, Price; CM ETO 3375, Tarpley; CM ETO 3837, Bernard W. Smith).

4. The charge sheet shows that accused is 32 years of age and that he was inducted 30 April 1941; discharged 17 November 1941; and reinducted 8 March 1942 to serve for the duration of the war plus six months. No prior service is shown.

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

6. The penalty for 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).

/s/ Jonathan Tarr Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3 10 AUG 1945

CM ETO 11386

U N I T E D S T A T E S	)	1ST INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Cheb,
	)	Sudetenland, Czechoslovakia,
Private First Class NORMAN J. TOON (35725120), Company I, 18th Infantry.	)	3 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 First Class Norman J. Toon, Company I, 18th Infantry, did, at Wolfschaag, Maastricht, Holland, on or about 13 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: participation in combat, and did remain absent in desertion until he was apprehended at Paris, France, on or about 19 October 1944.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Verlautenheid, Aachen, Rheinprovinz, Germany, from about 22 October 1944 to about 28 November 1944, thereby missing participation in combat with the enemy.

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

3. Evidence for prosecution:

a. Charge I and Specification.

For approximately six months accused had been on detached service with the regimental military police platoon. On 13 September 1944, a member of the "MP" platoon brought accused to the third battalion headquarters near Gemmenich, Belgium, and told the battalion sergeant major that accused was to return to his company for duty. The sergeant major, telling accused "to wait until I found a guide to take him back", went in search of one. When he returned, accused was missing without his permission. Not finding accused in the battalion area, he telephoned the first sergeant of accused's company (R7-8, 13). That day, the first sergeant and a sergeant made a search. The latter, who searched the platoon area without success, testified that accused was not present with the company between 13 September 1944 and 19 October 1944 and had no permission to be absent (R13-16). Accused was apprehended 19 October 1944 at Paris, France (R16-17; Pros.Ex.B).

For two weeks prior to 13 September 1944, the battalion had been crossing Belgium. It had no action until east of Liege but from Herve to Gemmenich engaged enemy infantry. As far as was known to the battalion sergeant-major, accused was present with the regimental military police during those two weeks (R10). On 13 September 1944, accused's company was "pushing the enemy" (R15). In the morning the battalion advanced approximately six miles to a position near Gemmenich, Belgium; in the afternoon, it consolidated its position (R9). Accused's company was at Wolfshaag, Holland, (R7) approximately one mile from battalion headquarters (R13) and approximately one-half miles from the enemy. It was being subjected to scattered enemy artillery and mortar fire (R9). General knowledge among the men of the 18th Infantry was "only that we would reach the Seigfried line and attack Aachen". Between 13 September 1944 and 19 October 1944, the battalion engaged in combat and sustained its heaviest casualties (R10-11).

Introduced into evidence without objection was the original company morning report for 16 September 1944, said to bear "the signature /First Lieutenant/ James A. Lucas, 18th Infantry Personnel Officer". Permission was granted to substitute a duly authenticated extract copy therefor at the termination of the trial, whereupon "the witness read /to the court/ the entry pertaining to the accused as it appeared on Prosecution's Exhibit "A" appended hereto". Exhibit "A" is an extract copy, authenticated by "James A. Lucas, 1st Lt., 18th Inf. Pers. Officer", of the company morning report for 16 September 1944, showing accused from "Dy to AWOL 13 Sept 1400 hrs" over the initials "RCH Jr" (R8-9; Pros.Ex.B).

b. Charge II and Specification.

On 19 October 1944, at Paris, France, accused was released from custody and ordered to return to his organization (R16-18; Pros.Ex.B) which was then in the vicinity of Verlautenheid, Germany, some 250 miles from Paris. A witness thought it would take approximately two or three days to "hitch-hike" from Paris to Verlautenheid (R11-12). Accused was not present with his organization from 22 October to 28 November 1944. A sergeant of accused's company testified accused did not have permission to be absent during this interim (R15). Accused was apprehended at Cherbourg, France, on 28 November 1944 (R16-18; Pros.Ex.B).

4. No evidence was presented by the defense. After his rights as a witness were explained to him, accused elected to remain silent (R19).

5. The charge sheet reveals accused was originally charged with "straight" desertion from 13 September to 28 November 1944. Without a re-execution by the accuser, the original specification was lined out and the specifications hereinbefore set out substituted therefor. When arraigned the accused did not object. While the practice followed was irregular (CM ETO 5406, Aldinger) accused's substantial rights were not injuriously affected thereby (CM 229477, Floyd, 17 BR 149 (1943); CM ETO 5555, Slovik; CM ETO 4570, Hawkins; CM ETO 5155, Carroll; CM ETO 12580, Groin).

6. a. Charge I and Specification.

The witness identifying the original morning report for 16 September 1944 testified it bore the signature of Lt. James A. Lucas, the personnel officer. "Prior to 12 December 1944 there was no express authority in ETO for a personnel officer to sign an original morning report", (CM ETO 6951, Rogers). However, the extract copy substituted therefor, instead of showing the morning report to have been signed by Lucas, shows the initials "RCH Jr", indicating that the original may have been authenticated by another officer as well. The questions presented need not be determined for, independent of the morning report entry, accused's absence without leave was established by competent oral testimony of the battalion sergeant major and the company sergeant. That his absence was without authority could be inferred from the circumstances attending his absence (CM NATO 1087, 3 Bull.

JAG 9). While awaiting an escort to his company about a mile away, he absented himself without the permission of the sergeant major to whom he had been delivered and in whose custody he was. The company was notified whereupon the first sergeant and another made a search for accused without success. Accused was apprehended 67 days later in Paris, France.

While it does not appear that accused was told his company was in combat, the evidence discloses that his company was about a mile away being subjected to enemy artillery and mortar file. In the absence of evidence to the contrary, it may be assumed that accused was aware of the bursting of the artillery and mortar shells and the meaning thereof. The record of trial supports the finding of guilty of Charge I and Specification (CM ETO 6637, Pittala).

b. Charge II and Specification.

At Paris, France, on 19 October 1944, accused was released from custody and told to report to his unit. At that time, his unit was at Verlautenheid, Germany, some 250 miles distant from Paris. While it was not shown that accused did not return to his company prior to 22 October 1944, it was proved that accused was absent from his organization from 22 October to 28 November 1944, when he was apprehended at Cherbourg, France. The court was justified in finding that accused failed to return to his organization and that he thereby absented himself without leave therefrom. His failure "to report to his own company resulted in a new absence without leave from that company" (CM NATO 1087, supra). He was found not to have returned until 28 November 1944. The duration of accused's absence was not of the essence of his offense (cf CM NATO 1087, supra).

7. The charge sheet shows the accused is 20 years of age and was inducted, without prior service, 13 February 1943, at Evansville, Indiana.

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

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

(ON LEAVE) Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 4

8 DEC 1945

CM ETO 11400

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Hurth, Germany, 20 March 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 MITCHELL J. KASZEWICZ (36043092), Company H, 36th Armored Infantry Regiment	)	

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 upon the following charges and specifications:

CHARGE I: Violation of the 75th Article of War.

Specification: In that Private First Class Mitchell J. Kaszewicz, Company H, 36th Armored Infantry Regiment, did, near Floret, Belgium, on or about 4 January 1945, misbehave himself before the enemy by refusing to join his command, which command was then engaged with the German Army, after he had been ordered to do so by First Lieutenant Merritt E. Hulstedt.

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

Specification: In that * * *, having received a lawful command from 1st Lt. Merritt E. Hulstedt, his superior officer, to report to Capt. Herman M. Bundrick, did, near Floret, Belgium, on or about 4 January 1945, willfully disobey the same.

He pleaded not guilty and, two-thirds of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I and Charge I, guilty of the Specification of Charge II except the words "willfully disobey", substituting therefor the words "fail to obey" and not guilty of Charge II, but guilty of a violation of Article of War 96. 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 may be summarized as follows:

On 4 January 1945 accused's organization, Company H, 36th Armored Infantry Regiment, was engaged in battle with the German Forces near Floret, Belgium (R6,7). The company had cleared Floret, had taken the ground south of Floret, and was attacking in that direction (R7). The 83rd Reconnaissance Battalion and the 2nd Armored Division were on its right flank, and certain allied elements held the left flank with the 82nd Airborne Division (R7). The company was holding a temporary defense position while the forces on the left flank were clearing a small town (R7). There was some enemy artillery fire, and there were some casualties from small arms fire and enemy booby-traps (R7).

About the middle of the afternoon, First Lieutenant Merritt E. Hulstedt, Motor/Executive Officer of accused's organization, had a conversation with him in the company motor area where the vehicles were "coiled" and being routed to the front about two miles distant therefrom, and told him to get his equipment ready and go to the front (R6,8). Accused gathered together his equipment and left the area (R8). At about 1730 hours Lieutenant Hulstedt was ordered to take gasoline to the front, went to Floret to load it, and while there he saw accused and ordered him to go to the front with him on a half-track, a distance of approximately 1200 yards (R8,9). They proceeded to the "very front" where the tanks were located, arrived there at about 1900 hours, and stopped the half-track where the gasoline was to be unloaded. He then ordered accused "to report to the Company Commander" and informed him he was about 10 or 15 yards away (R9,13,15). He unloaded the gasoline, started back to the motor area, and when he had driven about 25 or 30 yards he observed accused "scrambling into the rear of the half-track" (R9). He stopped the vehicle and again told accused to "report to the Company Commander or his platoon", whereupon accused replied that he could not take it any more (R9,10). He talked with him and informed him that he would be court-martialed if he did not stay with the company, but accused again stated that "he could not stand it any more", and refused to obey the order (R10,14917). Witness was of the opinion that accused was not of value to the company at that time, and in this connection testified,"Well, it appeared to me to be a mental attitude when he decided he wasn't going to stay and if I knocked him off the track I am quite sure he would have walked back for he had refused to report to the Company Commander and I talked to him about the court-martial and he still maintained what I stated before so I ordered him into the track and continued on my mission for Col. Fowler"(R16).This determination was not, however, based on accused's physical condition (R16).

Lieutenant Hulstedt did not recall that any other soldier was with accused when he picked him up in Floret, but the sergeant who accompanied him on the trip testified that they also took Private First Class Duguay from Floret to the front (R26-29).

With reference to accused's physical condition at the time in question, Lieutenant Hulstedt testified he had been examined by a medical officer and marked for duty shortly prior to the time he was first ordered to the front, which was about 1500 hours (R12); that he did not appear "over nervous" when he got on the half-track at the front to return to the rear (R15), and that his condition at that time was in fact less acute than it had been when he was examined by the medical officer earlier that day (R32); that although he was not completely normal at the time, he was not hysterical but merely nervous as all are on the front lines (R31); and that on the front lines "We class as everyone a little nervous" (R13). The sergenat who was with Lieutenant Hulstedt at the time accused sought to return to the rear observed that he had "a hard time even talking to the Lieutenant", and that at "that time he was cracking, shaking and was in a very upset condition" (R17). It was stipulated that if the Division Neuropsychiatrist were called as a witness he would testify that he examined accused on 29 January 1945, and that his examination disclosed no psychosis, and that he is of the opinion that accused is fully cognizant of the difference between right and wrong and is sane and responsible (R18).

4. The evidence for the defense may be summarized as follows:

Private First Class Duguay, a member of accused's organization, was with him on 4 January 1945 when they received an order from Lieutenant Hulstedt to return to the line (R19). In compliance with this order they walked to Floret, which was on the way to the front, where they saw Lieutenant Hulstedt, and then went to the front by motor vehicle (R19,20,22). When they arrived at the front shells were falling (R24). He did not hear Lieutenant Hulstedt order accused to report to the company commander, but he did see accused looking around for someone (R23-24). He did not see accused rejoin his squad, and he could not state whether he did or did not rejoin it (R21-22).

5. a. Specification, Charge I (Misbehavior before the enemy).

The Specification alleges that on 4 January 1945 accused misbehaved himself before the enemy by refusing to join his command, which was then engaged with the enemy, after being ordered to do so by Lieutenant Hulstedt. It became the prosecution's burden, therefore, to prove by substantial competent evidence that (1) accused was serving in the presence of the enemy, and (2) that he committed the act alleged (MCM, 1928, par. 141a, p. 156).

The evidence shows conclusively that accused was serving in the presence of the enemy at the time in question, and the only issue for solution is whether his conduct constituted misbehavior within the meaning of Article of War 75. The record of trial discloses that on 4 January 1945, at approximately

(124)

1500 hours, accused was ordered by Lieutenant Hulstedt to collect his equipment and proceed to the front, which was a short distance from Floret, Belgium. He left the rear area as ordered, and was next seen by Lieutenant Hulstedt in Floret shortly after 1730 hours. Lieutenant Hulstedt was proceeding to the front with a half-track loaded with gasoline, and ordered accused to accompany him. They proceeded to the "very front" where Lieutenant Hulstedt ordered him to report to the company commander, unloaded the gasoline, and started to return to the rear area. When he had driven approximately 25 or 30 yards accused was seen "scrambling into the rear of the half-track", and he stopped the vehicle and ordered him to report to the company commander or his platoon. The evidence shows that accused then stated "he could not take it any more", that Lieutenant Hulstedt talked with him and told him he would be "court-martialed" if he did not stay on the line, and that accused still asserted he could not stand it and refused to obey. He then concluded that although accused was not "over nervous", was not hysterical, and was not physically disabled, he would not be of value to the company because of his mental attitude, and in this connection said, "if I had knocked him off the track I am quite sure he would have walked back". He then ordered him into the half-track and proceeded on his mission to the rear.

The evidence shows without conflict that at a time when accused was before the enemy he was given an order to rejoin his organization on the line, and that he refused to obey it even though the consequences of his disobedience were explained to him. Conduct of this character has been held repeatedly to involve misbehavior in violation of Article of War 75 (Winthrop's Military Law and Precedents (Reprint, 1920), p. 623; CM ETO 5004, Scheck; CM ETO 5114, Acers; CM ETO 6177, Transeau; CM ETO 6376, King; CM ETO 6694, Warnock; CM ETO 11503, Trostle, Jr.). The order given him, being of in praesente character, required immediate compliance, and the offense was complete upon his refusal to obey (cf. CM ETO 2469, Tibi; cf. CM ETO 4820, Skovan; cf. CM NATO 1614, Langer). Whether mere disavowal of an intent to comply, or a mere refusal to obey, would, if followed by a reconsideration and revocation of the order, constitute the offense, is not a question for determination here, as there is substantial competent evidence from which the court could conclude that the order was at no time modified or revoked, and that accused was taken to the rear solely because of his unsoldierly and insubordinate conduct. Lieutenant Hulstedt testified that he ordered him to the rear because of his mental attitude, and that he did not believe him to be "over nervous", hysterical or physically disabled. The record of trial shows that he threatened to "court-martial" him if he did not stay on the line, and that he tried to persuade him to do so. The court was, therefore, abundantly justified in concluding that the order persisted throughout, and that his refusal to obey it was, under the circumstances disclosed by the evidence, the misbehavior recognized in Article of War 75.

Although "a genuine and extreme illness or other disability" existing at the time of the alleged misbehavior is a defense (Winthrop's Military Law and Precedents (Reprint, 1920), p. 624), and has been so recognized (CM ETO 15661, Satmary), fear or cowardice, unattended thereby, does not

11400

excuse a soldier from the full performance of his duty and constitutes no defense to a specification laid under Article of War 75 (CM ETO 13376, Aasen). When, as here, substantial competent evidence shows that accused was not "over nervous", hysterical, or physically disabled, and that he had been examined and marked for duty earlier that day by a medical officer, while other evidence indicates he was "cracking, shaking and was in a very upset condition", and no evidence conclusively discloses the genuine and extreme illness or other disability which constitutes a defense, the determination of his mental and physical competency becomes an issuable question of fact for resolution by the court, and is not open to reexamination here (CM ETO 1404, Stack; CM ETO 1663, Ison; CM ETO 1693, Allen; CM ETO 4004, Best; CM ETO 4074, Olsen; CM ETO 4095, Delre; CM ETO 4783, Duff; CM ETO 13376, Aasen).

We conclude, therefore, that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I.

b. Specification, Charge II (Failure to obey).

The evidence discloses that when accused arrived at the front with Lieutenant Hulstedt he was given an order to report to Captain Bundrick, the company commander, as alleged, but the record of trial is barren of any substantial competent evidence to show that this order was not complied with. Lieutenant Hulstedt testified that Captain Bundrick informed him that accused did not report to him, but this evidence, being of hearsay character, has no evidentiary value (CM ETO 15719, Kennedy). Although accused stated that "he could not stand it any more", this admission against interest is not necessarily inconsistent with compliance with the order, does not establish a failure to obey, and, there being no other pertinent competent evidence, the record of trial is not, therefore, legally sufficient to support the findings of the court as to the Specification of Charge II and Charge II.

6. The charge sheet shows that accused is 27 years of age and was inducted 23 July 1941 at Chicago, Illinois. 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 of Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support the sentence.

8. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). The designation of 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.

Judge Advocate.

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

BOARD OF REVIEW NO. 3

8 JUN 1945

CM ETO 11401

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at Bickendorf, Germany, 14 March 1945.
Private First Class CLIFFORD H. SCHULTZ (36212728), Service Company, 33rd Armored Regiment.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private 1st Class Clifford H. Schultz, Service Company, 33d Armored Regiment, did, at Courville-Sur-Eure, France, on or about 25 August 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: motorcycle messenger for Service Company, 33d Armored Regiment, while 33d Armored Regiment was in action against the enemy, and did remain in desertion until he surrendered himself at Service Company

Orderly Room, 33d Armored Regiment, Breinigerheide, Germany, on or about 26 October 1944.

He pleaded not guilty to and, all of the members of the court present at the time thevote 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, to be reduced to the grade of private, 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. In presenting its case, the prosecution called as a witness Private Elwood L. Bough, of Headquarters Company, 33rd Armored Regiment, whose testimony, when read together with other evidence of record, indicates that he and the accused jointly were absent from their respective organizations from about 24 August 1944 to about 26 October 1944 (R6-9). However, the prosecution failed to elicit from this witness detailed testimony with respect to the facts and circumstances surrounding such absence but instead sought to cover this matter by introducing into evidence a statement made by him to the investigating officer prior to trial. This statement is obviously hearsay and cannot be considered in passing upon the legal sufficiency of the record.

However, the following circumstances surrounding the absence are sufficiently established by competent evidence. On the night of 24 August 1944 the 3rd Armored Division, following a move from Fromental, France, to Corbeil, France, again pushed north toward the Seine River (R9,13). The movement was made in several columns, one of which passed through the town of Courville-Sur-Eure (R7). It may fairly be inferred from the record that the division's immediate objective at or about this time was the crossing of the Seine (R9,13). On the following day, 25 August, at least some elements of the division engaged in combat with the enemy and accused's organization, in supporting the combat operations, received some artillery fire and suffered some

casualties (R9). Accused, who apparently performed the duties of "bike rider and road guide" during movements, had been ordered to "follow the column of the 87th Field Artillery" on the night of 24 August and had no permission to be absent from his organization other than in the performance of his official duties (R12,14). However, apparently during the movement, he "left or disappeared from" the organization with the result that an entry was made in the morning report for 3 September showing him from "dy to missing, 24 August 44, Courville-Sur-Eure, France, NonBattle Casualty" (R12; Pros.Ex.B). On the days following the movement above described, the Seine was crossed and the unit again resumed its northward advance (R9,13). It moved constantly, passing through Mons, Charleroi, Namur and Liege, and ultimately entered Germany near Rotgen on or about 14 September. During this period it was in contact with the enemy on several occasions and casualties again were sustained (R10). On or about 15 September it moved to "the vicinity of Breinig", where it remained until 26 October (R10,13). On that date, accused returned to the organization (R10,11,13).

The testimony of Private Bough indicated that during the period of their joint absence both he and the accused had made inquiries in Paris, Liege and "all along the road" in an effort to learn the location of the division in order that they might rejoin it but were only successful when, on or about 26 October, they saw a vehicle bearing the markings of the 33rd Armored Regiment (R8,9). Accused apparently made similar representations to his company commander concerning his absence and, in view of his excellent past record, the fluid situation which existed at the time, and "the fact that even on the motorcycle it would have been quite a job trying to keep up with us or trying to locate us", the company commander accepted his explanation as true (R11,12, 14). Accused was accordingly restored to duty and an entry reflecting this action was made in the morning report for 26 October ("Missing 24 Aug 44 Courville-Sur-Eure, France, NONBattle Casualty, to returned to duty")(R11; Pros.Ex.B).

He remained on a duty status until sometime in January when, for reasons not brought out either by the prosecution or the defense, the charges which culminated in the instant trial were instituted against him. Probably for the same reasons which motivated the preferring of charges, correcting entries were made in the morning report for 21 January showing accused from duty to absent without leave on 24 August 1944 and from absence without leave to duty on 26 October 1944 (R12,14; Pros.Ex.B). Accused's

company commander was asked by a member of the court why charges were not pressed until January but the trial judge advocate interposed an objection to this question and the objection was sustained (R14). The company commander testified that from the time accused was restored to duty to the time he was placed in the stockade to await trial the company was in almost continuous contact with the enemy, that during this period accused performed his duties in an excellent manner and that he "very much would like to have him back" in the company (R11,12).

4. For the defense, First Lieutenant Lawrence E. Abney, Maintenance Officer, Service Company, 33rd Armored Regiment, testified that in his opinion accused had performed his duties as a "bike rider messenger" well and was a "good soldier", and that he would like to have him return to the company (R16,17). First Lieutenant Thomas J. Nebus, Supply Officer, Service Company, testified that prior to 24 August accused had performed his duties in a "very fine manner" and that his character was outstanding—"one of the best men in the company as far as his character is concerned". He had seen accused infrequently since 26 October but at such times as he had seen him he had conducted himself as a soldier. The witness stated that he would like to see accused return to the company (R18). The first sergeant of the company characterized accused's character, performance of duty and conduct as a soldier as "very good" and also stated he would like to have him back in the company (R19,20). Another noncommissioned officer, under whom accused had worked for about eight months, testified that accused had performed his duties "very well", that his character was "excellent" and that he would like to have him back in his section. Accused had at no time refused to perform any hazardous assignments or duties given him by the witness (R21).

Accused elected to remain silent and did not testify on his own behalf (R22).

5. a. The evidence for the prosecution shows that accused initially became absent from the company at a time when the division of which it was a part was in pursuit of the enemy and as it was approaching the Seine River, a point at which it might reasonably have been expected that

a stand would be made. On the day following his absence, contact with the enemy was established and casualties were suffered by his organization. Although equipped with a motorcycle, he did not return until some two months later, after the company had ceased its previous rapid advance. During the two months of his absence his unit engaged in severe fighting. On the evidence presented, the court could not only refuse to believe that accused's conduct was that of a man who inadvertently became separated from his company and thereafter diligently attempted to rejoin it but could find that he deliberately absented himself for the purpose of avoiding the hazardous duty which obviously confronted him. Under these circumstances, the finding of the court that accused was guilty of the offense charged cannot be disturbed by the Board of Review (Cf: CM ETO 6934, Carlson; CM ETO 7189, Hendershot; CM ETO 5953, Myers).

b. The court's finding cannot, however, be sustained if accused's restoration to duty after his return to his unit constituted constructive condonation of his offense. While ordinarily it will be presumed that no such defense exists where not raised at the trial by defense counsel (CM ETO 4489, Ward; CM ETO 6524, Torgerson), further inquiry into this question appears proper in the instant case because of certain facts appearing in the allied papers attached to the record of trial, reference to which will hereinafter more fully be made. The Manual provides that an unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates (MCM, 1928, par.69b, p.54; see also CM ETO 4489, Ward; CM ETO 5196, Ford; CM ETO 6524, Torgerson; CM ETO 6766, Annino; CM NATO 2139, Grabowski, III Bull.JAG 229). This has long been the law (see Winthrop's Military Law and Precedents (Reprint, 1920), p.270,271; Dig. Op. JAG, 1918, pp.317; idem p.635; Dig.Op.JAG, 1912-40, p.996). The above authorities are, however, unanimous in holding that in order to constitute constructive condonation a restoration to duty must not only be unconditional but must be made by an authority competent to order trial for the desertion to which the restoration relates, i. e., by an authority competent to appoint general courts-martial (CM NATO 2139, Grabowski, III Bull.JAG 229; SP JGJ 250.413, July 20, 1942, I Bull.JAG 103; see Dig. Op. JAG 1912, XVI F, p.423). In the instant case the allied papers attached to the record of trial indicate that when accused returned to his unit his company commander, "in view of his excellent record and the plaus-

1943/3/83 (AW 13; AW 70(5h))

ability of his story", was disinclined to prefer charges against him and accordingly sent him, together with the executive officer and the first sergeant of the company, to the office of the staff judge advocate of the division for advice as to what disposition of the matter should be made. A warrant officer there on duty referred them to the assistant adjutant general of the division who, in view of accused's unblemished record, recommended that no charges be preferred and that he be picked up on the morning report as returned to duty from missing in action. This action was taken and the requisite entries were made. However, on or about 15 January, accused was questioned in the presence of his company commander by an officer who was conducting an investigation of charges which had been preferred against Private Bough and, during this questioning, accused apparently gave a somewhat different version of the facts and circumstances surrounding his absence from that which he had previously related. As a result, the present charges were preferred against him. The allied papers also show that neither the commanding general of the division nor his staff judge advocate personally passed upon the question whether accused should be restored to duty without trial or had knowledge that this in fact was done. The question for decision is whether restoration to duty under these circumstances constituted constructive condonation of the offense. The allied papers contain some suggestion that his restoration to duty may have been made on the basis of false representations and, if this in fact was true, he would of course not be permitted later to advance the fact of his restoration to duty as a defense. However, it is by no means clear that he did secure restoration to duty on the basis of a misrepresentation of the facts and, on this assumption, he might properly have pleaded his restoration to duty as a defense provided the necessary conditions of such defense otherwise were met. Under this analysis the question becomes whether his restoration to duty was accomplished by an authority "competent to order trial" or, more specifically, whether the commanding general was bound by the action taken by his assistant adjutant general in recommending the action here taken. In deciding this question, it should be remembered that restoration to duty is not generally regarded as a defense and operates as such only in the single case of desertion, where it is hedged about with certain important restrictions (see Winthrop's Military Law and Precedents (Reprint, 1920), p.271; CM ETO 2212, Coldiron; and authorities hereinabove cited). It may also be noted that Army Regulations in force when this rule was first adopted differ from Army Regulation

dll HQ(30) 75(3) 96(6)(a-1)

on this point currently in force, and apparently contemplated, as present Army Regulations do not, either the express removal of a prior administrative charge of desertion as having been erroneously made or the express restoration to duty of an admitted deserter under certain pains and penalties set forth in the then regulations (see Dig.Op. JAG, 1918, p.317; idem, p.431; AR 615-300, 25 March 1944). Under these circumstances, it is felt that the rule which makes restoration to duty without trial a defense to the desertion to which such restoration relates should not be extended but, on the contrary, should be narrowly construed. While staff officers may act for their commanding general in many matters, it should be remembered that "the question whether a particular set of charges shall or shall not be brought to trial is to be determined in every case by the proper convening authority, who is responsible for the maintenance of discipline, and whose decision as to the necessity or propriety of a trial is final and conclusive" (Davis, A Treatise on the Military Law of the United States, p.80). In the instant case it appears that accused's restoration to duty was made primarily on the recommendation of the division assistant adjutant general, to whom the matter had been referred by a warrant officer in the office of the staff judge advocate, and that neither the commanding general nor his staff judge advocate had knowledge of the action taken. Without attempting to set forth the exact procedure necessary, it is concluded that the action here taken was not such as to constitute an "unconditional restoration to duty by an authority competent to order trial" and hence did not amount to constructive condonation of accused's offense (Cf: CM ETO 2212, Coldiron, supra). It follows that accused could properly be convicted of desertion and that the action of the law member in foreclosing further inquiry into this question by sustaining the prosecution's objection to a question designed to secure information in this connection did not injuriously affect his substantial rights.

6. The charge sheet shows that accused is 27 years of age and was inducted 13 June 1941 at Camp Grant, Illinois.

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

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 3

26 MAY 1945

CM ETO 11402

U N I T E D S T A T E S	) 3RD ARMORED DIVISION
	)
v.	) Trial by GCM, convened at Bickendorf,
	) Germany, 22 March 1945. Sentence:
Private First Class WARREN R. DIEDRICKSON (32863762), Company B, 36th Armored Infantry Regiment	) Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Warren R. Diedrickson, Company B, 36th Armored Infantry Regiment, did, on or about 1200 8 September 1944, in the vicinity of Leige, Belgium, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: Combat against the German Army, and did remain absent in desertion until he surrendered himself at his organization on or about 21 Janury 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present

at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, to be reduced to the grade of private, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his naturallife. 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 is clear and undisputed that on 8 September 1945 accused was a rifleman in a squad of Company B, 36th Armored Infantry Regiment. Company B was then at the Meuse River near Liege, Belgium, and was receiving sniper and small arms fire from the enemy. The squad leader informed members of the unit including accused that their orders were to be prepared to move out at 1230 hours to relieve a road block at 1300. At 1200 it was discovered by the squad leader that accused was missing and a search of the area failed to disclose his presence. He remained absent without leave until the latter part of January 1945. Accused testified that on the afternoon of 8 September he attempted to return to his company, that he jumped up in the kitchen truck and rode 20 miles. He,

> "slept in the kitchen truck that evening and the next morning the 3/4 ton truck driver went down to the Company and I didn't get up in time to go back with him. When he came back he said the company commander wanted me to come to the Company he told me to go to TF 'Y'".

The driver told him it was "around five miles" from his company to the place where the kitchen was.

There is substantial evidence from which the court was authorized to infer that accused knew of the important service upon which his organization was engaged and that he nevertheless deliberately left his place of duty to avoid prospective battle hazards (CM ETO 9796, Emerson and cases therein cited).

4. Although defense counsel stated that accused desired to take the stand as a sworn witness, the record of trial fails to recite that he was sworn before speaking in his own behalf. However, since his statements follow the heading "TESTIMONY OF ACCUSED - Warren R. Diedrickson" and there was brief cross-examination by the prosecution (R16), it may be assumed that his request that he be sworn was complied with (R15). In the event he was not sworn, no substantial right of accused was injuriously affected since his representations wholly failed to explain either his alleged initial absence without leave or its extension for a period of over four months.

5. The charge sheet shows that accused is 20 years of age and was inducted 15 March 1943 at New York, New York, to serve for the duration of the war plus six months. He had no prior service.

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

7. The penalty for desertion in time of war is death or such other punishement 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).

Benjamin R. Sleeper Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3 28 MAY 1945

CM ETO 11404

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at Bickendorf, Germany, 14 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private HILTON G. HOLMES (32233912), Company B, 83rd Armored Reconnaissance Battalion	

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

---

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

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

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

Specification: In that Private Hilton G. Holmes, Company "B", 83rd Armored Reconnaissance Battalion, did, near Fromental, France, on or about 22 August 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit: Combat operations against the German Army, and did remain absent in desertion until he surrendered himself at the 48th General Hospital, Paris, France, on or about 16 December 1944.

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

Specification: In that * * * did, near Fromental, France, on or about 22 August 1944, knowingly and willfully misappropriate one quarter (¼) ton truck, of the value of about one thousand three hundred and sixty dollars ($1,360.00), and a SCR 510 Radio of the value of about one thousand two hundred dollars ($1,200.00), property of the United States, furnished for the military service thereof.

He pleaded guilty to the Specification of Charge I except the words "desert" and "in desertion" substituting therefore, respectively, the words "absented himself without leave from" and "without leave", to the excepted words not guilty, to the substituted words guilty; not guilty to Charge I but guilty of a violation of the 61st Article of War; and not guilty to Charge II and its Specification. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

Accused was a member of Company B, 83rd Armored Reconnaissance Battalion (R14,16). On or about 20 August 1944, the company moved into a location at Fromental, France, variously described by prosecution's witnesses as a rest area and an area for reequipment and maintenance (R7,9,14,17,19). While there, the company was on patrol duty and at one time enemy artillery fire reached a point 400-500 yards away (R13). The Falaise gap had just been closed, in which engagement the company appears to have participated (R7,14,17). They were told that they would be in rest two days before "jumping off again" and this was a matter of general knowledge in the company although the men were not informed of the next operation of the unit (R9,17,19-20).

On 21 August 1944, accused, who was a jeep driver in the second platoon scout section, took his jeep to the battalion

maintenance area for repairs. He returned to the company and later in the day gassed up and drove off. When he failed to return, inquiries were made throughout the company area and a searching party was sent out next day. Neither he nor the jeep could be found. His absence was without authority and continued until he surrendered himself to military control at the 48th General Hospital, Paris, France, on 16 December 1944 (R7,10,11-12,14-16,17,20; Pros.Ex.A). The jeep which was a company vehicle valued at $1,360 was equipped with a radio SCR-510 valued at $1,200. Neither jeep nor radio was ever recovered (R8).

Prior to his absence, accused had been a good combat soldier (R10). His organization remained at Fromental for four or five days and then moved on to the vicinity of the Seine River near Corbeil, France, where they engaged the enemy. They then continued on through France and Belgium and ultimately into Germany. Scattered contact with the enemy was had throughout this period (R18-19).

4. Accused, after explanation of his rights by defense counsel, elected to remain silent. No evidence was offered in behalf of the defense (R21).

5. With respect to the charge of desertion with intent to avoid hazardous duty (Charge I and Specification), the unauthorized absence specified is amply proved. While the record of trial contains some hearsay evidence relative to accused's whereabouts during his absence and to his return to military control, the proof of the absence itself is compelling and such hearsay therefore was not prejudicial to him. Accordingly, the only question is whether the record of trial is legally sufficient to sustain the finding of guilty of desertion. Although the duration of the unauthorized absence was such that a charge of desertion based solely on the intent not to return might well have been brought, a finding of guilty of such offense may not be made on the basis of the specification as framed (CM ETO 5958, Perry and Allen). Hence, it is necessary to consider whether there is sufficient proof that accused was aware of impending hazardous duty at the time he absented himself without leave, this proof being necessary to justify an inference that his absence was designed to avoid such duty (CM ETO 455, Nigg; CM ETO 1921, King; CM ETO 5958, Perry and Allen). On this issue, the evidence established beyond a reasonable doubt that the company at the time of accused's departure, had been engaged in combat operations against the German army and that further duty of the same hazardous character not only impended but actually occurred throughout the entire period of absence. Although the company was in a

"rest area" when accused absented himself it was there for purposes of reequipment and maintenance and continued on patrol duty throughout. The area, moreover, was within 400-500 yards of a point reached by enemy artillery fire and hence could not have been far distant from the zone of active combat operations. It was a matter of general knowledge in the company that it would be in the area only a few days before jumping off again and that accused had such knowledge may reasonably be inferred from his presence with the company as late as 21 August 1944. Under these circumstances the court was justified in its finding that he was aware of impending hazardous duty and that he absented himself with the design of avoiding it (CM ETO 5666, Bowles and Burrell).

Accused was also found guilty of misappropriation of a jeep and radio in violation of Article of War 94 (Charge II and Specification). All elements of this offense as provided in the Manual for Courts-Martial (MCM, 1928, par.150i, p.184-185) have been fully proved and the record of trial is therefore legally sufficient to support the findings of guilty. (See CM ETO 5666, Bowles and Burrell).

6. The charge sheet shows that accused is 24 years and 11 months of age and was inducted 12 February 1942 at Fort Niagara, New York. No prior service is shown.

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

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

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Lewis Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

24 AUG 1945

CM ETO 11455

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Monschau, Germany, 16 February 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
	)	
Private LESTER E. SHARP (20744189), Company C, 15th Engineer Battalion	)	

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

---

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

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

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

Specification: In that Private Lester E. Sharp, then Private First Class, Company "C", 15th Engineer Battalion, did at Zweifall, Germany, on or about 6 October 1944, desert the service of the United States by absenting himself without leave from his organization with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion until he was apprehended

at Menin, Belgium, on or about 2 December 1944.

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

Specification: (Finding of not guilty)

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of 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 with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The Commanding General, European Theater of Operations, confirmed the sentence, but due to unusual 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 is clear and undisputed that accused absented himself without leave from his organization at or near Zweifall, Germany, on 6 October 1944 (R7,10,12) and remained absent until he was taken into custody by the military authorities at Menin, Belgium, on or about 2 December 1944 (R8,10,16). At the time his absence began, his company was in direct support of an infantry regiment, which was engaged in combat with the enemy, with the platoons of the company working on the front line, clearing roads and mines, helping assault pillboxes and blowing these up after they were taken, and engaged in other tasks such as the building and repairing of roads.

Accused was a motorcycle messenger and was subject to being sent from the company headquarters to the front line platoons at any time (R6,7), where the area was exposed to heavy shell fire and infiltration by enemy patrols, and where he would have to take messages by himself at any hour of the day or night (R9). There was, therefore, sufficient evidence from which the court could infer that accused absented himself without leave with intent to avoid hazardous duty. The court's finding of guilty of desertion under the 28th and 58th Articles of War was justified. Accused's conduct followed the pattern of the "battle line" desertion cases (See CM ETO 9836, Cave; CM ETO

10004, Kehoe; and cases cited in CM ETO 5958, Perry and Allen and CM ETO 8760, Mascuillo). It was stipulated that he was taken into custody by military authorities at Menin, Belgium, on 2 December 1944 (R16).

4. The charge sheet shows that accused is 22 years of age and served in the Iowa National Guard 9 January 1941 to 6 November 1941, was discharged 6 November 1941 for the convenience of the Government, and was inducted into the Army of the United States 7 November 1941 for one year. His service period was extended by the Service Extension Act of 1941.

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 as commuted.

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

Wm. F. Sumrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

(146)

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 LESTER E. SHARP (20744189), Company C, 15th Engineer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 11455. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11455).

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

(Sentence as commuted ordered executed. GCMO 393, USFET, 7 Sept 1945).

11455

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

BOARD OF REVIEW NO. 1

26 MAY 1945

CM ETO 11468

U N I T E D S T A T E S	3RD ARMORED DIVISION
v.	Trial by GCM, convened at APO 253, U. S. Army (Hurth, Germany), 19 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class MARTIN R. BAGGETT (14027944), Company B, 36th Armored Infantry Regiment	

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 charges and specifications:

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

Specification: In that Private First Class Martin R. Baggett, Company B, 36th Armored Infantry Regiment, did at Liege, Belgium, on or about 1200 8 September 1944, desert the Service of the United States by absenting himself from his organization with intent to avoid hazardous duty, to wit: combat operations against the German Army; and did

remain absent in desertion until he was apprehended at Verviers, Belgium on or about 14 October 1944.

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

Specification: In that * * * having been duly placed in arrest at Stolberg, Germany, on or about 14 October 1944, did, at Stolberg, Germany, on or about 19 October 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Stolberg, Germany, from about 19 October 1944 to about 24 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of 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 shot to death by musketry. 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. 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. Uncontroverted evidence for the prosecution was substantially as follows: On the morning of 8 September 1944 accused was present with his company as an acting squad leader. The company, located on the west side of Liege, Belgium, was on a one-hour alert to move across the Meuse River. Mounted patrols of the company, which were sent to the river, received enemy small arms and artillery fire from the opposite bank. At sometime before the company left

its area to cross the river, at about noon, accused departed without permission and remained absent without authority until his apprehension at Verviers, Belgium, on 14 October. After he was turned over to his company commander on that day, the latter placed him under arrest in the company area near Stolberg, Germany, pending trial. On or about 19 October, without having been set at liberty, he broke his arrest, and absented himself without leave from the company until he surrendered to the military police at Liege, Belgium on 24 January 1945. The record amply sustains the findings of guilty (Charge I and Specification: CM ETO 8162, Yochum, and authorities therein cited; Charge II and Specification: CM ETO 4376, Jarvis).

4. The record shows that the trial took place only two days after the charges were served on accused (R2). As no objection to trial at such time nor any motion for continuance was made at the trial and as it does not appear that accused's substantial rights were prejudiced in any way, no error was committed (CM ETO 5958, Perry and Allen; CM ETO 6751, Burns and Makay).

5. The charge sheet shows that accused is 26 years of age and enlisted 14 December 1940 at Jacksonville, Florida, to serve for three years. (His service period is governed by the Service Extention Act of 1941). He had no prior service.

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

7. 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

(150)

1st Ind.

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

1. In the case of Private First Class MARTIN R. BAGGETT (14027944), Company B, 36th Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 11468. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11468).

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

(Sentence as commuted ordered executed. GCMO 198, ETO, 7 June 1945).

11468

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

BOARD OF REVIEW NO. 2

30 AUG 1945

CM ETO 11481

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private FRANK SANDERS (37064896), 3681st Quartermaster Truck Company (Transportation Corps).	Trial by GCM, convened at Cherbourg, Manche, France, 7 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Frank Sanders, 3681st Quartermaster Truck Company, (TC), did, without proper leave, absent himself from his organization at or near Chamery, France, from about 8 October 1944 to about 26 October 1944.

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

Specification: In that * * * did, at or near Village de La Hage, Montfarville, Manche, France, on or about 24 October 1944, with malice aforethought wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one, Private Nathaniel Freeman, a human being, by shooting him with a pistol.

He pleaded not guilty and three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of three previous convictions, two by summary court for absence without leave for two days and four days respectively, in violation of Article of War 61 and one by special court-martial for abandoning his duty by deviating from his prescribed route and going to Paris, in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the period 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 evidence for the prosecution shows: That the morning reports of the 3681st Truck Company indicate accused as "Dy to missing as of 3 Sept. 1944" (Pros.Ex.A, dated 14 Sept.1944) and "missing to AWOL as of 3 Sept. 1944" (Pros.Ex.B, dated 18 Sept.1944) (R9). Accused was missing from his unit 3 September (1944) and never returned to it (R6-7). A stipulation was placed in evidence to the effect that accused was released from the Seine Section Guardhouse (in Paris) on 8 October 1944 and ordered to return to his organization without delay (R9).

On 24 October (1944) about noon, an American car (R12) going very fast (R13) and in a dangerous manner (R14) ran into a stone wall near the house (R10,18) of M. Michael Joly, a farmer of Montfarville, (France) (R10). Joly testified that he found the driver (R12), whom he identified in court as accused, a colored soldier (R18-19) still in the car and that he tried to sell Joly some jerrycans of gasoline. Accused, (R12) who appeared mad or drunk (R14-16,20) also went out in the road and shot his revolver in the air several times (R11,14,19) while Joly was sending for the police. A large American army truck came by, stopped and then towed accused's car down the road (R12). The large truck was driven by a young colored soldier and accused road in the towed car (R13). People in a neighboring house saw the two vehicles, the larger towing the smaller, coming from the direction of the Joly home (R21,24-25), with colored soldiers driving each vehicle and shortly after passing the house, they heard two shots (R22, 25-26,28). The soldiers were heard quarreling and shouting at each other as they passed (R23-24,26-27,29). The vehicles were seen stopped a short way beyond the house when the shots were heard and the colored soldier who had been in the small truck (R25) was seen to take some jerrycans from the small truck, put them in the larger truck (R29), get in and drive it away (R25-26).

Accused had stayed at the home of M. Alphonse Bihel near Reville, for several days prior to the "accident" (R30), leaving at noon on the day in question in an open American car described as larger than a jeep, and returning on foot about half-past three in the afternoon. He left again

shortly thereafter and returned with a large open truck (R31-32). Accused slept at the Bihel home that night contrary to the desires of the Bihels and only after giving his pistol to them to keep for him during the night (R33).

The military police informed of "some shooting" on 24 October visited the place where the wall was damaged by accused's vehicle and about 500 yards beyond (R34) in the middle of a narrow dirt road, they found a command car with the front end smashed in. It had been towed there and no one was with it. About 20 feet off the road was a colored soldier lying on his face with a trail of blood from him to a spot in the road about ten feet in front of the command car (R35,38-39). The soldier was removed to the dispensary and there identified as Nathaniel Freeman (R36,40). In the front seat of the command car were three .45 caliber cartridges, two of which had been expended (R36). No weapon was discovered but a (R37) knit (R57) wool hat was found in the road (R37,39).

Freeman was received at the hospital on 24 October and died 29 October (R17). An autopsy performed 29 October showed that he died from a gunshot wound in the head (R16), the bullet entering the right side and coming out the left side (R17-20).

It was known that accused was armed and the Bihel home was raided the night of 24 October, accused arrested and his pistol secured from the family (R55). Agents of the Criminal Investigation Division on 27 October obtained a sworn, signed statement from him (R53-54) which was admitted in evidence without objection (R55). In this statement accused told of convoying gasoline to Paris, of losing his truck from a parking lot and of being picked up by the military police, court-martialed and being released and ordered to return to his unit which he could not find. In the guardhouse he had bought a ".45 cal." pistol from another soldier. He went to Cherbourgh where he met a soldier named Barnett from his own outfit with a reconnaissance car. Barnett and accused drove to a farm house and bought rabbits. Barnett left the car at a [("cat" (R72)] house while accused drove away. While on a narrow road his steering gear locked and he ran into a stone wall. He then stopped a passing truck and accepted a tow. About a quarter mile up the road from where he had the wreck he heard a shot, "the driver [ahead] stopped his truck and I thought he was shooting at me, so I took my .45 cal automatic out of my pocket and shot him in the head" just as he was getting out of the truck cab. When accused saw that he (the truck driver) was hurt, he was frightened, unhooked the tow chain and drove away in the large truck, leaving the driver and the other car in the road. He drove to a field, left the truck and walked to the Bihel house where he stayed until he was arrested (Pros.Ex.H). Pictures of the two vehicles, the broken wall and the road where the car and body were found were admitted in evidence (R56-58; Pros.Ex.I.J.K.L. and M).

4. The evidence for the defense showed that accused was examined by a psychiatrist from an American hospital who testified that accused is a large heavy-set negro farm boy with a mental age of eight years, moron level but not mentally defective either when examined or at the time of the alleged offense (R43-47). His opinion was that accused knew just what he was doing at the time of the shooting (R48) and knew better than to shoot a man (R49). Madame Joly testified that though accused had tried to sell her gasoline (R51) on 24 October after he had run into their wall, he acted as if he was "mad through drunkenness" (R50). Bihel testified that he gave accused a half quart of cider before noon of 24 October. He had known accused for some time and on that day he appeared normal (R52-53).

At his own request, accused was sworn and testified that he drank cognac, calvados, cider and wine on the morning of 24 October. He remembered the incidents of the day, admitted having a pistol and told substantially the same story as in his signed statement. He said the truck driver had called to him as he was being towed, about what money he had and accused answered that he had four or five thousand francs which belonged to another soldier. When he was shot at accused thought it was because of the money. He did not know Freeman (R60-63). He told in detail the incidents of his absence from his organization and of the shooting, but said he fired but one shot. After detailing the shooting of deceased accused's testimony was vague (R64-70) but he denied he shot Freeman to secure his truck (R71).

5. Accused admitted and the evidence showed his absence without leave as charged. Murder is the unlawful killing of a human being with malice aforethought and to prove the offense, it must be shown to have been so committed (MCM, 1928, par.148a, pp.162-164). Accused admits he shot Freeman and the only question is whether there was "malice aforethought".

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed" (Ibid., p.163).

Malice is inferred from the intentional use of a deadly weapon in a deadly manner unless circumstances exist which mitigate, excuse or justify the act (29 C.J. sec.74, p.1101). Accused claimed he had been drinking heavily prior to the killing and there is some testimony that he was not

normal immediately after the collision with the fence. However, he was sufficiently normal to stop a passing truck to secure a tow and to remember and recount in detail all the incidents from before the collision until the shooting. Two shots were heard. He denies firing but once, but two expended shells were found in the seat of his car and he admittedly at once got into Freeman's truck and drove away. The inference is strong that he wanted the truck to use after damaging the car he had been driving. His gun was not one issued to him but one he had purchased presumably for a purpose. He had demonstrated a willingness to use it recklessly by firing it in the road after his collision with the wall. His mental age may be low but the medical testimony is that he was not mentally defective and knew just what he was doing when he shot Freeman. The court's findings of guilty of murder are substantially supported by competent evidence (CM ETO 9422, Norris).

6. The charge sheetshows accused to be 31 years three months of age and that without prior service he was inducted 24 May 1941 at Camp Joseph T. Robinson, Arkansas.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92) and for absence without leave, any punishment less than death (AW 61). 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, is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

22 JUN 1945

CM ETO 11497

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Second Lieutenant MELVYN A. BOYD (O-1113594), Headquarters and Service Company, 389th Engineer General Service Regiment.	Trial by GCM, convened at Flawinne, Belgium, 26 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 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 94th Article of War.

Specification: In that Second Lieutenant Melvyn A. Boyd, Headquarters and Service Company, 389th Engineer General Service Regiment, did, at or near Jemeppe, Belgium, on or about 11 February 1945, wrongfully and knowingly sell to Pierre Marcel Ohms two tires of the value of about $58.00, property of the United States, furnished and intended for the military service thereof.

11497

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 five years. 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, 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 summarizes as follows:

About 8 February 1945 (R7) accused, Assistant Motor Officer of Headquarters and Service Company in the 389th Engineer General Service Regiment (R36), came to the home of a cafe proprietor, Pierre Marcel Ohms, in Jemeppe, Belgium, and asked if he wished to buy two tires. Ohms answered, "Yes, sir, if they are civilian tires". The following Sunday, 11 February, while Ohms was in his cafe with guests, accused entered and said he had brought the things he had promised some days before. Accused then brought two tires into the hall next to the cafe, as Ohms requested him to do. Ohms thereupon called to a woman, considered as his wife, to pay 10,000 francs to accused, which she did (R7,8,13). After the officer had left, Ohms discovered that the tires were marked with the word "military" on them (R8,11). He hid the tires in the next garden, where they were found by the Belgian and military police (R11).

Captain Ernst F. Lieberman of the Criminal Investigation Division testified that accused voluntarily made a sworn written statement before him (R14-16), reading as follows:

> "On or about the 11th of February 1945 at about 2000 hrs. in Liege Belgium I did receive the sum of 10,000 Francs for two tires 900 x 20 property of the U.S. government" (Pros.Ex.1).

In addition, accused voluntarily told Captain Lieberman that he delivered the two tires to Ohms (R17).

Captain Lieberman testified that he had seen the two tires in question, which were used but "pretty new" tires, size 900 x 20, with civilian tread, the name "Firestone" being stamped on them (R16,17,31).

Two Belgian police officers went to the premises of Pierre Ohms on 13 or 14 February and found two tires in the garden next to his garden, which tires were turned over to members of the Criminal Investigation Division (R33,35). On the tires were marks in English (R35).

Captain Russell W. Scott of the 389th Engineer General Regiment testified that his job was to keep 15 or 20 trucks running at all times and that all the tires he had ever seen of civilian tread purchased by the military were marked "military" (R36,37).

It was stipulated that the tires in question had a value of about $58 (R18).

4. The two Belgian policemen, appearing as witnesses for the defense, testified that they had found two large tires in the garden next to Ohms' garden. They further testified that Ohms had the reputation of being a liar (R20,21).

Accused, after his rights were explained to him, elected to testify on his own behalf, substantially as follows:

On 8 February he was in the cafe of Pierre Ohms, who told him he could use any kind of large civilian or military tires. The following Sunday, 11 February, accused returned to the cafe in a jeep for the purpose of arranging for the tires. He told Ohms that he knew of two 30 x 20's that he could get for him if he wanted them. The cafe proprietor replied that he did not want them delivered there but would give him the money. He called his wife to the kitchen, and she gave accused 10,000 francs. Accused never delivered any tires to Ohms and had no tires which he was ready to deliver to him at that particular time, but had never repaid the 10,000 francs. Accused had two 30 x 20 tires which he had picked off a piece of German salvage equipment (R22-28).

He admitted voluntarily signing the written statement before Captain Lieberman. With regard to the words in the statement "for two tires 900 x 20 property of the U. S. government", he did not understand this to mean that he had delivered the tires to Ohms, but only that he had made a bargain with him (R27,28).

5. Competent, substantial evidence supports the court's finding that a sale of the tires was effected by accused at the time and place and in the manner alleged in the Specification. Such finding also accorded with the natural probabilities inherent in the situation as proven (CM ETO 11072, Copperman; CM ETO 11936, Tharpe, et al).

The only substantial question raised in the record is whether there was sufficient evidence upon which the court could found its finding that the tires involved in the transaction were "property of the United States, furnished and intended for the military service thereof".

The following discussion appears in the Manual for Courts-Martial regarding the circumstantial evidence which may make such proof:

> "Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended" (MCM, 1928, par.150i, p.185).

The evidence showed that the two tires involved were "pretty new" large tires with civilian tread and marked with the words "military" and "Firestone" in English. Captain Scott, who was charged with the duty of keeping 15 to 20 trucks running in accused's regiment, testified that all the tires he had seen with civilian tread that had been purchased by the military were marked "military". In addition, accused in his written confession stated that he had received the sum of 10,000 francs "for two tires 900 x 20 property of the U.S. government", although at the trial he testified that he had never delivered the tires and that he had two 30 x 20 tires which he had taken from a piece of German salvage equipment.

From the above evidence the court was, in the opinion of the Board of Review, warranted in inferring that the tires involved in the sale were "property of the United States, furnished and intended for the military service thereof" (Cf: CM ETO 11072, Copperman). Every element of the offense charged was therefore sufficiently proved.

6. The charge sheet shows that accused is 23 years of age and was commissioned 12 May 1943 at Fort Belvoir, Virginia, as a second lieutenant,

Corps of Engineers, Army of the United States. He had enlisted service from 31 July 1942 to 11 May 1943. No other prior service is shown.

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

8. Dismissal and confinement at hard labor are authorized punishments for violation of the 94th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (Cir.210,WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

11497

(162)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant MELVYN A. BOYD (O-1113594), Headquarters and Service Company, 389th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11497. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11497).

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

(Sentence ordered executed. GCMO 249, ETO, 9 July 1945).

11497

SECRET

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

BOARD OF REVIEW NO. 1

14 JUL 1945

CM ETO 11500

U N I T E D S T A T E S)	V CORPS
)	
v.)	Trial by GCM, convened at Mechernich, Germany, 15 March 1945. Sentence: Dismissal
)	
Lieutenant Colonel CLARENCE T. HULETT (O-15088), 28th Signal Company)	

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 specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel Clarence T. Hulett, Division Signal Officer, Headquarters, 28th Infantry Division, did at various places in France, Belgium, Luxembourg and Germany, from 1 October 1944 to 5 February 1945,

11500

wrongfully and negligently fail to prescribe and properly supervise the enforcement of an adequate standing operating procedure for the security of secret cryptographic devices and codes used at Headquarters, 28th Infantry Division.

Specification 2: In that * * * did at Colmar, France, on or about 5 February 1945, wrongfully and negligently fail to exercise and direct adequate measures for the security and safekeeping of secret cryptographic devices, codes, and Division Message Center equipment, stored and transported in a 2½ ton truck, as a result of which the truck and contents were lost through theft by persons unknown.

Specification 3: (Finding of not guilty)

Specification 4: (Finding of not guilty)

He pleaded not guilty and was found not guilty of Specifications 3 and 4 and guilty of the remaining specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, V 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, though deeming it wholly inadequate punishment for an officer guilty of such grave offenses, stated that in imposing such meager punishment the court has reflected no credit upon its conception of its own responsibility, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence established the following undisputed facts:

Accused was designated Division Signal Officer of the 28th Infantry Division and entered upon his duties on 3 October 1944. He continued to act in such capacity until 6 February 1945 (R9,63; Pros.Ex.A).

11500

The command post of the 28th Infantry Division on 4 February 1945 was at Kaisersberg, Alsace, France. The 28th Signal Company operated the message center at the command post. Included therein was a cryptographic code room (R11,53). On that date the command post of the 28th Infantry Division was moved from Kaisersberg to Colmar, France, and on 5 February the former command post at Kaisersberg was closed (R12,28).

Cryptographic equipment is of a critical and highly secret nature and it is considered necessary that extraordinary security measures be taken to protect it. However, in the 28th Infantry Division there was never any formal written "standard operating procedure" with respect to the handling and protection of cryptographic equipment during the course of its transportation. The methods practiced originated in England, were brought to France and in course of time became the customary method of handling the same (R15,31,50,90). Under this custom and usage there were not any regularly assigned guards for the cryptographic equipment at the time of its transportation. The standard procedure with respect to guarding vehicles which hauled the equipment was:

> "To place the other vehicle [which contained cryptographic equipment] in the company bivouac area, if we were bivouaced in the field or in the company motor pool if we had one if we were in buildings" (R81).

No special guard was ever provided (R82).

The 28th Signal Company on the dates aforesaid held possession of and operated two complete sets of cryptographic equipment. Each set was composed of two sections - an upper (designated as "SigRINO") and a lower section (designated as "SigABA"), which could be disengaged from each other and separated. Each section was placed in its own safe for transportation (R17; Pros.Ex.C). On 4 February only one cryptographic set (for convenience designated herein as "set A") was operated. The non-operating set (for convenience designated herein as "set B"), when the division command post moved from Kaisersberg to Colmar on 4 February,

11500

was "jumped" forward to the new command post, installed in the new message center and placed in operation (R11). "Set A" remained in use at the message center at Kaisersberg until "set B" was in operation at Colmar. At that time (about the middle of the afternoon of 5 February) the message center at Kaisersberg automatically ceased operations and its equipment was dismantled. "Set A" was disassembled and the two sections were placed in their respective safes. The safes containing "set A" were loaded into a 2½-ton, 6x6 Government truck which had bows and a tarpaulin top. Its side walls were composed of plywood (R11,44). This truck was a unit in a convoy of about five vehicles, and the message center part of the convoy was in charge of the assistant message center officer, Warrant Officer (Junior Grade) Edward K. Moody, who rode in a 1½-ton truck which immediately preceded the 2½-ton, 6x6 truck in the convoy. The personnel which accompanied the latter vehicle was the driver and the assistant driver who sat on the front seat and three enlisted men who rode in the back of the truck. The latter carried their standard equipment which included their basic weapons (R11,12,28,29). They rode in the truck as a matter of convenience and were not detailed as guards (R13,29,82,86).

The convoy left Kaisersberg about 1530 hours and arrived at Colmar about 1700 hours (R43). The truck which contained the cryptographic equipment halted for 15 or 20 minutes before the message center at the division command post in Colmar. At the conclusion of that period First Lieutenant Robert E. Viets, 28th Signal Company, who was the message center officer and who also on 27 October 1944 became the divisional cryptographic security officer, ordered that the vehicle be parked in front of the company billet, which was located in a residential section of the city, fronted upon a public street and was about 100 yards from the message center. No parking lot or motor pool had been provided in Colmar for Government vehicles (R13,22,29,30,43,58,70). Lieutenant Viets at that time knew that the truck contained cryptographic equipment but did not order any special security guard for it (R36,59,67,68). It was driven to a point in front of the billet and there parked (R34,44, 45). The truck operated without an ignition key and the steering wheel was not locked. The engine thereof was placed in operation upon a mere turn of the starting switch (R47).

11500

The message center personnel prodeeded to clean their billet and make their beds for the night. No guards were posted on the truck either upon arrival at the billet or at any time thereafter, although it then contained the cryptographic equipment ("set A") (R13,40, 45,46).

Some time after 1800 hours on 5 February, the 6x6 truck and the contents which included the cryptographic mechanism ("set A") were stolen by parties unknown. The theft was not discovered until the next morning. Search was made for same, but at the time of trial neither the truck nor the cryptographic material had been recovered (R16; Pros.Ex.B).

The accused in a voluntary extrajudicial statement (R93; Pros.Ex.J) given to an officer of the Inspector General's Department in pertinent part stated:

> "I reported to this Division on 29 September 1944 and one of my first actions was to determine the protection afforded secret and confidential material particularly the SIGABA which includes the SIGRINO. The protection required by regulations is a three combination lock which is a part, an integral part of the device".

He further stated that he had endeavored at all times to have the equipment in separate rooms at the message centers but that no provisions had been made for guarding trucks which contained the equipment

> "except the parking of the vehicle in the immediate vicinity of the message center or in a recognized motor pool. Military police are always on duty at this place in addition to the motor pool dispatchers" (Pros.Ex.J).

The motor vehicle was not locked because

> "The T/E provides for a duplicate set of equipment including the equipment that is missing" (Pros.Ex.J).

11500

He did not think it necessary to put a guard on the truck although it contained secret devices

> "in normal Division Command Post installations unless the definite threat of enemy infiltration was present. The military police guard in the immediate vicinity I have considered adequate for Division Command Post. If the equipment were a 1/4 of a mile or more away from the center of the Command Post, I would consider a guard necessary for the group of vehicles which would include this equipment" (Pros.Ex.J).

He further stated that

> "This unit has had several visits by cryptographic security officers from echelons or higher and everything seemed to be entirely satisfactory except where due to cramped conditions we have not had a separate room for the SIGABA" (Pros.Ex.J).

4. Accused, after his rights were explained to him, elected to remain silent (R97).

The defense presented evidence as follows:

a. Copy of report made by First Lieutenant G. D. Bown of the Signal Office of the First United States Army, dated 28 November 1944, with respect to operation of the message center of the 28th Infantry Division (R25; Def. Ex.4). The report consisted of a formal questionnaire submitted by the investigating officer and answers thereto. There are indicated therein no questions with respect to posting security guards on vehicles engaged in hauling cryptographic material or the guarding of vehicles containing cryptographic equipment when the same were parked.

b. The stipulated testimony of the Commanding General of the 28th Infantry Division, Major General Norman D. Cota, who assumed command of the division on 13 August 1944 (R37; Def.Ex.5). He testified that accused became Division Signal Officer on 1 October 1944; that he, witness, delegated the responsibility for safeguarding cryptographic equipment to the Signal Communications Officer; that he

made inspections of the offices occupied by the signal communications personnel on several occasions and never discovered any negligence on the part of any responsible person in the execution of his instructions; and that

> "No higher headquarters, and no signal officer of any higher headquarters ever communicated to me any dissatisfaction with the methods used by the Division Signal Officer in safeguarding cryptographic material and equipment".

c. In the stipulated testimony of Lieutenant Colonel Harry S. Messec, who became Assistant Chief of Staff, G-2, of the 28th Infantry Division on 1 January 1943, he testified that inspections were made by him or at his direction of the divisional message center and cryptographic equipment; that the latest inspection was made by a representative of CIC at his direction in December 1944 at Wiltz; and that such inspections did not disclose any negligence "to my knowledge" (Def.Ex.6). He further stated:

> "To my knowledge there are no published orders in this Division with respect to measures to be taken to safeguard cryptographic materials and devices. I do know that certain letters through signal channels have gone to the Division Signal Officer with respect to safeguarding certain special equipment. These letters were not through command channels. Personnel of this Division have been trained in cryptographic security but safeguarding that particular equipment lost was not of general application * * * The message center which normally operated from a truck in late September and early October had a guard on it * * * " (Def.Ex.6).

d. Accused's Efficiency Report, dated 5 March 1945, executed by the Commanding General, 28th Infantry Division (R96; Def.Ex.7) carried the declaration:

"This officer's strong point is his professional knowledge. He has ability but has a tendency to depend too much on others to accomplish results".

The net value of accused was fixed at 55. In both "Initiative" and "Force" he was graded 3; "Judgment and Common Sense", 6; "Leadership", 5; and "Ability to obtain results", 6.

e. Form WD AGO 66-1 with respect to accused (R97; Def.Ex.8) disclosed he was awarded bronze stars for the Battle of Pearl Harbor and Normandy Campaign. He is entitled to wear Asiatic-Pacific Theater, American Defense and European Theater of Operations Ribbons. He was also awarded the Purple Heart.

5. a. The evidence is uncontradicted that at the time and place the cryptographic equipment ("set A") was stolen by unknown persons it was in a Government motor vehicle which was parked on a public thoroughfare in Colmar, France. Notwithstanding the fact that Colmar was in a combat zone, the vehicle was left unguarded and unprotected through the hours of the night although there was no ignition lock on the truck and it could be placed in motion by simple manipulation of the starter switch. The immediate message center personnel, including the divisional cryptographic security officer, knew that the truck contained this cryptographic equipment and they also knew that the equipment was of such highly secret nature and of such critical importance in the operation of the communications system of the army that special detailed security instructions had been promulgated by the Secretary of War and the Chief Signal Officer of the European Theater of Operations with respect to protecting and safeguarding it. The loss of the cryptographic equipment was the direct and proximate result of permitting the unlocked motor truck which contained it to be parked in the night time in an exposed location without the protection of guards. When consideration is given to the fact (of which both the court and Board of Review may take judicial notice (CM ETO 7413, Gogol)), that the enemy had been but recently expelled from Colmar and that it was subject to the disorders and lawlessness which characterize territory newly freed from enemy control, the failure to post proper

11500

guards to secure the truck and contents against loss presents a picture of gross carelessness and neglect which is inexcusable and deserve most severe condemnation.

b. Higher authority prior to the incidents here involved did prescribe a standard of care of cryptographic equipment while in course of transportation:

> "Cryptographic material and associated equipment is always highly vulnerable to capture by the enemy or compromise during transit irrespective of geographical location" (Pros.Ex.E, par.A).
>
> "The following protective measures will be observed in preparing the SigRINO for any means of transportation: * * * h. Under no circumstances will the SigRINO be transported without an authorized armed guard. The SigRINO will never be left unattended while in transit" (Pros.Ex.E, par.A(3)h).
>
> "Transmission by Road
> a.* * *
> b. Periodic checks should be made to determine security measures during transit.
>
> c. Under no circumstances will anyone be allowed to ride in the vehicle as a casual passenger" (Pros.Ex.E, par.A(5)).

Prosecution's Exhibits E and F were letters dated 14 March 1944 and 15 June 1944 respectively, from the Chief Signal Officer, European Theater of Operations to

> "Signal Communication, and Signal Security Officers down to and including Division Headquarters in Army Ground Forces * * *".

There is definite evidence that accused received these communications and their contents had been the subject of discussion between him and Lieutenant Viets (R56,57).

That it was the duty of some responsible officer to post or cause to be posted security guards to protect the truck and contents under the circumstances and conditions here shown there can be no doubt. Accused's duty with respect to protective security of the cryptographic equipment is imposed by AR 105-5, WD, 1 December 1942, whereby he was charged with

> "Preparation of signal operation instructions, signal annexes, special signal operation procedure and other signal orders, and instructions pertaining to the command" (par.3).

As Division Signal Officer his authority covered the

> "exercise of tactical and technical supervision of signal communications for the entire command"(par.2d).

It therefore appears that upon accused as Division Signal Officer was imposed the ultimate duty of devising, promulgating and enforcing methods of safeguarding and protecting the cryptographic equipment. He was charged with the knowledge and he did have knowledge of the contents of the highly important directives (Pros.Exs.E and F) of his superior, the Chief Signal Officer, European Theater of Operations, and it was his duty and obligation to see they were carried into execution.

The evidence is clear and decisive that accused issued no formal written orders to his command embracing the pertinent security provisions of the directives received by him from his superior. In particular there were no instructions issued by him covering the safeguarding of cryptographic equipment during course of transportation. In lieu thereof an informal "standard operating procedure" came into existence while accused's organization was stationed in England which was perpetuated in France. Accused's extrajudicial statement indicates that he knew of such procedure and did nothing to alter or change it. This informal practice wholly ignored the mandates of the Chief Signal Officer, European Theater of Operations that

(1) "Under no circumstances will the SigRINO be transported without authorized armed guard. The SigRINO will never be left unattended while in transit"

and

(2) "Under no circumstances will anyone be allowed to ride in the vehicle as a casual passenger".

The assistant message center officer (R14,15), one of the technicians (R31), the truck driver involved in this transaction (R48), one of the cryptographers (R50,51) and the cryptographic security officer (Lieutenant Viets) (R66,67), each testified that no formal orders were issued by accused as Division Signal Officer covering the safeguarding of cryptographic equipment while in transit. In lieu thereof accused knowingly allowed and permitted the informal procedure to be followed, which procedure did not in substance conform with the directions of higher authority. The facts of the instant case clearly demonstrate the inadequacy of such informal procedure to afford the necessary security for the equipment.

It should be noted particularly that these directions required that the equipment be attended at all times by an armed guard and prohibited casual passengers on the vehicle transporting the equipment. The placement of the vehicle in a parking lot or motor pool (even though the park or pool was guarded) obviously did not fulfill this requirement. The presence of armed soldiers on the vehicle while in motion when they rode in it for their own convenience and were not detailed as guards constituted a violation of the higher mandate and was not a compliance therewith.

Specification 1 charged that accused did

"willfully and negligently fail to prescribe and properly supervise the enforcement of an adequate standing operating procedure for the security of secret cryptographic devices and codes * * *".

11500

This allegation charged accused with nonfeasance - the failure to perform a duty imposed upon him by law.

> "Non-feasance. The non-performance of some act which ought to be performed.
>
> When a legislative act required a person to do a thing, its non-feasance will subject the party to punishment" (Bouvier's Law Dictionary, Rawle's 3rd Rev., p.2356).
>
> "Nonfeasance. The neglect or failure of a person to do some act which he ought to do. * * * 'Nonfeasance' means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do" (Black's Law Dictionary, 3rd Ed., p.1255).
>
> "Nonfeasance. An omission to perform the required duty at all, or a total neglect of duty; the negligent omission of some act which one is bound as a legal or official duty to perform; the nonperformance of some act which ought to be performed; the omission of a duty; the omission of an act which a person ought to do; the omission of some act which ought to be performed; total omission to do an act which one promises to do" (46 CJ, p.490).

The evidence abundantly established the allegations of Specification 1. Accused failed to execute the orders of his higher command with respect to safeguarding the cryptographic equipment during the period alleged. His failure constituted a nonfeasance which was a neglect to the prejudice of good order and military discipline under the 96th Article of War (Winthrop's Military Law and Precedents (Reprint, 1920), p.722).

Two elements in the case, which the defense evidently considered as of exculpatory value to accused, deserve comment:

(1) Lieutenant Viets was cryptographic security officer of the division. He was the custodian of

11500

cryptographic material and was responsible for all measures necessary to insure cryptographic security and physical security of the material (AR 380-5, WD, 15 March 1944, sec. IV, par.43). The duty was therefore imposed upon him to provide immediate and physical safeguards for the equipment. He failed in the performance of this duty in that on the night of 5 February 1944 he did not post security guards to protect it when he knew it was contained in a truck parked on a public street. This dereliction of the security officer, however, did not excuse accused's nonfeasance. Accused was charged in Specification 1 with failing to implement the mandates of higher authority with respect to safeguarding the equipment by prescribing and supervising a proper procedural method for security. Proof of his offense was complete without evidence of the loss of this specific equipment. The incident served only to reveal the fact that he had not performed his duty.

(2) Uncontradicted evidence in the record of trial proved that periodic divisional inspections were made of the message center and cryptographic operations; that at no time were any criticisms or adverse reports made concerning the procedure followed in safeguarding the equipment during transportation thereof and in particular the attention of neither the accused nor Lieutenant Viets was invited to their failure to observe the procedure prescribed by higher authority with respect to intransit security requirements. The failure or oversight of the inspectors to discover the derelictions here involved afforded accused no defense. The process of inspections in the Army is not for the purpose of absolving personnel from responsibility for the non-performance of their duties; rather it is to insure that they perform their duties and observe the requirements of the law and rules and regulations governing the administration and discipline of the military organization. Strictly speaking, the evidence pertaining to these inspections and their results should have been excluded as being foreign to the issues involved in the case. Its admission however was invited by accused and is therefore not prejudicial error (CM ETO 436, Smith).

6. Specification 2 alleged that accused

> "did at Colmar, France, on or about 5 February 1945, wrongfully and negligently fail to exercise and direct adequate

> measures for the security and safekeeping of secret cryptographic devices, codes, and Division Message Center equipment, stored and transported in a 2½ ton truck, as a result of which the truck and contents were lost through * * *".

As has been demonstrated, the theft of the cryptographic equipment was the direct result of the failure to post security guards on the truck which contained the same. Beyond peradventure Lieutenant Viets was grossly negligent in hot providing said guards. The primary duty of posting such guards was upon Lieutenant Viets as cryptographic security officer (AR 380-5, WD, 15 March 1944, sec.IV, par.43). Specification 2, unlike Specification 1, charged that accused negligently failed to "exercise and direct" adequate protective measures for said truck and its contents at the time and place stated. It alleged a definitive offense. The question therefore for determination is whether, upon the evidence in the case, there was the duty upon accused directly and immediately to post or cause to be posted guards on the truck. Stated otherwise, the question is whether accused is answerable for Lieutenant Viets' defaults and derelictions.

The evidence is clear that accused had full knowledge that the mandate of the theater signal officer that

> "Under no circumstances will the SigRINO be transported <u>without an authorized armed officer courier and an armed guard</u>. The SigRINO will <u>never</u> be left unattended while in transit"

was not observed. In his statement (Pros.Ex.J) he discussed the method pursued in guarding the truck and described the use of parking areas and motor pools, but did not so much as imply that on occasions of the transportation of the equipment it was always under an "authorized armed guard". With such state of the evidence it is not unreasonable to impute Lieutenant Viets' default in the performance of his duty, at the time and place alleged, to his superior operational and tactical officer, the accused. What the result would have been had accused specifically ordered Lieutenant Viets to carry out the procedure directed by superior authority and thereafter,

11500

without his knowledge, there had been continued violation of the same, need not be decided because such situation was not here involved. It is enough that accused was fully apprised of the "unwritten SOP /standard operating procedure/" (as characterized by Lieutenant Viets (R66,67)), which violated superior orders and that he did not intervene and order Lieutenant Viets to post guards under circumstances here revealed. The fault of his subordinate became his fault. The rule here applied is peculiarly within the ambit of military law wherein proper discipline and administration of the military forces demand that the orders and authority of superior authority be enforced and maintained. Such power and authority is not an unbalanced, one-sided proposition. It must necessarily be accompanied by responsibility.

The Board of Review concludes that Specification 2 not only alleged an offense against accused but also that the evidence fully sustained the court's findings that accused was guilty of such offense.

7. At the arraignment of accused and prior to his pleading to the Charge and specifications, the defense separately moved to strike out Specifications 1 and 2 or in the alternative to require the prosecution to make each of the same more definite and certain. The bases of the motions were that Specification 1 was indefinite because it did not allege wherein accused was negligent, and as to Specification 2 it was asserted that it was defective in that it did not state wherein accused was negligent in failing to exercise and direct adequate protective and security measures.

The discussion on the merits of the case presents complete answers to these contentions. Each specification manifestly stated facts constituting an offense. They informed accused of facts adequately to enable him to prepare his defense and they also identified the offenses with sufficient accuracy to afford him the opportunity, if necessity arose, to use the same as bases of pleas of double jeopardy. They met all of the requirements of good pleading before a military court (CM ETO 895, Davis, et al).

11500

8. The charge sheet shows that accused is 43 years three months of age and was commissioned a second lieutenant 5 January 1923, promoted to first lieutenant 5 October 1927, captain 1 August 1935, major 1 July 1940, and lieutenant colonel 1 February 1942.

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

10. A sentence of dismissal is authorized upon conviction of an officer of an offense in violation of Article of War 96.

L. Franklin Pitts Judge Advocate

Wm. F. Sumner Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

11500

1st Ind.

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

1. In the case of Lieutenant Colonel CLARENCE T. HULETT (O-15088), 28th 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, 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 11500. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11500).

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

(Sentence ordered executed. GCMO 282, ETO, 20 July 1945).

11500

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

BOARD OF REVIEW NO. 1

26 MAY 1945

CM ETO 11503

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at APO 253,
	)	U. S. Army (Bickendorf, Germany),
Private BERNARD C. TROSTLE, JR.	)	13 March 1945. Sentence: Dis-
(13158453), Company H, 36th	)	honorable discharge, total forfeit-
Armored Infantry Regiment	)	ures and confinement at hard labor
	)	for life. United States Peni-
	)	tentiary, Lewisburg, Pennsylvania.

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

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 58th Article of War.

Specification: In that Private Bernard C. Trostle, Jr., Company H, 36th Armored Infantry Regiment, did, near Floret, Belgium, on or about 3 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 German Army, and did remain absent in desertion

until he surrendered himself at Aywaille, Belgium, on or about 12 January 1945.

CHARGE II: Violation of the 75th Article of War.

Specification: In that * * * , did, near Mont Le Ban, Belgium, on or about 14 January 1945, misbehave himself before the enemy by refusing to join his command, after being ordered to do so by 1st Lt. Hulstedt, which was then engaged with the German Army, which forces, the said command was then opposing.

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. Evidence was introduced of one previous conviction by summary court for absence without leave for five days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge 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. a. Specification of Charge I:

On 3 January 1945, during the Battle of Ardennes, accused's company was located in the vicinity of Floret, Belgium, on the northern flank of the German salient. When his squad reached the line of departure at daybreak for attack against the enemy, he was discovered to be absent without permission. He was present for duty, according to the morning report, during the earlier hours of the morning, and by inference from the squad leader's testimony, at a squad check at the assembly area. The company was in contact with the enemy throughout the day. Accused did not return to military control until 12 January. From these facts of imminent attack, with all the attendant circumstances of preparation and excitement, the court could reasonably infer that the unauthorized absence was with intent to avoid hazardous duty (CM ETO 1432, Good; CM ETO 1664, Wilson; CM ETO 7339, Conklin; CM ETO 6637, Pittala and authorities therein cited).

b. Specification of Charge II:

When accused reported back to his company 14 January 1945 south of Mont Le Ban, Belgium, he was ordered by an officer to go to the front where elements of his unit were receiving small arms and artillery fire. He was told that the company was in direct contact with the enemy and in a defensive position. He refused to go forward, saying he could not "take it". The facts constitute a typical Article of War 75 case, and the accused was properly convicted (MCM, 1928, par.141a, p.156; CM ETO 6564, West and cases therein cited).

4. The charge sheet shows the accused is 19 years of age and enlisted 21 June 1943 at Harrisburg, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

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

6. The penalty for desertion in time of war, or misbehavior before the enemy, is death or such other punishment as a court-martial may direct (AW 58,75). 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.299, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(184)

1st Ind.

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

1. In the case of Private BERNARD C. TROSTLE, JR. (13158453), Company H, 36th Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 11503. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11503).

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

(Sentence as commuted ordered executed. GCMO 200, ETO, 8 June 1945).

11503

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

BOARD OF REVIEW NO. 2

27 JUL 1945

CM ETO 11504

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.	
Captain ROBERT W. NASON (O-569543), Casual Pool, 70th Reinforcement Depot (AAF), attached 152nd Reinforcement Company, 127th Reinforcement Battalion (AAF) AAF 591	Trial by GCM, convened at AAF Station 591, APO 652, U. S. Army, 23 March 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Capt. Robert W Nason, Casual Pool, 70th Reinforcement Depot (AAF) attached 152nd Reinforcement Company, 127th Reinforcement Battalion (AAF) AAF 591, APO 652, U S

Army, did, at AAF 591, APO 652, on or about 7 March 1945, feloniously take, steal and carry away $235.00 in American currency, the property of 1st Lt Louis D. Hamilton III.

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 reviewihg authority may direct, for two years. The reviewing authority, the Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, 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 prosecution's evidence shows that accused, on 8 March 1945 and for some time prior, occupied a part of Room 40 Block 21 at American Air Forces Station AAF 591. The room provided accommodations for four people and is divided by a half partition. One entering or leaving the room could see into both compartments (R5, 8,15). Accused occupied the space on one side of the partition and First Lieutenants B. G. Barnard and Louis D. Hamilton III occupied the other side (R15). On the evening of 7 March, accused and Hamilton had played gin rummy at the Red Cross Club and Hamilton paid accused two dollars lost to him, out of his wallet (R5). Hamilton noticed in doing so that he had three $10.00 bills and six $1.00 bills, and that one of the $1.00 bills was torn through the serial number having the O and C on the right hand side of the tear which was stapled together. He examined it closely to see that the two pieces belonged to the same bill. Hamilton also had at the time $200.00 all in "tens and twenties" (R6,7) in the left breast

pocket of his battle jacket, put there on payday afternoon (R8,10). Accused had entered the room as he was putting the money in the jacket pocket (R8,11-12). Hamilton went to bed about 2345 hours the night of 7 March. He had not removed the money from the pocket (R8). On the morning of 8 March when he arose he missed his wallet and the money was gone from the jacket. The wallet was later found under his bed, partially open and absolutely empty of money (R13-14). Hamilton was scheduled to leave by boat for the States the 8th of March. The shipping list had been posted on the 6th of March and accused knew Hamilton's shipping date for they had talked about it (R9).

On the night of 7 March, Lieutenant Barnard had returned from pass about 1030 hours, walked to his room and opened the door. He testified that

> "Just as I opened the door Captain Nason was on our side of the partition with the front part of his body, it looked to me like he was reaching in our stuff- anyway, he was leaning over with his head and arms towards clothing that was hanging on our side, and I came in and he jumped up and towards his room" (R15).

He learned of Hamilton's loss the next morning and after Hamilton had left the rooms, asked accused why he had been over on their side the night before.

> "He didn't answer for about thirty seconds --- he was perfectly silent, and then he said, 'Give me time to think' * * * and then I waited maybe thirty seconds more, and he said he was tying his shoe I believe, and I said, 'Your shoes were on and fastened when I came in', and he said he must have forgotten * * * he had been pretty tight the night before" (R16).

In Barnard's opinion however, accused had been perfectly reasonable and sober the night before (R16,18).

On the morning of 8 March the Provost Marshal and his assistant (R10) searched accused finding a pocketbook containing $83.00 in American currency, being two 20 dollar bills, four ten and three one dollar bills (R20). On removing and searching accused's leather jacket (R21), in the lining through a hole in the pocket a "wad " of money amounting to $173.00 was found, six 20, five 10 and three one's in American money. One of the $1.00 bills was torn having OC on one piece, the torn pieces fastened together by clips (R22). At first accused said he did not know where the money came from but later he admitted he took the money and signed a statement on 8 March 1945 to that effect, which statement (Pros.Ex.5) was admitted in evidence (R24). It reads in part:

> "At or about 1700 hours, 7 March 1945, I went to the Red Cross Club * * * about 2300 hours * * * returned to my room, Number 39, Block 21. Upon arriving at my room I went into room 40 which is connected to my room. I then removed approximately $235.00 in American currency, from the wallet and blouse pocket of 1st. Lt. Louis D. Hamilton III. I then returned to my own room and went to bed, but before going to bed I took the money which I had taken from Lt. Hamilton and put it through a hole in the pocket of my A-2 jacket and into the lining of the pocket".

4. Counsel for defense at accused's request, made an unsworn statement in his behalf which was substantially as follows: Accused had been in the Army four years and in the "ETO" for 26 months, with two ratings of excellent and the others superior. He made the statement (Ex.5) on the promise of leniency and in order not to detain witnesses who were scheduled to return home. On the night of 7 March he had had six double gins and a couple of glasses of beer, so much that when he came into the room he didn't realize what he was doing. He had plenty of funds and had never done anything like that before (R25-26).

5. "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein" (MCM, 1928, par. 149g, p.171).

The evidence, disregarding accused's statement clearly shows the offense of larceny to have been committed by accused. He knew where the money had been placed, probably the only one other than the owner, he had the opportunity to take it and was not only seen in a suspicious position but when questioned, was halting and evasive in his answers. The money, part of which was marked so it was easily identified, was found concealed in his clothing and at first he denied knowing where it came from (MCM, 1928, par.112a, p.110; CM ETO 1607, Nelson).

6. The charge sheet shows accused to be 32 years, eight months of age. He enlisted 19 March 1941 and was commissioned 9 December 1942. He had no prior service.

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

8. Conviction of an officer of an offense under Article of War 93, is punishable as a court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

(190)

1st Ind.

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

1. In the case of Captain ROBERT W. NASON (O-569543), Casual Pool, 70th Reinforcement Depot (AAF), attached 152nd Reinforcement Company, 127th Reinforcement Battalion (AAF) AAF 591, 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 11504. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11504).

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

(Sentence ordered executed. GCMO 326, ETO, 12 Aug 1945).

11504

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

BOARD OF REVIEW NO. 1

10 OCT 1945

CM ETO 11518

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private ANGELO M. ROSATI (31278344), Attached Unassigned, 234th Replacement Company, 90th Replacement Battalion	Trial by GCM, convened at Marburg, Germany, 25 April, 2 May 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Angelo M. Rosati, attached unassigned 234th Replacement Company, 90th Replacement Battalion, did, at or near Bad Neuenahr, Germany, on or about 14 November 1944, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Namur, Belgium on or about 12 March 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "Bad Neuenahr, Germany", substituting therefor respectively the words "Verviers, Belgium", 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 thirty years. The reviewing authority approved the sentence but reduced the period of confinement to twenty years, and, as thus modified, ordered the sentence duly executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 346, Headquarters Advance Section, Communications Zone, European Theater of Operations, APO 113, U. S. Army, 15 May 1945.

3. Testimony by the first sergeant of the 234th Replacement Company, 9th Replacement Battalion (accused's alleged company) was that within his personal knowledge accused was absent from the unit during the period from 14 November 1944 to 12 March 1945 and that such absence was unauthorized (R18). The company was stationed at Verviers, Belgium,on 14 November (R14). It was stipulated that accused surrendered at Namur, Belgium, 12 March 1945 (R17; Pros.Ex.B). With regard to whether accused was assigned to this company, he testified initially as follows:

"Q. Did you ever have a Private Rosati in the 234th Replacement Company?
A. Yes, sir.

Q. I now hand you this document for identification and ask you what it is?
A. This is a memorandum we received from the Third Replacement Depot directing us to pick up 41 enlisted men in an AWOL status.

Q. I direct your attention to the name of Private Angelo M. Rosati. Was he one of the men that was to join your organization?
A. Yes, sir.

Q. Did Private Angelo M. Rosati ever arrive at your organization?
A. No, sir.

Q. Do you know of any reason why he did not arrive at your organization?
A. No, sir.

Q. What appropriate action was taken at the time this memorandum was received by the 234th Replacement Company?
A. After that memorandum was received I made the appropriate remarks picking up the 41 enlisted men in an AWOL status on the morning report.

Q. Who was commanding officer of the 234th Replacement Company at that time Sergeant Wallace?
A. Captain Robert F. Vollmer, sir.

Q. I hand you this document for the purpose of refreshing your memory and again ask you who was the commanding officer of the 234th Replacement Company?
A. Captain Hamilton at the time, sir.

Q. I direct your attention to the remark concerning Private Angelo M. Rosati. What was the date of this morning report?
A. 14 November 1944.

Q. Was that the date in which the man Private Angelo M. Rosati was picked up on the date of AWOL on the morning report?
A. Yes, sir" (R13-14).

Recalled as a witness, the first sergeant testified on this point:

"Q. Was the accused Private Rosati on your company rolls on the 14th of November 1944?
A. Yes, sir.

* * * *

Q. You made all these statements from your own personal knowledge, is that correct?
A. Yes, sir" (R18).

There was a great deal of testimony adduced concerning accused's absence from other assigned organizations, which is not material to the decision involved because not relevant to this company and absence therefrom. The law member excluded all this testimony except that which showed: that at some unstated time accused was attached to "Repl Det X 39 H"; and that about 7 October 1944 his records were returned from the 3rd Replacement Depot to the 15th Replacement Depot because he did not report to the former. Whether accused was ever physically present in any of these organizations or whether the 234th Replacement Company was connected with any of them, is not in evidence.

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 (R18-19).

5. In this state of the record, the case must stand or fall upon the testimony of the first sergeant of the 234th Replacement Company. It has fatal weaknesses: the only reasonable inference is that he gained all of his knowledge from an order transferring accused in an absence without leave status, and accused never reported to the company. Assuming that parole evidence of the written directive was admissible in the absence of objection, and further, that a man need not be present with his company before he can be absent without leave from it, we cannot hold that accused is presumed to have notice of an order issued transferring him in an absent without leave status (Cf. Winthrop's Military Law and Precedents (Reprint, 1920), p. 575). It is therefore our opinion that there is no proof by which it can be inferred that accused had notice that he should report to this company, and therefore none that he was under a duty to be there. How could we hold him for absence without leave from a command to which he is not shown to have known he must report? Lack of permission from this company to be absent from it is immaterial, for the case does not show he was under any duty of which he had notice, to secure such permission. There is no competent evidence at any specific place and time that he was absent from any other command, guard, quarters, station or camp without proper leave, and the record of trial is therefore in our opinion legally insufficient to support the findings and sentence. (Cf: CM 229562, Bangs, II Bull. JAG 60, 17 BR 197 (1943); CM 224325, Michael, I Bull. JAG 212, 14 BR 117 (1942); CM 199270, Andrews, 3 BR 343 (1932); CM 189682, Myers, 1 BR 179 (1930). The stipulation as to surrender at Namur, Belgium, on 12 March 1945 (R17; Pros.Ex.B) will not save any part of the case (CM ETO 11693, Parke; CM 227831, Gregory, 15 BR 375, I Bull. JAG 359 (1942)).

6. The charge sheet shows that the accused is 28 years 11 months of age and was inducted 4 January 1943 at Fort Devons, Massachusetts, 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. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Wm. T. Sprow Judge Advocate

(ON LEAVE) Judge Advocate

Gerard Tolan Judge Advocate

11518

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 10 OCT 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private ANGELO M. ROSATI (31278344), Attached- Unassigned, 234th Replacement Company, 90th Replacement 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

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

(Findings and sentence vacated. GCMO 206, W.D. , 1 July 1946).

11514

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

BOARD OF REVIEW NO. 3

16 JUN 1945

CM ETO 11543

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Warrant Officer (Junior Grade) THORNTON LOGAN (W-2121170), Headquarters 260th Quartermaster Battalion	Trial by GCM, convened at Lille, Nord, France, 30-31 March 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 warrant officer above named 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 Warrant Officer Junior Grade Thornton Logan, Headquarters, 260th Quartermaster Battalion, did, at Tourcoing, Nord, France, on or about 18 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Flight Lieutenant Frank Binns, a human being by shooting him with a revolver,

11543

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 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, 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 but, because of unusual circumstances and the unanimous recommendation of the court and of the reviewing authority for clemency, commuted it to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for the term of his natural life, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that, at the Excelsior Cafe in Tourcoing, France, shortly after eleven o'clock on the night of 18 February 1945, accused, a colored warrant officer, finished a drink, set his empty glass upside down on the bar and started to walk away. Deceased, a British flight officer who was sitting at the bar, called accused back and told him that it was bad luck to turn a glass down before leaving company. Accused replied that it was good luck to him. The same or similar remarks were repeated by the two of them, until finally accused was heard to say "Bull-shit", then, "I don't give a fuck what you say", or words to that effect, whereupon deceased struck accused knocking him against a table at one side of the bar (R8-9,13,20,26). Accused was "half-way up and * * * attempting to go back and renew the fight", when an American officer aided by a warrant officer and technical sergeant restrained him, took him outside and told him that he had better go home and stay out of trouble (R8,11). Between ten and fifteen minutes later, he returned to the cafe carrying a revolver. As he entered he freed himself from the restraint of a soldier and a woman, one holding each of his arms, and fired a shot at the deceased, who was still at the bar. The bullet struck deceased in the abdomen inflicting a wound from which he died the next morning (R8,9,14,15,23, 24; Pros.Ex.2).

11543 11544

4. After his rights were explained to him (R30,31), accused testified under oath that after deceased had provoked and persisted in an argument with him about the propriety and significance of his placing his empty glass upside down on the bar, accused characterized deceased's conversation as "a lot of bullshit" and was immediately struck and floored by deceased. He wanted to retaliate but was pushed outside by others and the first thing he thought of was his gun (R31-32). It took him about ten minutes to go to his office, obtain it and return to the cafe, where he had no recollection of being restrained at the door, and, once inside, remembered seeing only the deceased prior to firing (R32,35). He knew his gun was loaded and recalled aiming it, but it was only after firing one shot that "it fully came to me and I realized what I was doing" (R33). He did not fire again, although unaware at the time that he had shot deceased. He could not remember taking his weapon from his field desk or loading it (R34,36), although, on cross-examination, he admitted that he had made a written statement in which he said that he got his gun from his field desk and loaded it with six rounds (R36-37).

Following accused's testimony, the defense presented evidence that after he shot deceased accused remarked to the proprietress of the cafe, "I'm sorry but he hit me" (R42,45). Earlier in the evening, the proprietress had had a "small argument" with deceased, growing out of his statement to her that she should not permit colored soldiers to come into her place. She told him they were as welcome as anyone else, and testified that accused had been thereoften and was always correct (R43).

The commanding officer and the executive officer of accused's regiment testified that his service had been diligent, dependable and free from misconduct, and that he had never manifested unusual temper or excitability but, on the other hand, had always appeared to be a calm, normal person (R38-40, 40-42).

5. The only defensive issue raised by the record of trial is whether or not accused killed deceased in the heat of sudden passion caused by adequate provocation, reducing the offense from murder as charged to the lesser included offense of voluntary manslaughter.

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severly as if he were guilty of a deliberate homicide.
>
> In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark.)
>
> The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. Instances of adequate provocation are: Assault and battery inflicting actual bodily harm, * * * If the person so assaulted * * * at once kills the offender or offenders in a heat of a sudden passion caused by their acts, manslaughter only has been committed" (MCM 1928, par.149a, p.166).

In the case under consideration, deceased provoked an argument with accused which he terminated by committing an assault and battery upon the accused by striking him, without warning, such a powerful blow with his fist as to knock him down against a table beside the bar, if not actually to floor him. Restrained from attempted immediate retaliation, accused went to his office and secured his gun; then, returning ten or fifteen minutes after the blow had been struck, he shot and killed deceased.

Even though the assault and battery committed, under the circumstances shown, by deceased upon accused might reasonably be regarded as furnishing adequate provocation for reducing murder to manslaughter, had accused killed deceased instantly thereafter, the time elapsed between the provocation and the killing raises a clear issue of fact as to whether such period comprised sufficient cooling time to constitute the killing murder, even

if the passion persisted. There is nothing in the record to suggest that the ten or 15 minutes interval shown did not constitute substantial evidence that accused had had sufficient time to cool his uncontrollable passion, applying either the standard of an ordinary reasonable person or the standard of the accused's individual temperament as revealed by the evidence under all of the circumstances involved in the killing (CM ETO 292, Mickles). The findings of guilty of murder are therefore supported by substantial evidence.

6. The charge sheet shows that accused is 25 years 3 months of age; and that, with no prior service, he was inducted at Fort Bliss, Texas, 3 August 1942 and discharged to accept temporary appointment as warrant officer 20 May 1943.

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

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Dewey Jr. Judge Advocate

11543

(202)

1st Ind.

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

1. In the case of Warrant Officer(Junior Grade) THORNTON LOGAN (W-2121170), Headquarters, 260th Quartermaster 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 11543. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11543).

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

(Sentence ordered executed. GCMO 247, ETO, 8 July 1945).

11543

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

BOARD OF REVIEW NO. 3

10 AUG 1945

CM ETO 11546

U N I T E D S T A T E S	)	XXIX TACTICAL AIR COMMAND (PROVISIONAL)
v.	)	
First Lieutenant MELVIN L. CLARKE (O-1640313), 402nd Fighter Squadron, 370th Fighter Group	)	Trial by GCM, convened at Maastricht, Netherlands, 23 February 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for four years. No place of confinement designated.

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

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

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

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

Specification 1: (Withdrawn by direction of Appointing Authority)

Specification 2: In that First Lieutenant Melvin L. Clarke, 402nd Fighter Squadron, 370th Fighter Group, did, at Site A-78, Florennes, Belgium, on or about 18 December 1944, feloniously embezzle by fraudu-

11546

lently converting to his own use, about 1226 Belgian francs, value about $28.00, the property of 2nd Lieutenant Donald P. Matthews, 402nd Fighter Squadron, 370th Fighter Group, then missing in action, entrusted to him as the duly appointed and authorized Inventory Officer of his organization, for disposition in accordance with Part II, Standing Operating Procedure No. 26, European Theater of Operations, 9 June 1944, subject: "Burial and Effects".

Specification 3: In that * * * did, at Site A-78, Florennes, Belgium, on or about 17 December 1944, feloniously embezzle by fraudulently converting to his own use, one trench coat, value about $30.00, the property of 2nd Lieutenant David H. Bastel, 402nd Fighter Squadron, 370th Fighter Group, then missing in action, entrusted to him as the duly appointed and authorized Inventory Officer of his organization, for disposition in accordance with part II, Standing Operating Procedure No. 26, European Theater of Operations, 9 June 1944, subject: "Burial and Effects".

Specification 4: In that * * * did, at Site A-78, Florennes, Belgium, on or about 21 December 1944, feloniously embezzle by fraudulently converting to his own use, one Canadian dollar bank note, one United States dollar bank note, one Australian pound bank note, one English ten shilling bank note, one Belgian bank note, one French bank note, one Dutch ten guilden bank note, and one Indian rupee bank note, all of which bank notes were fastened to each other and known as a "Short-snorter", of the aggregate value of $12.00, the property of 1st Lieutenant Erwin J. Koss, 402nd Fighter Squadron, 370th Fighter Group, then missing in action, entrusted to him as the duly appointed and authorized Inventory Officer of his organization, for disposition in accordance with Part II, Standing Operating Procedure No. 26, European Theater of Operations, 9 June 1944, subject: "Burial and Effects".

11546

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

Specification: In that * * * at Site A-78, Florennes, Belgium, on or about 13 January 1945, did wrongfully and unlawfully suggest to 2nd Lieutenant Robert W. Hoyle, 402nd Fighter Squadron, 370th Fighter Group, that he, the said 2nd Lieutenant Robert W. Hoyle, officially state that on or about 21 December 1944, he delivered to the said 1st Lieutenant Melvin L. Clarke, the Inventory Officer of said organization, among the property of 1st Lieutenant Erwin J. Koss, 402nd Fighter Squadron, 370th Fighter Group, then missing in action, a smaller amount of money than was in fact, on 21 December 1944, delivered by the said 2nd Lieutenant Robert W. Hoyle to 1st Lieutenant Melvin L. Clarke, well knowing that the suggested statement would be false.

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

Specification 1: (Withdrawn by direction of Appointing Authority).

Specification 2: In that * * * acting as Inventory Officer of his organization, did, at AAF Site A-78, Florennes, Belgium, on or about 19 December 1944, with intent to deceive Effects Quartermaster, Communications Zone, United States Army, unlawfully, falsely and fraudulently execute an inventory of effects pertaining to the property of Second Lieutenant Donald P. Matthews, missing in action, by knowingly and wrongfully failing to include therein approximately one thousand two hundred twenty-six (1,226) Belgium Francs, the equivalent of about twenty-eight dollars ($28.00), United States Currency, property of the said Second Lieutenant Donald P. Matthews, for disposition in accordance with Part II, Standing Operating Procedure No. 26, European Theater of Operations, 9 June 1944, subject: "Burial and Effects".

1154
1154

Specification 3: In that * * * acting as Inventory Officer of his organization, did at AAF Site A-78, Florennes, Belgium, on or about 18 December 1944, with intent to deceive Effects Quartermaster, Communications Zone, United States Army, unlawfully, falsely and fraudulently execute an inventory of effects pertaining to the property of Second Lieutenant David H. Bastel, missing in action, by knowingly and wrongfully failing to include therein one trench coat, property of the said Second Lieutenant David H. Bastel, for disposition in accordance with Part II, Standing Operating Procedure No. 26 European Theater of Operations, 9 June 1944, subject: "Burial and Effects".

Specification 4: In that * * * acting as Inventory Officer of his organization, did, at AAF Site A-78, Florennes, Belgium, on or about 22 December 1944, with intent to deceive Effects Quartermaster, Communications Zone, United States Army, unlawfully, falsely and fraudulently execute an inventory of effects pertaining to the property of First Lieutenant Erwin J. Koss, missing in action, by knowingly and wrongfully failing to include therein one Canadian dollar bank note, one English ten shilling bank note, one Belgian bank note, one French bank note, and one Indian rupee bank note, all of which bank notes were fastened together and known as a "short snorter" of the aggregate value of about twelve dollars ($12.00), property of said First Lieutenant Erwin J. Koss, for disposition in accordance with Part II, Standing Operating Procedure No. 26, European Theater of Operations, 9 June 1944, subject: "Burial and Effects."

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The

reviewing authority, the Commanding General, XXIX Tactical Air Command (Provisional), disapproved the finding of guilty of Specification 4 of Charge I insofar as such finding included the words "one Australian pound bank note", "one Belgian bank note", and "one Dutch ten guilden bank note" and the finding of guilty of Specification 4 of the Additional Charge insofar as such finding included the words "one Belgian bank note", approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

a. Accused was inventory officer of his unit, the 402nd Fighter Squadron, responsible for "handling" the personal effects of pilots missing in action (R7; Pros.Ex.4). Missing in action on or a few days prior to 20 December 1944 were Second Lieutenant Donald P. Matthews (R6,10; Pros.Ex.1), Second Lieutenant David H. Bastel (R6,9; Pros.Ex.2), and First Lieutenant Erwin J. Koss (R6,12; Pros.Ex.3).

b. Specification 2 of Charge I and of Additional Charge, respectively. About 18 December 1944, accused was given Matthews' billfold containing, among other things, two thousand Belgian francs (R10-12). About the 22nd or 23rd accused delivered to a sergeant at the unit orderly room moneys purportedly belonging to Matthews and two other officers. The sergeant counted the money, put each officer's money in a separate envelope noting thereon the amount and purported owner, stapled the envelopes, and placed them in the safe (R16-18). On the 23rd the squadron executive officer took from the safe envelopes containing money purportedly belonging to Matthews, Koss and another officer and delivered them to a Finance Office which issued a receipt in the amount of $17.25 for Matthews' money (R6, 25-28; Pros.Ex.7). An inventory of Matthews' effects had been typed up on the basis of a "pencil copy" supplied by accused. It was received through normal channels by the assistant adjutant, 370th Fighter Group, and had been

signed by accused. It was undated and listed the cash found as $17.25 (R20,22,28-29; Pros.Ex.9). The court was asked to take judicial notice that two thousand Belgian francs was the equivalent of $45.65 (R11) and that $17.25 was the equivalent of 755 Belgian francs (R26).

c. Specification 3 of Charge I and of Additional Charge, respectively. About 20 December 1944, Bastel's effects, including his trench coat, were delivered to the "Ready Room" pursuant to accused's instructions (R9). Two or three days later they were packed and an inventory thereof typed up on the basis of a pencil copy supplied by accused (R20,22,23). The inventory was received through normal channels by the assistant adjutant, 370th Fighter Group (R28-29). Although the copy (Pros.Ex.8) substituted therefor (R35) does not affirmatively show it to have been signed by accused, testimony indicates it was signed by him (R29). It was undated and listed, among other things, "1 trenchcoat", (Pros.Ex.8). Several days later accused was seen wearing Bastel's coat (R9). In an inspection of the quarters shared by accused and another officer made on 28 December, the coat was found on accused's side of a cabinet (R15,25; Pros.Ex.6). It was not hidden (R16, 26) and had a value of $35.00 (R35). A reinventory was made of Bastel's effects. A different trenchcoat was found among his effects (R24; Pros.Ex.5).

d. Specification 4 of Charge I and of Additional Charge, respectively, and Charge II and Specification. About 21 December 1944 Second Lieutenant Robert W. Hoyle, 402nd Fighter Squadron, delivered to accused Koss' wallet containing, amohg other things, Koss' "short snorter" souvenir. While Hoyle did not take the "short snorter" out of the wallet,

> "Lieutenant Koss and I had a sort of a contest between ourselves, and he had American money in it, English notes, Canadian, French, German, Indian, and he had a Hawaiian bill in it, and I can't remember anything else as far as the 'short snorter' goes" (R12).

It was stipulated that the value of the "short snorter" "of the type delivered" was about $12.00. The wallet also contained 2150 Belgian francs. Later accused was given

11546

200 Belgian francs for Koss (R12-14). Still later Koss' effects were packed and an inventory thereof typed up on the basis of a pencil copy supplied by accused (R20, 22). The inventory was received by the assistant adjutant, 370th Fighter Group, and had been signed by accused (R28-29). It was undated, listed no "short snorter", and showed the amount of cash received as $58.71 (Pros.Ex.10). Subsequently a reinventory and search of Koss' effects failed to disclose a "short snorter" (R21,25). On 13 January 1945, accused spoke to Lieutenant Hoyle, who testified that accused

> "took me aside and asked me if I would swear to the fact that there was less money given than the amount I had given to him, and I asked him, 'Why?' And he said that Lieutenant Matthews' TPA was credited for less than the amount turned in, and he said he could cover it by the amount from Lieutenant Koss' account, so I asked him how they got mixed up, and he tried to explain and I didn't quite understand it, so I told him I would think it over and then that evening I told him I couldn't do it absolutely" (R13).

4. Summary of defense evidence:

Cross-examination of prosecution witnesses revealed that Lieutenant Koss' pay was about $300 per month (R26-27) and that he sent a war bond to his sister a few days before he was missing in action (R14). In December he purchased money orders for approximately $100. He had an allotment of $197.95 per month (R30).

After his rights as a witness were explained, accused testified (R31). Lieutenant Hoyle did not give him a "short snorter" (R31). On 13 January 1945 he asked Lieutenant Hoyle if he were certain as to the amount turned over for Lieutenant Koss. Hoyle said 2350 francs (R32). He knew he had received approximately 2500 francs for Lieutenant Matthews. As he recalled, Hoyle had given him "approximately 500 francs, possibly a little over" for Koss. He knew Hoyle was mistaken as to the amount(R34). It was his opinion that the Koss

and Matthew accounts had been switched. He then saw Hoyle again and "asked him if he would be willing to make a statement that there was not that amount of money in Lieutenant Koss' pocket book" (R32). It was fairly common for pilots to swap clothing (R32-33).

5. a. At the outset it is to be noted that ownership was alleged and proved in officers missing in action. This was tantamount to alleging ownership in them, if living, and if dead, their successors in ownership. A specification "does not need to possess the technical nicety of indictments at common law" (7 Ops.Atty.Gen.604). Ownership may be alleged as unknown in larceny (2 Wharton's Criminal Law (12th Ed,1932, sec.1190, p.1503); so also in embezzlement (Ibid, sec.1293, p.1603). Even had there been no allegations of ownership, the remaining allegations were "in sufficient detail to enable accused to prepare his defense and to avoid the risk of being charged with the same offenses at a later date" (CM ETO 850, Elkins).

b. Specification 2 and 3 of Charge I and of Additional Charge, respectively. It was proper for the court to take judicial notice of the value of the Belgian franc (CM ETO 12453, Marshall). It was shown that accused received funds as alleged, that he failed to account for them and that they were not listed on the inventory which he furnished the quartermaster. An officer who is intrusted with funds and who fails to account for them on proper demand cannot complain if the natural presumption that he embezzled them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (Dig.Op JAG, 1912-40, sec.451(17), p.317). With reference to the trenchcoat, it was proved that Bastel's effects, sometime prior to packing, included, among other things, a trench coat which accused unlawfully and without authority appropriated to his own use. Accused did, in fact, list "1 Trenchcoat" on his official inventory. But Bastel's effects, as packed, were found upon re-inventory to contain a trenchcoat other than that embezzled by accused. True, the prosecution introduced no direct evidence that this second trenchcoat was, in fact, Bastel's; indeed, defense evidence might be regarded as suggesting that this second trenchcoat belonged to accused and had been "swapped" by him for Bastel's. Be that as it may, even assuming that the trenchcoat listed was the one embezzled, the packing

by accused of the second trenchcoat among Bastel's effects was in the nature of admission from which the court could reasonably infer that Bastel's effects, as received by accused, included the second trenchcoat in addition to the one embezzled by accused. Accused listed "1 Trenchcoat", not two. The evidence fully supports the court's findings of guilty under these specifications alleging each embezzlement in violation of Article of War 93 (CM ETO 2766, Jared) and conduct unbecoming a gentleman in violation of Article of War 95 (CM ETO 765, Claros; MCM, 1928, par.151, p.186).

c. Specification 4 of Charge I and Additional Charge, respectively. The prosecution's evidence showed that at the time and place alleged Lieutenant Hoyle delivered to accused Lieutenant Koss' wallet containing a "short-snorter" composed of American, Canadian, French, German, Indian and Hawaiian money of varying denominations (R13). Accused's signed inventory failed to account for this property. Accused testified he never received the "short-snorter" from Lieutenant Hoyle (R13). This presented a question of fact which the court was fully warranted in resolving against accused. While there was no affirmative proof that certain bank notes alleged to be among the components of the "short-snorter" were in fact, included therein (see CM ETO 11972, Allison) to say nothing of their irdividual values, this was immaterial. A "short snorter" "of the type delivered" was stipulated to have a value of $12.00. The evidence supports the court's findings, as approved, of embezzlement in violation of Article of War 93 (CM ETO 1302, Splain), and conduct unbecoming a gentleman as described under Article of War 95 (CM ETO 765, Claros; MCM, 1928, par.151, p.186).

d. Charge II and Specification. All solicitations to wrongful conduct are not indictable at common law (1 Wharton's Criminal Law (12th Ed, 1935), sec.218, pages 288-291). Solicitations are "indictable where their object is interference with public justice, as where * * * perjury is advised; * * * or the corruption of a * * * witness is sought * * *" (Ibid, p.288). The evidence compels the inference that accused's activities as inventory officer were under scrutiny, if not investigation. Even if accused's suggestion to Hoyle fell short of a solicitation to perjury, it remained an evasion of duty cognizable under

Article of War 96 (see Winthrop's Military Law and Precedents (Reprint, 1920), p.722). The record of trial supports the findings of guilty of Charge II and Specification.

6. The charge sheet shows that accused is 25 years six months of age, that he was appointed a second lieutenant 18 December 1942, and that he had prior service as an enlisted man from 3 October 1941 to 17 December 1942.

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 confirmed, and the sentence.

8. The penalty for violation of Article of War 95 is dismissal; for embezzlement and for violation of Article of War 96, such punishment as a court-martial may direct (AW 93,96).

9. Accused was sentenced, among other things, to be confined at hard labor, at such place as the reviewing authority may direct, for four years. No place of confinement has been designated. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E. B. Lindsay Jr. Judge Advocate

11546

1st Ind.

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

1. In the case of First Lieutenant MELVIN L. CLARKE (O-1640313), 402nd Fighter Squadron, 370th Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved and confirmed, and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be desighated the place of confinement. This may be done in the published general court-martial order directing execution of the sentence.

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 11546. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11546).

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

(Sentence ordered executed. GCMO 355, USFET, 28 Aug 1945).

11546

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

BOARD OF REVIEW NO. 2

28 AUG 1945

CM ETO 11580

U N I T E D S T A T E S	)	70TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, Convened at Frankfort am Main, Germany, 4 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN HALKO (36906516), Company C, 275th Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John Halko, Company C, 275th Infantry, did, at Alsting, France, on or about 22 February 1945, desert the service of the United States by absenting himself, without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to wit, engagement with the enemy, and did remain absent in desertion until he was apprehended at Nancy, France, on or about 25 March 1945.

He pleaded to the Specification of the Charge, "guilty", excepting therefrom the words, "desert the service of the United States by absenting", and "with intent to avoid hazardous duty, to wit, engagement with the enemy, and remain in desertion until he was apprehended at Nancy, France" and substituting therefor respectively the words "absent" and "did remain absent without leave to". To the excepted words, "Not guilty" and to the

substituted words, "Guilty". To the charge "not guilty" but "Guilty" of a violation of the 61st Article of War. Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of the Charge and Specification. No evidence was introduced of previous convictions. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the findings, changing only the alleged apprehension to a finding of surrender, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence shows substantially as follows: An extract copy of the morning report of Company C, 275th Infantry (Prox.Ex.A) was admitted in evidence and reads,

> "15 April 1945: Correction (26 Feb 45) Halko, John 26906516 Pvt dy to MIA in France 22 Feb 45 dropped fr rolls. Should be Halko, John 36096516 Pvt Dy to AWOL as of 22 Feb 45 0600".

Also admitted in evidence was a stipulation (Pros.Ex.B) to the effect that a military policeman if present as a witness would testify that accused surrendered himself to him at Nancy, France, 25 March 1945 (R6). The former executive officer of Company E of the 275th Infantry who assumed command of Company C on 24 February 1945 testified that accused was not present when he took over the company or since. Both companies were then in the Stiftwald forest area where they had been engaged in attack since 20 February, meeting enemy counter attacks made with small arms, mortar, artillery and tanks on three occasions. There were no records of Company C indicating leave, pass or permission to accused to be then away from the command (R7-8). About 40 men were missing and about 43 were present for duty when he took over (R9). The company First Sergeant testified that accused had joined the company on 9 February and on the nights of the 21st and 22nd there was a heavy attack in the forest area when the company suffered many casualties (R10,14) and for several days thereafter there was considerable enemy fire. Search was unsuccessfully made for accused who was then marked "MIA" and dropped from the rolls as of 22 February (R11-12). He did not give accused permission to be absent (R13). A sergeant of Company C testified that he and accused were detailed to take prisoners to the rear on 21 February and were then ordered to remain in a house where their platoon was located. While there the prospective attack on neighboring woods was discussed and the platoon moved out on the attack (R14) later that afternoon. The sergeant returned to the aid station the same night for treatment and stayed in a nearby house that night where he found accused. On the morn-

ing of the 23rd they were ordered to report to the battalion and he did not thereafter see accused (R15,18).

4. As the only defense evidence, accused made an unsworn statement through his counsel, in substance that: He went with prisoners to the rear on 22 February and lost his helmet and was ordered not to go on without it. He stayed in town for the next three days when he secured a helmet and while on his way to join the Company met a soldier from A Company. Not knowing where their outfits were, they got on a truck going to Nancy, intending to go "AWOL" and be back in a couple of days but stayed on. He gave himself up when his buddy got caught. He "went to see a psychiatrist and he said I was a nervous guy. I bite my fingernails".

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 clearly shows his unauthorized absence from duty beginning on or about 22 February and he admitted it by his plea. The evidence also is clear and undisputed that his company engaged the enemy at or about that time and suffered many casualties. The attack to be made on the 23rd was discussed by the platoon in the house where accused then was and he knew the hazardous duty ahead. He was not with the men when they moved out as ordered, but caught a ride on a truck going elsewhere. The psychiatrist said he "was a nervous guy". He bites his fingernails. The evidence substantially supports the findings of guilty of desertion (CM ETO 6549, Festa; CM ETO 13292, Kazsimir; CM ETO 14131, La Nore).

6. The charge sheet shows accused to be 19 years of age and that, without prior service, he was inducted 25 July 1944 at Chicago, Illinois.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

11580

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

BOARD OF REVIEW NO. 3 13 AUG 1945

CM ETO 11589

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luneville, France, 12 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade JOSEPH R. SOKOLOWSKI (36228617), 14th Ordnance MM 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 charges and specifications:

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

Specification: In that Technician Fifth Grade Joseph R. Sokolowski, 14th Ordnance MM Company did, at Saint Laurent (Vos) France, on or about 1830 hours, 30 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Ann Marie Houot, Saint Laurent (Vos) France.

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

Specification: In that * * * did, at Saint Laurent (Vos) France, on or about 1830 hours, 30 October 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Miss Ann Marie Houot, Saint Laurent (Vos) France.

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

3. Evidence for prosecution:

About 1830 hours 30 October 1944 (R7), the prosecutrix, Mademoiselle Ann Marie Houot, age 17, was walking from her work in Epinal, France, to her home in St. Laurent, France, a distance of about six kilometers (R6). When she was about two kilometers from her home, a jeep containing accused and its driver, Technician Fifth Grade Kenneth W. Nelson of accused's organization, stopped and accused motioned for her to enter the vehicle (R7). She replied, "Non; maison pas loin". Accused then "got out of the car. He took me by the arm and I got myself into the car, * * * voluntarily, * * * to be home earlier". She sat between accused and Nelson (R8). En route accused kissed her on the side of the head whereupon she drew herself back and said, "Non; pas bon". Upon coming to her home she said, "Stop maison". However, the car continued on with accused indicating they would return in a few minutes. It continued down the main road for about one kilometer (R10), turned down a side road, and came to a stop on another side road at a point some three to five hundred meters from the main road (R10,11, 21,22). When the car stopped she "wanted to get up, * * * to go home". In trying to do so she fell. "They pulled me back to the front of the car and one /Nelson/ put his hand under my dress" (R11). After the jeep stopped they remained therein for about five minutes (R21). During this time accused "took out his pistol * * * /and pointed it/ toward my face". He also hit her (R12) on the face (R21). When she said "Dehors", accused dismounted and was followed, in order, by herself and Nelson (R12,13). Dismounted, "I tried to get away. * * * /but/ accused held me back". Nelson spread a blanket on the ground. Accused "took me to the blanket. * * * by the arm" (R13). "I defended myself /by trying to get out of his arms, (R19/ and we both fell to the ground". He removed her panties (R14). She held onto them but "he would hit me on the hand". Although made of "indemaillable * * *, a kind of silk", they were not torn (R20). Accused motioned for her to undress him. When she refused, he undressed himself. "Then he motioned to take his penis in my mouth (R14) * * *, laid himself on the side of me, and * * * pushed my head so that I had to

11589

take his penis in my mouth" where it remained for about ten minutes (R15). She did not attempt to injure him "because I was too scared * * * of the pistol" (R21), the whereabouts of which she did not know (R20). "Then he tried to penetrate me [i.e.]* * * to make his penis penetrate my female organ". He was successful "because I felt a pain. * * * in my organs". The penetration lasted "perhaps two or three minutes" (R15). After this "he was lying on the side of me * * *. I couldn't get away anyhow; he would have hauled me back at once" (R20). Next, he removed the rubber and "penetrated me again" (R15).

Although at first testifying to two penetrations (R15), upon cross-examination, when questioned about and confronted with her testimony at a previous trial, she was positive as to only one penetration (R18,19). She further testified that she screamed. The nearest house was distant some 300 or 400 meters (R20). "I tried to hold my legs as tight as I could". She did not think she used her hands to try to prevent an entry (R80). "I couldn't defend myself because he held me and hit me each time I tried" (R15). Her face was injured (R22). When accused finished he continued to hold her (R16). Then Nelson came to her (R15). Later, she got her handbag and gloves from the jeep, picked up her panties, and ran home, a distance of about one and a half kilometers, in 10 or 15 minutes. Her mother and father were at home (R17,19). She consulted a doctor the next day but not about the spots or buises on her face (R22). She had told an American officer that now that she knew she was not pregnant, she did not feel that accused should be prosecuted (R18).

The mother of the prosecutrix testified about 2000 or 2015 hours 30 October 1944, her daughter came home looking "very pale and disheveled". Her clothes were torn. When asked for an explanation, she said, "If you knew how much they have beaten me", and went upstairs to her room (R24). "I asked her and she told me there were two and they had raped her". At the former trial the witness used the same word "abuser", which for her "was exactly the same" as "violer". The interpreter, questioned by the law member, said that both meant rape (R26-29).

On 31 October 1944 a doctor examined the prosecutrix's sexual organs. "The membrane of the hymen showed signs that it had been recently broken. It had been fragmented in several pieces that were still bleeding". Prosecutrix did not complain of any bruises on her face. The physician saw no bruises or discolorations on her face. "It was difficult

to see anything because her face was red. * * * and swollen as though she had recently wept (R29-31). On the same day prosecutrix was seen by an agent of the Criminal Investigation Division, John R. Brown. He testified:

> "The complainant, Miss Huout, had bruises on both cheeks, particularly in the upper segment of the cheek in the neighborhood of the cheek bone, on both sides of the face. Under her left eye she had a black and blue spot about a half inch long, elongated and elliptical in shape. The left ear was purple completely and visibly bruised. There were two or three small scratches on the right jawbone at the neck" (R32).

Over defense's "formal objection", accused's statement to a CID agent was introduced (R42,43; Pros.Ex.A). Therein accused substantiated prosecutrix in how she came to enter the vehicle. He did not recall kissing her but he may have touched her on the neck. Anyway she did not resist. They "asked her if she wanted to 'come across'for some money and she just smiled". As they"drove on she pointed to a house and said something in French" he did not understand. They drove down a side road and stopped.

> "We sat in the car and asked her to 'Put out' and she didn't say anything. I got out of the car and she followed me. We walked to the back of the jeep. Nelson got out with the blanket and laid it on the ground and then walked back towards the jeep. She didn't scream or struggle and lay right down on the blanket and I told her to take her pants off and she did. I then put a 'rubber' on and tried to 'lay' her but I couldn't get it in. I then took off the 'rubber' and did not try to 'lay' her with the 'rubber' off but motioned for her to 'take it in the mouth' and she just smiled and did. She seemed to know how to do it * * *. I * * * motioned for her to finish it by 'jacking me off'. She did * * *. I did not try to 'lay' her again. While she was 'jacking me off' she was kissing me. When she was through, I lay down a little over a hundred francs where she could see it. I don't know whether or not she picked it up. That's when I called Nelson. He came over and I was standing around the jeep. When Nelson was through she came over to the jeep and asked for her pocketbook and gloves and Nelson asked her if she wanted a ride home and she pointed the other way from the way the jeep was facing and she walked away" (Pros.Ex.A).

4. Evidence for defense:

After his rights as a witness were explained to him, accused elected to testify (R53). His testimony (R54-64) was substantially in accordance with his pre-trial statement which he admitted was voluntarily made (R57-58). He did not remove his pistol from the holster (R59-60). He neither hit (R57) nor forced her. She did not scream (R56). Instead, she was giggling all the time (R62). She voluntarily removed her panties (R55-56). He did not penetrate her (R56, 61-62). "She had her hand on it /his penis/ and I thought she was going to lead it in but she didn't" (R61). Instead, "she kept on playing with it" (R62). "I don't think I even touched her /female organ/" (R61). "I wanted to /penetrate her/ but she had her hand on it and I couldn't do it" (R56). He left some money for her (R55,60). On a former occasion when he denied having ever seen prosecutrix before, he was scared of rape charges (R58) or bastardy proceedings since Nelson thought he had made a penetration (R61). According to his understanding, if somebody "layed" a girl, "maybe he got what you call a blow job, or he penetrated her, or a hand job or something" (R59).

Fifth Grade Technician/Kenneth W. Nelson, accused's companion of the evening, substantiated accused's testimony (R64-70). Prosecutrix, to all appearances, consented to everything. He did not see accused have intercourse with her but he had imagined he did (R68). When accused returned to the jeep, he then went to the prosecutrix and had intercourse with her. "She didn't object to it because after she laid down there she pointed down at her vagina and told me to finish it there, which I did" (R67).

The investigating officer testified he had spoken French since he was five years old. The French word for "abuse" was "abuser". Asked if the word "abuser" in French meant "rape", he replied, "Not that way". The French word for rape was "violer". He had interviewed the prosecutrix in his investigation. He explained to her the punishment for rape. "She said now that there won't be any consequences that she felt, 'Why don't they send them to the front?'" (R50). Her position was that she entered into intercourse by force (R52). Accused stated to him that his relations with the prosecutrix were upon her own free will and accord (R51).

Accused's company commander testified he had a conversation with CID Agent Brown. Brown asked him not to see accused and Nelson until after he had obtained statements from them. Brown seemed very interested in getting a conviction (R77).

Accused testified he was 25 years of age, was single, and had attended grade school and trade school for eight, and two and a half years, respectively. He had had no trouble in civilian or military life. He entered the military service in November 1941, came overseas in February 1942 and had since served in Ireland, England, North Africa, Italy and France. He had been awarded the "Purple Heart", "Good Conduct Ribbon" and "European Campaign Ribbon" and was entitled to wear six stars. In the Italian campaign "we came in after Salerno and went to some place around Venafro, and were taken back to the 3d Division and invaded Anzio" (R53-54). Accused's first sergeant testified he had known accused since February 1942. His reputation for chastity and morality was good. No disciplinary action had been taken against accused since he had known him. At Anzio, where accused was wounded, he had shown bravery beyond duty. To aid two injured men, he left his place of protection and exposed himself to enemy fire. He performed his duties in the company very well (R70-72). The company executive officer testified that accused's reputation as a law-abiding citizen and for chastity and morality was very excellent, for truth and veracity, excellent. He should like to have accused back in the company even if he had admitted to sodomy (R73-74). His company commander testified that accused's reputation for chastity, morality, and decency was good; for truth and veracity, good "beyond reproach" (R76-78). His battalion commander testified that accused's record as a soldier was clean and "everybody spoke very well in every respect for the accused" (R75-76). The battalion chaplain felt that accused was a congenial and friendly individual accepted by and interested in the members of his company (R72-73).

5. Much testimony was adduced concerning the circumstances preceding and attending accused's making of the statement (Pros.Ex.A) introduced into evidence over "formal objection" by defense (R32-44, 48-49). No purpose would be served in setting out such testimony. Suffice it to say that accused testified the statement was voluntarily made (R58-59).

6. Substantial evidence supports the findings of guilty of Charge I and Specification. The prosecutrix's testimony constituted full and complete proof of the alleged rape. It matters not whether accused accomplished his penetration on the first or second occasion, or both. One carnal act only was involved (Cf. CM ETO 7078 Jones). The prosecutrix was positive in her testimony that accused penetrated her on at least one of the two occasions. Any penetration is sufficient carnal knowledge (MCM, 1928, par.148b, p.165). Considered, as it has been, in the light of the evidence that accused's companion, Nelson, also carnally knew the prosecutrix, the medical testimony corro-

borates her testimony in that it leaves no doubt of a recent penetration of her vagina by something (CM ETO 6554, Hill). The mother noted the prosecutrix' pale and disheveled condition when she arrived home that evening. The next day a CID agent observed bruises on her face. This evidence tended to confirm prosecutrix's testimony of abuse at the hands of accused (CM ETO 611, Porter). Her statement to her mother that she had been raped served to rebut any inference of consent that may have been drawn had she remained silent (CM ETO 611, Porter; CM ETO 969, Davis).

Substantial evidence likewise supports the findings of guilty of Charge II and Specification. The prosecutrix's testimony constituted full and complete proof thereof. In addition, accused admitted thereto in his statement to the CID agent and in his testimony.

7. The charge sheet shows that accused is 24 years eight months of age and was inducted 18 November 1941 at Fort Sheridan, Illinois. He had no prior service.

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

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

BRSCooper Judge Advocate

(On leave) Judge Advocate

BLMurray Jr Judge Advocate

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

BOARD OF REVIEW NO. 3

18 JUN 1945

CM ETO 11590

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Luneville, France 18 March 1945.
Technician Fifth Grade KENNETH W. NELSON (31037167) 14th Ordnance MM Company	)	Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

---

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 Technician Fifth Grade Kenneth W. Nelson, 14th Ordnance MM Company did, at Saint Laurent (Vos) France, on or about 1830 hours, 30 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Ann Marie Houot, Saint Laurent (Vos) France.

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

Specification: In that * * * did, at Saint Laurent (Vos) France, on or about 1830 hours, 30 October 1944, commit the crime of sodomy, by feloniously and against the order of nature have carnal connection per os with Miss Ann Marie Houot, Saint Laurent (Vos) France.

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

3. Evidence for prosecution:

About 1800, 30 October 1944, the prosecutrix, Ann Marie Houot, age 17, was walking from her work in Epinol, France, to her home in St. Laurent, France, a distance of about six kilometers. When she was about two kilometers from her home, a jeep, driven by accused and also containing Private Joseph R. Sokolowski, stopped and the latter motioned for her to enter the vehicle (R6-8). She replied, "Non; maison pas loin." Sokolowski then "got out of the car and took me by the arm and I got myself into the car" (R9) where she was seated between the two soldiers (R10). En route Sokolowski kissed her whereupon she drew herself back and said, "Non; pas bon" (R12). Upon arriving at her home she said, "Stop maison" but the car continued past with Sokolowski making a gesture they would return in a few minutes. It continued down the main road for about one kilometer, turned down a by-road, and came to a stop on a smaller by-road (R10) at a point about three or four hundred meters from the main road. "I wanted to get up in order to get out * * * I tried to stand up but I could not because they held me back." Accused put his hand under her dress (R11). Sokolowski struck her on the face with his open hand "20 times perhaps" (R13). She no longer knew whether Nelson struck her struck her while in the jeep (R14-15). She screamed when Sokolowski struck her. He pulled his pistol from his holster and pointed it at her face for one or two minutes. When he put it back in the holster, she said "Dehors" (R15) whereupon they got out of the vehicle. She tried to escape but Sokolowski held her. Accused spread a blanket on the ground. After he had spread the blanket and while Sokolowski was holding her, she thought, but wasnot sure, that accused hit her on the face two or three times with his open hand. He then returned to the jeep. She and Sokolowski fell to the ground (R16-18). She remained on the blanket with Sokolowski for about three-quarters of an hour. At the end thereof accused was standing near and Sokolowski went away. She could not make an effort to escape because accused "was near me * * * touching me." "He laid himself on the side of me * * * /and/ undressed himself * * *. He forced me to take his penis in my mouth * * * /by pushing/ very hard on my head." His penis remained in her mouth for about ten minutes (R19).

She could not make an effort to get his penis out of her mouth because he was holding her by the head. Next he tried to penetrate her. She held her legs tight and screamed. He was successful in penetrating her because she felt his penis and a pain in her female organ. While not consenting or agreeing to intercourse (R20) she neither scratched nor bit accused (R25) because "he was causing me pain, and that caused me more pain." She did not hit him with her hand "because he would have hit me too." She was afraid of Sokolowski's pistol (R27). The penetration lasted for approximately two or three minutes (R20). Next he turned her over on her stomach and penetrated her anus. She could not do anything to prevent that "because he had me turned so I could not do anything" (R21-22). Finished, accused stood up, folded the blanket, and went to the jeep where Sokolowski was. She, too, returned to the jeep for her handbag and gloves (R22). She was not then afraid because "I thought they wouldn't hurt me because he had had what he wanted" (R28). She next picked up the panties Sokolowski had removed from her and went home (R22-23,26). She walked rather fast and arrived there in ten or fifteen minutes to find her mother and father (R23-24). She had talked to a Colonel Artamonoff and had stated that since she was not pregnant she felt the soldiers should not be prosecuted (R24).

The prosecutrix' mother testified that her daughter arrived home on the evening in question about 2000 or 2015 in a "very pale and completely disheveled" condition. Her blouse was torn as was one stocking (R29). She said "If you knew how much they had beaten me." The mother than followed the prosecutrix to her bedroom and asked what had happened (R30). "She said that two Americans - and I use the French word - abused her. That means to me they had raped her." On two former occasions when testifying the mother had used the word "abuser." The French word for "rape" was "viol" (R32). In a previous trial she had testified that her daughter said she had been struck "by an American" and had been "abused" by "some Americans" (R33). Her daughter had said she had been struck "by two Americans" (R34).

The next morning she and the prosecutrix visited a physician (R35), who, upon examination of the prosecutrix, found that "the membranes of the hymen was broken in several pieces and they were still bleeding." In his opinion the prosecutrix' female organs "had recently been penetrated by some object" which "could have been a male penis" (R36). He saw no bruises on her legs or body. He "couldn't see on her face" for it "was rather deformed by weeping and very red." The next afternoon, John R. Brown, an agent of the Criminal Investigation Division, saw the prosecutrix. According to him,

> "There were bruises about her face on both cheeks, especially in the upper segment of both cheeks around the cheek bones. There was deep purple marke under her left eye about a half to three-quarters of an inch

> long and elliptical in shape. The left ear was very deep purple. There were three or four small scratches on the right jaw bone at the angle of the jaw where it joins the neck" (R38).

After being advised of his rights (R39,41) accused voluntarily made a statement which reads, in part, as follows:

> "She sat in front of the jeep between Sokolowski and I. While riding she kissed Soklowski and he kept his arm around her. We continued down the road and she then told us to turn left onto a dirt road. We did and went along this dirt road until we went down a hill. We turned around at the bottom of the hill and then I stopped the jeep half way up it. We sat and talked to the girl for a while then Sokolowski got out and she followed him. He put the blanket on the ground and 'layed her' while I sat in the jeep. Then he asked me if I wanted 'it' and I came over. She gave me 'half and half'; that is, she started to give me a 'blow job' and finished 'it' and 'taking it' regular'. I 'layed' her only one time. She seemed to be experienced and knew her stuff, going through the motions and cooperating fully. When we were through she asked me for money. I paid her a five hundred franc note (American). I asked her if she wanted to ride back but she said "No" and she walked away. * * * I did not rape her but she voluntarily had intercourse with me for money" (Pros.Ex.A).

4. Evidence for defense:

After his rights as a witness were explained to him, accused elected to testify (R45). His testimony (R46-52) was substantially in accordance with his pre-trial statement which he testified was voluntarily and willingly given (R50). He denied the use of any force or threats by either himself or Sokolowski (R48-49), and testified that to all appearances prosecutrix freely consented.

Sokolowski likewise testified that no force or threats were used and that the prosecutrix, to all appearances, fully and freely consented (R52-61)--

> "She kept on saying 'oui' and nodding and giggling. She didn't resist any" (R55)

When he took her to the blanket, she removed her panties (R56) and

> "I took a rubber out and put it on my penis and was going to put it in her but she kept her hand on it and I couldn't do it so I laid her over on the side

and took my rubber and threw it away. She was playing with my penis and pointing and making motions and she took it in her mouth and she worked a little bit. I didn't want to discharge in her mouth so I took it out. Then I discharged in her hand" (R55).

Finished, he gave her some money (R55). He did not look at the prosecutrix and accused when they were together (R58).

The investigating officer testified he had spoken French since he was four years of age. The French word for "rape" was "viol". The French word "abuser" means exactly the same as it does in English. Nelson made a statement to him which was substantially the same as that made to the "CID" agent. He interviewed the prosecutrix. She was horrified at the penalty imposed by the military law for rape and said that since she was not pregnant she thought "They should merely be sent to the front or something" (R42-45).

Accused's company commander testified he talked to CID agent Brown who requested him not to see accused or Sokolowski until they had made statements. As he recalled, Brown further "said that he was going to hang the boys" (R65-66).

Accused further testified that he was 29 years of age and divorced. He entered the military service in November 1941 and came to Ireland in February 1942. From Ireland he went "to England, Africa, all through the African campaign, and from there to Salerno to Venafro, to Anzio and from Anzio we came to France." He had never been convicted in either civilian or military life for a crime or offense. He was a cook. He had been awarded the "Good Conduct Ribbon, Pre-Pearl Harbor, and six battle stars" (R46-47,70). Sodomy was common among soldiers who had served in Africa and Italy (R49).

Accused's mess sergeant, first sergeant, company executive officer, company commander, battalion chaplain and battalion commander testified as to his good reputation for truth, veracity, decency and chastity (R61-70). The company executive officer further stated he would like to have accused returned to the company even if he had admitted to sodomy.

5(a). A defense witness testified that Agent Brown, one of the prosecution witnesses, stated "he was going to hang the boys." It was the province and duty of the court to determine the credibility of the witnesses and the weight, if any, to be given their testimony (CM 158027, Dig.Op.JAG 1912-40, sec.395 (56) p.237; CM ETO 817, Yount; CM ETO 12758, St. George).

(b) In his statement to the "CID" agent and in his testimony

accused frankly admitted to sodomy and carnal intercourse with the prosecutrix. The sole question presented is whether the carnal knowledge was had of the prosecutrix forcibly and feloniously against her will. While the prosecutrix testified she did not resist accused other than to hold her legs tight, she further testified that she did not hit him because "he would have hit me too," that he hit her on the legs in order that she open them, and that she was afraid of Sokolowski's pistol. The slappings and threat prosecutrix had undergone at the hand of Sokolowski, accused's companion, may well have lead her to believe resistance was futile, if not dangerous. While accused and Sokolowski denied that prosecutrix was either struck or threatened with a pistol, the court saw fit to believe the prosecutrix. Accused was present when Sokolowski struck and threatened the prosecutrix. Knowing of this he nonetheless struck her upon the legs forcing her to open them. Her resistance, though slight, was sufficient for accused to know she was not consenting to intercourse. The prosecutrix made prompt complaint to her mother who testified to her disheveled condition upon arriving home. Bruises were observed upon her the next day by a "CID" agent. The Board of Review is of the opinion that the record of trial supports the findings of guilty (CM ETO 11589, Sokolowski).

6. The charge sheet shows that accused is 29 years one month of age and that he was inducted without prior service, 17 November 1941 at Fort Devens, Massachusetts.

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

8. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rapd by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567); and also upon conviction of sodomy by AW 42 and Section 22-107, District of Columbia Code (CM ETO 3717, Farrington and the authorities therein cited). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II,par.1b(4), 3b).

BR Sleeper Judge Advocate

(On Leave) Judge Advocate

B K Newman Jr Judge Advocate

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

BOARD OF REVIEW NO. 1

22 JUN 1945

CM ETO 11608

U N I T E D S T A T E S	)	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Corporal JESSE J. HUTCHINSON (39620819), Company C, 334th Engineer SS Regiment	)	Trial by GCM, convened at Mannheim, Germany, 10 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

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 Corporal Jesse J. Hutchinson, Company C, 334th Engineer SS Regiment, did at Karlsruhe, Germany on or about 20 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Frau Elisabeth Dimmig.

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

Specification: In that * * * did, at Karlsruhe, Germany, on or about 20 April 1945, unlawfully enter the dwelling of Frau Elisabeth Dimmig, with intent to commit a criminal offense, to wit, rape, therein.

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

3. The credible testimony of the victim of the alleged crimes established that, at the time and place alleged, accused entered her dwelling without authority in the company of four Moroccan soldiers and that on three separate occasions he had sexual intercourse with her by force and without her consent. As there was no motion by the defense to require the prosecution to elect upon which act of intercourse it would rely in its proof of rape, it will be assumed on appellate review that the prosecution elected to stand on the first offense shown by the evidence (CM ETO 492, Lewis; CM ETO 7078, Jones; CM ETO 12162, Grose). The victim's testimony showed that accused, with the aid of the four Moroccans, forcibly prevented her from escaping from her room, that he beat her when she screamed, tore off her clothing, engaged in intercourse with her by violence and against her continuing protest and resistance and permitted each of the other soldiers to have intercourse with her. Her testimony was corroborated by the testimony of a neighbor that accused pursued her to the neighbor's residence in the same building and struck her face, by testimony of soldiers (to whom she complained shortly thereafter) that she was excited and hysterical and that her room had been plundered, and by medical testimony that her head, thighs and legs were bruised and her eyes discolored.

Accused in his testimony denied having any intercourse with her until the Moroccan soldiers had left the scene and stated that thereafter she willingly had sexual connection with him. His denial of the first act of intercourse created a clear issue of fact for the court, whose determination in its findings of guilty is supported by clear evidence and will not be disturbed upon appellate review (CM ETO 11376, Longie, and authorities therein cited).

Prosecution's evidence, and accused's own testimony that he followed the other soldiers into the victim's dwelling after they broke the door thereof, establish his guilt of housebreaking, and the subsequent rape is evidence of his intent to commit the same at the time of the unlawful entry (CM ETO 4589, Powell, et al; CM ETO 6193, Parrott,

et al). The denial of the defense motion for findings of not guilty of Charge II and Specification was proper (MCM, 1928, par.71d,p.56).

The question of accused's intoxication and the effect thereof upon the criminal intents involved in the offenses constituted issues of fact for the sole determination of the court, whose findings of guilty will not be disturbed, in view of the substantial evidence in support thereof, including particularly accused's clear recollection in his testimony of the events at the time in question (CM ETO 12662, McDonald; CM ETO 3859, Watson and Wimberly).

4. The charge sheet shows that accused is 29 years 11 months of age and was inducted 11 October 1943 at Butte, Montana, to serve for the duration of the war plus six months. He had no prior service.

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

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

_____ 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

2 JUN 1945

CM ETO 11619

U N I T E D S T A T E S	)	V CORPS
	)	
v.	)	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post in the vicinity of Pilsen, Czechoslovakia, 17 May 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for nine years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class RICHARD R. THOMPSON (16049405), Battery B, 186th Field Artillery Battalion	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private First Class Richard R. Thompson, Battery B, 186th Field Artillery Battalion, did, at or near Cernice, Czechoslovakia, on or about 9 May 1945, without proper leave, absent himself from his organization, station and place of duty, and did remain absent therefrom without proper leave until he was apprehended at Pilsen, Czechoslovakia, on or about 14 May 1945.

He pleaded guilty excepting the words in the Specification "he was apprehended at Pilsen, Czechoslovakia", and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absences without leave for three

and five days respectively, breaking restriction and failure to obey an order in violation of the 61st and 96th Articles of War respectively. 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 nine years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The Board of Review has treated the record of trial as being forwarded for action pursuant to Article of War 50½.

3. The evidence is clear and convincing beyond reasonable doubt that accused was absent without leave from his organization at its bivouac area near Cernice, Czechoslovakia from 9 May 1945 to 14 May 1945. He was apprehended on the latter date at Pilsen, Czechoslovakia by the first sergeant of his battery. The allegations of the Specification were therefore fully proved.

4. The record of trial was not transmitted pursuant to paragraph 3, Article of War 50½, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations for examination by the Board of Review in his office, but without such examination the approved sentence was promulgated on 18 May 1945 by General Court-Martial Orders No. 37, Headquarters V Corps. Apparently, the reviewing authority acted on the assumption that he was authorized to order execution of the sentence without appellate review by the Board of Review. In this respect he was in error because the sentence was not

> "based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty" (Par. 3, AW 50½).

Accused by his plea specifically excepted the allegations of the Specification

> "he was apprehended at Pilsen, Czechoslovakia."

and thereby left the burden upon the prosecution to prove such excepted allegation beyond reasonable doubt. The substance of the excepted phrase affected directly the enormity of accused's offense and would undoubtedly influence the court in adjudging the sentence. By military usage and tradition a voluntary termination of a period of absence without leave by a recalcitrant soldier is viewed with favor. Contrawise his return to military control involuntarily and under compulsion works to his de-

triment before a court-martial. Consequently, the findings of guilty were not "based solely upon findings of guilty of a * * * specification * * * to which the accused has pleaded guilty". The issue of the General Court-Martial Order was premature and wholly void. It should be nullified and recalled.

5. The charge sheet shows that accused is 33 years four months of age. He enlisted in the military service on 19 February 1942 at Fort Sheridan, Illinois, to serve for the duration of the war plus six months. He had prior service in Battery B, 120th Field Artillery, from 10 January 1929 to 9 January 1932.

6. 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.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

21 JUL 1945

CM ETO 11621

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, 31 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates First Class RUDOLPH TRUJILLO (37346776), JETER B. CAMBRELL (34658226), and RICHARD D. PRICE (34674599), all of 822nd Military Police Company	)	

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:

TRUJILLO

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Rudolph Trujillo, 822 Military Police Company, did, at Suchteln, Rheinland, Germany, on or about 5 March 1945 forcibly and feloniously, against her will, have carnal knowledge of Greta Wirtz.

Specification 2: (Disapproved by Reviewing Authority).

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

Specification 1: In that Private First Class Rudolph Trujillo, 822d Military Police Company, did, to the prejudice of good order and military discipline at Suchteln, Rhine Province, Germany, on or about 5 March 1945, unlawfully enter the curtilage of an enemy civilian at 25 Hochstrasse, Suchteln, Rheinland, Germany, and did therein commit acts of violence and disorder, by threatening the civilian occupants with show of arms, and by unlawfully having sexual intercourse with Greta Wirtz and with Anna Stellbrink, German civilians, all to the scandal and disgrace of the military service.

Specification 2: (Findings of Not Guilty).

GAMBRELL

Identical charges and specifications, except for appropriate transposition of names, and identical disposition of Specification 2 of the Charge and Specification 2 of Additional Charge.

PRICE

Identical charges and specifications, except for appropriate transposition of names, and identical disposition of Specification 2 of the Charge and Specification 2 of Additional Charge.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, each was found not guilty of Specification 2 of the Additional Charge preferred against him and guilty of the remaining specifications and both charges. No evidence of previous convictions was introduced as to any of accused. 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, as to each accused, disapproved the findings of guilty of Specification 2 of the Charge preferred against him, approved as to accused Gambrell and Price only so much of the findings of guilty of Specification 1 of the Additional Charge as found the accused guilty, at the time and place alleged, of unlawfully entering the curtilage of an enemy civilian and therein committing acts of disorder by unlawfully having sexual intercourse with Greta Wirtz and Anna Stellbrink, German civilians, to the scandal and disgrace of the military service, and as to each accused 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 for action pursuant to Article of War 50½.

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

On 5 March 1945 the three accused, all members of the military police, entered a curtilage, or courtyard, in Suchteln, Germany, which town had been captured by the American troops a few days before (R13,19, 45). From the curtilage they entered a house at Hochstrasse 25, occupied by several German civilians, including Greta Wirtz, a single woman of 37 years (R18,19).

According to her testimony, when accused entered this house, each carried a carbine. Trujillo also carried a revolver in a shoulder holster. Trujillo immediately pulled out his revolver, pointed it at her, motioned for her to go with him, and pushed her into a dark room in a store in the same building. He kept the revolver in his hand until they reached the room, then lifted her skirt and took down her pants. She tried to get away but he put his hand over her mouth and struck her on the shoulder with his open hand. She called "Rosa", and in German constantly begged him to leave her alone. He sat her down on a large box, pulled her legs apart, and several times had sexual intercourse with her. She was afraid of Trujillo and was afraid that if she resisted he would shoot her. He kept the carbine on his shoulder all of the time. After the acts of intercourse he talked to the other accused and held her on the box until accused Gambrell came in front of her. She tried to arise but Gambrell threw her over backwards. She stroked his cheek as a sign that he should let her go. He pushed her legs apart. She resisted him, but he held her hands on her back. After she had hit her head on a shelf, he had intercourse with her. She begged as she "neither had the push or the courage because they had threatened me". She attempted to push him away by touching him lightly. He made an effort to keep her on the box. Accused Price then came up. She begged him to let her go. He tried to make her touch his sexual organ, held her tight, lifted her upon a table, threw her down upon it, and had intercourse with her. She tried to get up and to resist but she no longer had any strength. She had never had sexual intercourse before (R18-42).

A German doctor testified that, on or about 6 March 1945, he made a physical examination of Greta Wirtz, which revealed that the defloration of the hymen had taken place as the result of sexual intercourse. In his opinion, this defloration had occurred not very long prior to the examination, possibly half a day or a day. According to his testimony, her sexual organ was still bleeding at the time of the examination (R42,43).

Anna Stellbrink, a house helper at Hochstrasse 25, testified that the three accused came to the house and engaged in sexual intercourse with her forcibly and against her consent. After accused had gone, she and Greta Wirtz washed themselves and she noticed that there was blood on Greta's towel (R43-59).

After accused had left the house, Greta Wirtz was crying and appeared to be very much excited (R63-65).

4. Each accused, after his rights as a witness were explained to him, elected to make a sworn statement.

Trujillo testified that he and the other accused entered the store for the purpose of securing some stove pipe. They entered a room off a hall and found several German civilians, among whom was Greta Wirtz. At this time he had his pistol in his hand, then put it in his holster. He beckoned to her to come to the store with him, though he did not know why he did so. They went into a little room where he began to make advances. When he put his arm around her, she put hers around him. She removed her pants and opened her legs. They then engaged in intercourse. She made no outcry and stroked his hair. She made no attempt to get away. After the intercourse she saw Gambrell standing behind him about ten feet away. Later he had intercourse with Anna Stellbrink (R67,71-74,80-83).

Gambrell testified that after they had entered the house, Trujillo motioned for Greta Wirtz to follow him. Later he saw Trujillo in the room buttoning his pants. Greta Wirtz was sitting on a table. He had intercourse with her. She pulled him down and did not try to push him away. He then went downstairs, where he found Anna Stellbrink, with whom he also had sexual intercourse (R88,89).

Price testified that, while he and the other accused were in the room with the German civilians, he told Trujillo to put away his pistol, and Trujillo did so. He, Price, first had sexual intercourse with Anna Stellbrink. Then he went upstairs to a room where he saw Greta Wirtz standing beside a table. He went up to her and put her arms on his shoulders. She then lay down on the table and he had intercourse with her. She made no resistance (R98,101,102,108,109).

The sole witness for the defense, other than accused, was their commanding officer, who testified that Trujillo and Gambrell had been "very good" soldiers and Price a "pretty good" soldier. He also testified that the town of Suchteln had been conquered about three days prior to 5 March 1945, and that his men had been warned many times that this was enemy territory and that they should be careful (R109,110).

5. a. Specification 1 of the Charge:

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

The evidence is clear and undisputed, and each accused on the witness stand admitted, that he had sexual intercourse with Greta Wirtz at the time and place alleged. The sole question raised is whether or not the acts of intercourse were against her will. The proof showed that the three accused, all members of the military police, entered the house of a German civilian about three days after the capture of the city and that each carried a weapon. Incriminating evidence as to rape rests entirely on the testimony of enemy witnesses. It is that one of accused brandished a pistol at the occupants of the house. Furthermore, the victim was, according to an enemy doctor, a virgin prior to accuseds' acts, and she was still bleeding when he made a medical examination the next day. She testified that the acts of intercourse were done forcibly, by terrorization and against her will, by the use of physical force and the threatened use of firearms. Each accused soldier testified that she made no resistance, protest or outcry, and cooperated in the intercourse with him. Thus a question of fact was presented for the exclusive determination of the court, whose findings of guilty are supported by evidence which the Board of Review upon appellate review is powerless to disturb (CM ETO 11267, Fedico and authorities cited therein; CM ETO 12662, McDonald).

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

The fact that the conviction of these accused of the crime of rape is dependent upon the testimony of enemy aliens whose homeland is occupied by American military forces presented to the court the serious responsibility of determining their credibility.

It is to be presumed that the court in deliberating upon this question took into consideration the motives which the witnesses might possess to secure the conviction. The court's conclusion cannot be treated casually or lightly by the Board of Review.

b. Specification 1 of the Additional Charge:

The court could properly infer from the evidence, particularly that of the subsequent conduct of accused on the premises, that the original entry into the curtilage (enclosed courtyard) was unlawful as alleged (CM ETO 8450, Garries and Jackson; CM ETO 11608, Hutchinson).

Concerning the acts alleged after entry, the evidence is uncontradicted that each accused had sexual intercourse with Greta Wirtz and with Anna Stellbrink. Each accused testified that he had such intercourse, which was unlawful with enemy citizens under existing orders whether or not force was used. In addition, there was substantial evidence that accused Trujillo threatened the civilian occupants as alleged. The circumstances proven were such as to bring discredit upon the military service. Thus the court's findings of guilty as to each accused, as approved by the reviewing authority, will not be disturbed upon appellate review.

6. The charge sheets show the following: accused Trujillo is 21 years four months of age and was inducted 29 May 1943 at Fort Logan, Colorado; accused Gambrell is 21 years one month of age and was inducted 5 June 1943 at Fort Jackson, South Carolina; and accused Price is 21 years two months of age and was inducted 27 May 1943 at Fort Bragg, North Carolina. Each accused was inducted to serve for the duration of the war plus six months. None had prior service.

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

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

BOARD OF REVIEW NO. 1

24 AUG 1945

CM ETO 11637

U N I T E D S T A T E S	)	90TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Merkers, Germany, 10 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class JAMES F. MONTI (31461721), Company I, 357th Infantry	)	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class James F. Monti, Company I, 357th Infantry, did, in the vicinity of Pachten, Germany, on or about 15 December 1944, while attached to a combat patrol, misbehave himself before the enemy by failing to advance with said patrol, against the enemy, when it was ordered forward by its patrol leader, Staff Sergeant Stanley O. Pingel, Company I, 357th Infantry.

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

Specification 1: In that * * * did, without proper leave, absent himself from his organization at Bigonville, Luxembourg from about 7 January 1945 to about 13 January 1945.

11637

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Bastogne, Belgium from about 21 January 1945 to about 31 January 1945.

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

Specification 1: In that * * * having been duly placed in arrest at Pachten, Germany on or about 15 December 1944, did, at Bigonville, Luxembourg on or about 7 January 1945, break his said arrest before he was set at liberty by proper authority.

Specification 2: (Finding of not guilty).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications except Specification 2 of Additional Charge II, of which he was found not guilty. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. On the early morning of 15 December 1944, across the Saar River near Pachten, Germany, an eight man patrol of which accused was a member, was assigned to rescue an American platoon in a pillbox surrounded by the enemy. One attempt, in which accused participated, failed. Reorganization of the patrol was had in a pillbox where, in accused's presence, telephoned arrangements for an artillery barrage and the lifting thereof coordinated in time with the second sally, were made by the patrol leader. Enemy small arms and artillery fire was being received. The patrol leader gave the order "I company patrol, let's go" and led his men from the dugout and against the enemy. Accused never left the dugout (R7-10).

Extract copies of competent morning reports established the absences without leave for the periods alleged, and also the status of accused as in arrest on 7 January 1945 (R19;Pros.Ex.s.1-6). On 7 January accused was told personally that he was under arrest, but left his organization at Bigonville, Luxembourg, while a guard in the room with him dozed (R12-13). He absented himself again at Bastogne, Belgium, on 21 January during an ordnance inspection (R17-18).

4. Accused, after his rights as a witness were explained to him, elected to make an unsworn statement in pertinent part as follows:

> "Well on that case when we were in the pill box after we first returned from the patrol and got into this discussion about the small amount of men we had there going on such a patrol. We didn't know how much power the enemy had there. We were discussing more fire power and more help. The Sergeant just stuck his head in; he said let's go. There were four of us who remained there and we didn't know whether the patrol went on until he came back and said we were going back to our own pill box. The mission wasn't completed that night, surrounded, for that pill box; because we could see from where we were when they blew up the pill box.
>
> And when I was brought back to the company all I knew the runner took me to the squad leader and as far as I could hear - said keep an eye on me. As far as any officer saying I was under arrest, no one told me I was under arrest" (R19-20).

No other evidence was introduced in his behalf.

5. The proof makes a clear case of a capital offense of cowardice before the enemy under Article of War 75. Accused not only failed to lend his needed aid and support to those brave enough to perform the mission, but failed as well his comrades who were surrounded and in peril. Every element of the requisite proof is present (CM ETO 3453, Kuykendoll; CM ETO 4074, Olsen; CM ETO 13458, Stover). There is likewise no question as to the unauthorized absences and the breach of arrest, as alleged in Specifications 1 and 2 of Additional Charge I and Specification 1 of Additional Charge II.

6. The charge sheet shows that the accused is 32 years 11 months of age and was inducted 4 April 1944 at Fort Devens, Massachusetts to serve for the duration of the war plus six months. He had no prior service.

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

11637

8. The penalty for misbehavior before the enemy in time of war is death or such other punishment as a court-martial may direct (AW75). 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).

[redacted] Judge Advocate

[redacted] Judge Advocate

Donald R. Carroll Judge Advocate

...ions
APO 887

OF REVIEW NO. 1

26 MAY 1945

ETO 11681

UNITED STATES v. Technician Fourth Grade KALSEN HENNING (19194998), 68th Quartermaster Base Depot	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at San Antonious, Belgium, 30 April 1945. Sentence: Dishonorable discharge, 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

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. There was no entrapment. Accused was one of the originators of the scheme to steal Government property. Page and the agents of the Criminal Investigation Department entered the conspiracy after it had been conceived (CM ETO 8619, Lippie et al).

3. 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. Franklin Riter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

11681

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

BOARD OF REVIEW NO. 3

18 AUG 1945

CM ETO 11683

U N I T E D S T A T E S	)	NORMANDY BASE SECTION COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private First Class JAMES BEAL (34416464) and Private JAMES McCOY (33375879), both of the 4163 Quartermaster Refrigeration Company.	)	Trial by GCM, convened at Cherbourg, Manche, France, 19, 20 April 1945. Sentence as to each: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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 First Class James Beal, 4163 Quartermaster Refrigeration Company, and Private James McCoy, 4163 Quartermaster Refrigeration Company, acting jointly, and in pursuance of a common intent, did, at Cherbourg, Manche, France, on or about 8 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mme. Marthe Nicolle.

Each 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. As to Beal, no evidence of previous convictions was intro-

duced. As to McCoy, evidence was introduced of two previous convictions by summary court for absence without leave of 30 minutes in violation of Article of War 61, and for entering a house of prostitution and violation of curfew hours in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for the period of his natural life. As to each, the reviewing authority 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. Evidence for prosecution:

On 8 March 1945, Mme. Marthe Nicolle, a widow 42 years of age, employed at the arsenal at Cherbourg, France, went there at 1800 to see her sister. About 1830 when leaving (R7) she was asked by Private Theodore R. Williams, 1542nd Labor Supervision Company, the guard on duty at the gate, if she wanted some soap. She did and followed him into a long shed nearby where he gave her some (R8,14,40, 43-44,51,53,58). According to Williams, he then had intercourse with her (R44,51,53,60). However, the prosecutrix denied this (R18,39), as did Williams in a pretrial statement (R50,59,60,62). Shortly after they entered the shed (R15,40,47,55) Beal came in and was soon followed by McCoy (R44). Beal "clicked the latch" on his carbine and prevented the prosecutrix' leaving (R45,48,49,51,52). According to the prosecutrix, Beal and McCoy threatened Williams with rifles and knives (R8-9). Williams departed. Beal showed the prosecutrix a rubber, asked her for "Zig-zig", put his rifle in the corner, placed his mackinaw on the floor, threw her on the coat and, despite her cries, blows, and struggling, had carnal knowledge of her (R9,17-22,24-25, 27). During this time McCoy seems to have walked to and placed himself at the front of the building (R17,20,22) "to see if anyone was coming" (R20). When Beal finished the prosecutrix got up (R9,23), whereupon McCoy came to her, choked her when she screamed, threw her to the floor and, despite her cries and struggling, had carnal knowledge of her (R9,29-30). Beal tried to have intercourse again but McCoy told her to leave and said to her, "no police" (R11,32). She departed and met two Frenchmen to whom she

complained. One told her to wait until the morrow to report the matter to the police for she was then too upset (R22,32-34,37). She further testified that she was struck (R19) and choked (R29-30); that her nose was scratched (R36), her breast and thigh bruised (R31), her hair disheveled (R11), and her clothes torn (R31); and that she was menaced with their weapons (R9-10,18,21,32) and feared for her life (R22,23,25). Neither used a rubber.

After Williams left the prosecutrix with accused, he returned to his post about 150 yards away. He heard no screams (R59-61). McCoy came out in about five minutes. "He couldn't have done anything in that small time, I don't think." Beal followed McCoy shortly. "They said they didn't have anything to do with the woman because she was crying." Beal also said, "The woman wasn't on your post as far as you know". The prosecutrix left with some Frehchmen (R49,52).

Accused's company commander testified they were identified by a woman in an identification parade held 9 March 1945. The woman also spoke to Williams. Thereafter Williams was told the woman claimed to have been raped by accused after "they had run him off with a knife and gun". Williams said "that was all true" (R62-64).

4. Summary of evidence for defense:

M. Bunamy saw prosecutrix that night about 1835 outside the gate. She was crying. Her back was full of dirt and her hair in disorder. She said she had been raped by two colored soldiers (R72-74). The same evening prosecutrix told her sister she had been assaulted by two colored soldiers. Her clothes were torn. She was crying. She was scratched on the nose and arm and bruised on the thigh (R70-72). The next morning the prosecutrix' foreman heard rumors of the incident. He inquired of the prosecutrix who said she had been assaulted by two colored men, one of whom succeeded in raping her and the other of whom was prevented from doing so by her struggles and pants (R67-70). She told essentially the same story to the chief of her department who also testified to her good reputation (R65,66,91-92).

The next day prosecutrix was examined by a medical officer. She was bruised on both arms and scratched between the breasts. However, there were no bruises on her legs or thighs. Vaginal smears showed the existence of gonorrhea, but no sperm. There was not any semen which

"probably would have * * * oozed out by" the time of his examination almost 24 hours later. She was "probably" suffering from gonorrhea prior to the alleged rape. Considering her condition, "the probabilities" were that men having intercourse with her would have contracted the disease (R92-94). Accused were examined 19 March 1945 by a medical officer who found no clinical evidence of any venereal disease (R90).

One soldier testified that the prosecutrix solicited him for soap in exchange for sexual intercourse (R85,88). Another soldier testified that prosecutrix not only solicited him but had intercourse with him in exchange for soap (R76,81). Still another soldier testified to having sexual intercourse with her about five times for such favors as candy, cigarettes, and soap (R115,116,121).

After his rights as a witness were explained to him (R90-91), each accused elected to testify.

Beal testified that about a week before the incident the prosecutrix asked him for a broom in exchange for intercourse. Later she had a box half full of soap (R96). On the evening in question he was on guard when Williams called and asked if he wanted any "zig-zig". He went into the soap room and saw Williams standing against the prosecutrix. "He was getting his 'zig-zig' then" (R97,98,106). When Williams finished he asked her for 'zig-zig'. She said "No." She was crying. He did not know why (R97,99,101,105). He showed her 200 francs and she asked about a rubber. When he showed her a rubber she put it on his penis (R97,100-103). She then backed up against the boxes. Before he could have intercourse, McCoy came up and asked if she would "zig-zig". She said, "No" (R97,102,103). McCoy said, "You done fucked up". He replied, "No, I haven't fucked up, Teddy [Williams] fucked up" (R97,99). He got scared and left without having intercourse (R97,99,103,106).

McCoy testified that he had seen the prosecutrix before and heard "you could give soap, or something, and * * * get zig-zig". On the evening in question he saw her enter the archway so he walked to the soap room. Williams came out and said "Beal's fucked". He entered and saw Beal and the prosecutrix standing behind some boxes. "I see he wasn't making any headway and I came back and said 'will she take my money?'" (R108,113). She was crying (109,110). He told Beal, "Get out of here, you done fucked up". Beal

replied, "No, Teddy fucked up" and left. He then handed prosecutrix some bread which she threw away (R108,110). She then departed in front of him (R114). While upon cross examination McCoy quoted Beal as saying, "I am going to fuck her again" (R110) and "I've done fucked her" (R111), upon direct examination he said "It isn't true because for the time he couldn't fuck". McCoy denied having intercourse with the prosecutrix or seeing Beal have intercourse with her (R113).

McCoy further testified that although he could have intercourse, he "had something wrong with my penis /what you call skin on my penis/ and if I did anything it would show * * *that cheese and skin would come off". He tried to show his penis to a "CID" lieutenant "when they picked me up" but the lieutenant would not look at it. That was his only chance to prove himself (R109). A "CID" agent confirmed that accused wanted to show him his penis (89).

5. The testimony of the prosecutrix was in effect, that each accused forcibly and feloniously had carnal knowledge of her against her will. She made a prompt complaint to M. Bunamy upon emerging from the building and to her sister later in the evening, each of whom observed her disheveled and upset condition. Williams testified to Beal's "clicking" his carbine and detaining the prosecutrix. Accused were jointly charged with a single rape. "Two persons cannot be jointly guilty of perpetrating a single joint rape but all persons present aiding and abetting * * * are guilty as principals equally with the actual perpetrator of the crime" (CM Nato 643, III Bull. JAG, pp.61-62). From the circumstances attending the offenses and from the prosecutrix' testimony that both accused threatened Williams with a knife and rifle and that while Beal was raping her McCoy went to the front of the building as if "to see if anyone was coming", the court was justified in finding that accused were acting jointly and in pursuance of a common intent, the joinder therefore was not improper (CM Nato 1242, III Bul. JAG 62). That the prosecutrix was or may have been "a woman of easy virtue who sold the favors of her body", as the defense sought to establish, did not constitute a defense. "A prostitute has the right to preserve the sanctity of her body when she so elects". Substantial evidence supports the findings (CM ETO 4589, Powell, et al).

6. The charge sheet shows that Beal is 23 years seven months of age and was inducted, without prior service, 1 October 1942 at Fort Benning, Georgia; and that McCoy is 32 years six months of age and was inducted, without prior service, 16 September 1942 at Fort George G. Meade, Maryland.

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

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

_____ Judge Advocate

(ON LEAVE) Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

5 JUL 1945

CM ETO 11693

UNITED STATES	)	1ST INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Selb, Bayern, Germany, 4 May 1945.
	)	
Private First Class JOSEPH P. PARKE (12022214), Company M, 16th Infantry	)	Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France.
	)	
	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Joseph P. Parke, Company M, 16th Infantry, did at Hamich, Aachen, Rheinprovinz, Germany, on or about 18 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at

Cherbourg, France, on or about 25 November 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. 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 30 years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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 Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 89, Headquarters 1st U. S. Infantry Division, U. S. Army, 10 May 1945.

3. The original morning reports of accused's company, introduced in evidence, were dated 23 November and 30 November 1944. They were signed by the regimental personnel officer, and contained an entry which showed accused "MIA" [missing in action] as of 18 November, corrected in the latter report to read "Fr dy to AWOL 1330 hours as of 18 Nov 44" (R12-17; Pros.Exs.A,B). Return to military control on 25 November 1944 at Cherbourg, France, was shown by stipulation.

Evidence other than the morning reports was in substance:

Accused's platoon engaged in action under heavy enemy fire on 17 November, and withdrew to the company command post to reorganize. He was present when the men were told not to leave the area and of the probable move back into line that night. He was also present at a roll call the next day, but absent at a later roll call at 2000 hours on 18 November. His squad leader testified he did not again see accused, who had no permission to be absent, until the time of trial (R7-10). The following cross-examination then took place:

"Q At the time the second roll call was made was any check made at the medics to see if he was there?
A I couldn't say for that, sir; I wouldn't know.

Q Now, if the accused had been given permission to leave the area, would you know about that?
A No, sir, I wouldn't; I was just the first gunner in the platoon there.

* * *

Q Sergeant Erickson, do you recall November 18th when the accused allegedly went absent? Is it clear in your mind, the details of that morning?
A I couldn't state that, sir.

Q I will reword it. On the morning of November 18th can you state whether or not the accused had been to the medics or whether he was sick to your knowledge?
A I couldn't state that, sir.

Q You cannot state that?
A No, sir" (R10-12).

4. The defense proved that accused was awarded the Distinguished Service Cross, and the order therefor revoked because of a recommendation for the Congressional Medal of Honor. These honors were due to the following action on 6 June 1944: His company was forced out of the town of Colleville Sur Mer, Normandy, France, by an enemy counter-attack. Accused and a comrade remained in the town and, from the cover of a building, with rifle and machine-gun fire for four hours held at bay several hundred of the enemy who attacked with support by a tank. The enemy employed heavy, small arms and mortar fire and barrages of artillery fire, some 300 shells of which fell in accused's immediate vicinity and almost entirely demolished the building.

> "So effective was his fire that the main body of his unit was soon able to return, convert the enemy attack into a complete rout and capture the strategically important town" (R18-23; Def.Exs.A-E).

Further testimony was that accused had participated in all action since joining Company M in July 1944 as an excellent soldier who had never shirked duty (R11).

Accused, after his rights as a witness were fully explained to him, elected to remain silent (R24).

5. The testimony aliunde the morning reports established accused's absence during the period alleged, for although the squad leader did not testify as to his own presence in the company during this time when he did not see accused, he described events occurring therein. Except for the morning reports, there is no competent evidence that the absence was without leave, an absolutely essential element of the offense of desertion.

It is apparent that the legal sufficiency of the findings and sentence is wholly dependent upon the facts supplied by the entries in the morning reports. These were signed by the regimental personnel officer. None was signed by

> "the commanding officer of the reporting unit or in his absence by the officer acting in command"

as required by AR 345-400, 1 May 1944, section VI, paragraph 42. The presumption of regularity, viz, that the morning report was signed by the authorized officer, as applied in CM ETO 5234, Stubinski, cannot arise in this case because the morning reports were signed by an officer not authorized by the Army Regulations to sign the same and were therefore not admissible in evidence. They possessed no efficacy as official writings (MCM, 1928, par 117a, p.121; CM ETO 7686, Maggie and Lewandoski; CM ETO 6107, Cottam and Johnson). Attention is particularly invited to the fact that paragraph 42, Army Regulations 345-400, 3 January 1945, was not in effect on the dates of these morning reports. Likewise, the directive of the Commanding General, European Theater of Operations, contained in Circular 119, European Theater of Operations, 12 December 1944, section 4, was not in effect. Were either applicable, the morning reports would have been admissible.

Nor will absence without leave be inferred from the proven surrender of accused at a distant station. In CM 227831 (1942), Gregory, 15 B.R. 375, I Bull. JAG, p.359, the evidence of absence without leave consisted of entries contained in an inadmissible extract copy of the morning reports of accused's organization. It was stipulated that accused surrendered in New York, New York, about 12 July 1942 in uniform. The Board of Review in holding the record of trial legally insufficient to support the findings and sentence, stated that the only proof of absence without leave consisted of the morning report entries (Cf: CM ETO 527, Astrella).

Since the morning reports were not admissible in evidence, since guilt will not be inferred from surrender, and since the essential element of lack of authority to be absent was therefore not proven, there is no evidence in this case whereby the accused can be said to have been absent without leave or to have had the requisite intent to avoid existent or imminent hazardous duty.

6. The charge sheet shows accused is 22 years, three months of age and that he enlisted 14 January 1941 at New York, New York, to serve for three years. (His service period is governed by the Service Extension Act of 1941). He had no prior service.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(Findings and sentence vacated. GCMO 268, ETO, 6 July 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 11719

26 MAY 1945

UNITED STATES v. Private First Class MELBURN A. TUCKER (39451944), and Private JAMES WILSON (38181017), both of 762nd Chemical Depot Company (Aviation)	AIR TECHNICAL SERVICE COMMAND IN EUROPE Trial by GCM, convened at AAF Station 389, APO 744, U. S. Army, 2 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor, TUCKER for three years, and WILSON for one year, six months. Loire Disciplinary Training Center, Le Mans, France.

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

1. The record of trial in the case of the soldiersnamed above has been examined by the Board of Review and found legally sufficient to support the sentences.

2. Prosecution's evidence proved beyond reasonable doubt the commission of the unlawful acts by two American soldiers at the time and place alleged. The question whether accused were sufficiently identified as the two offenders was for the determination of the court. The evidence presented by the defense in support of the pleas of alibi at most created an issue of fact. The findings of the court thereon will not be disturbed on appellate review if supported by competent substantial evidence. A critical examination of the evidence compels the Board of Review to conclude that the evidence established in a substantial manner the identity of the accused as the malefactors (CM ETO 3200, Price; CM ETO 3837, Bernard W. Smith).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

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

BOARD OF REVIEW NO. 3

25 AUG 1945

CM ETO 11725

UNITED STATES	)	XII CORPS
	)	
v.	)	Trial by GCM, convened at Bayreuth, Germany, 25 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	
Private WILLIAM E. WHITFIELD (36391506), Battery A, 452nd Antiaircraft Artillery Automatic Weapons Battalion (Mobile)	)	

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: In that Private William E. Whitfield, Battery A, 452d Antiaircraft Artillery Automatic Weapons Battalion (Mobile), did, without proper leave, absent himself from his organization at Elters, Germany from about 1000B hours 7 April 1945 to about 1630B hours 7 April 1945.

CHARGE II: Violation of the 75th Article of War.

Specification: In that * * * did, while before the enemy, quit his post at Elters Germany, on or about 1000B hours, 7 April 1945, for the purpose of plundering and pillaging.

11725

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

Specification: In that * * * was, at Roedergrund, Germany on or about 1200B hours 7 April 1945, drunk and disorderly in uniform in a public place, to wit, the town of Roedergrund, Germany.

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

Specification: In that * * * did atRoedergrund, Germany on or about 1230B hours, 7 April 1945 with intent to commit a felony, viz, rape, commit an assault upon Frau Elizabeth Heng, by willfully and feloniously lifting the skirt and seizing the undergarment of said Frau Elizabeth Heng.

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

Specification: In that * * * did at Roedergrund, Germany on or about 1300B hours, 7 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Rosa Romstadt.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification of Charge I, except the words "at Elters," substituting therefor the words, "near Roedergrund," of the excepted words, not guilty, ofthe substituted words, guilty, of Charge I, guilty, and guilty of the remaining 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 asthe 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. Charges I, II and III and their specifications.

On the morning of 7 April 1945, accused and Private Richard Williams, who testified as a defense witness (R50-57), both members of the same battery gun section, were on duty near Roedergrund, Germany (R7-10,16). The corporal in charge said to every man in the section, "I don't want you men to leave, I have duties to attend to" (R11). The enemy was a distance away from their position of "probably three thousand yards although there were some enemy taken out of the woods right around us, it is kind of hard to say" (R9). A machine gunner

in the section did not "know exactly" how far they were from the enemy, but machine gun fire could be heard in woods about 300 yards away (R13,15). The mission of the gun section was to give antiaircraft protection to C Battery of the 771st Field Artillery (R9), but that day no gun was fired, no airplanes were seen (R11) and no shells were fired at anybody. None of the guns of the field artillery battalion was fired (R14). There was occasional firing "over the hill" by unidentified persons, but it was not known whether or not such fire was directed at anyone or whether or not "a lot of them were trigger happy" (R12).

At about 1000 hours, accused and Williams absented themselves without leave (R8,11,13-14,15). Both were armed and visited various houses in Roedergrund asking for girls and whiskey. They drank liquor which was given them (R21,25,33,36) and became drunk (R17,19-20,21,25, 28,30,33,40). Accused discovered some weapons at the home of the burgermeister (R20,24) who "took them down in the yard and there was a man from the village and he broke them all up" (R23). Accused fired at some chickens (R32). Both men were later returned to military control in Roedergrund (R16-17,18).

b. Charge IV and Specification:

While in Roedergrund, accused entered the home of Elizabeth Heng, pointed his rifle at her and "took" her upstairs, accompanied by her five year old son. Accused "locked the door, he pulled me on the side, he lifted up my dress and he wanted to pull my undergarments off." She "pushed him away and unlocked the door and took my little son and ran away." Accused was drunk (R28,30,32-33).

c. Charge V and Specification:

Accused also entered the home of Frau Rosa Romstadt and wanted to look at her rooms (R35). Two men, Willy Mohr and Bruno Czebruk, both of Roedergrund, came in with a sack of flour (R36,41-42,45). Accused fired his rifle at the floor (R38,43,45). He then called Frau Romstadt's attention to a bedroom and pointed a pistol at her. Another colored soldier entered, who "threw Bruno out of the room" (R36,45-46) and then threw her on the bed. He told her to lift up her dress and she "didn't want to so he tore it open, he tore everything open." Meanwhile accused was guarding the door "that Bruno shouldn't enter" (R36). The unidentified colored soldier then "raped" her while accused pulled her legs apart. She started to scream and "they" slapped her face. She kept screaming and told them they should leave her alone because she had two children and her husband was a prisoner. One of them "wanted to pull my breast out and cut it off with his knife." The unidentified one was described as "the taller one," accused "the smaller." Asked "which one raped you?" she testified, "both." Asked how many times, she replied, "the little one twice" (R36-37,38-39). Asked if accused did "actually insert his penis into you," she testified, "Yes. He stuck it

in so hard that my heart was bouncing. I thought every minute I was going to get a heart attack." She "couldn't do much resistance against two men" because "they were slapping me and laying so tight on me" (R38). Because she was screaming and "they didn't want people to know," accused pulled down the blackout curtains of a window (R39). He was armed with a small pistol and a knife with an eight inch blade--"It was a straight knife, he pulled it out of his boot" and "the knife, he always had in his hand" (R40).

Bruno Czebruk testified that after he arrived at Frau Romstadt's with the bag of flour, "the soldier shot in the hallway and I was scared." Accused "didn't do anything, just talked with his tongue," but the other soldier "laid her on the bed and with a bayonet at the forehead and at the chest" (R45). Czebruk was in the room at the time but accused took him to another one (R46,48), left a pistol there and "looked in the other room to see what the other one was doing with the lady."

The following questions and answers indicate accused then entered the room where Frau Romstadt and "the black one" were and locked the door:

"Q. What happened then?

A. Once he [accused] went to look then he came back again to look and then he locked the door and through the window I skipped.

Q. When he locked the door, which room was he in?

A. The room where Frau Romstadt was and the black one" (R46).

Czebruk also testified that Frau Romstadt "hollered and cried" (R46). She was saying, "Don't come to me, I have two children, I am sick." One of the soldiers "said in German 'figfrau,' that is a German expression for try to screw" (R49). After leaving by the window, Czebruk hid in some hay from which place he "looked through the window a long time and I didn't see anything, then I saw her." She was standing "in the threshold and then they pulled her" and he "didn't see anything then for fifteen minutes" when he again saw her running--"she didn't go through the door, she must have jumped through the window. When I saw her her hair was all tangled" (R46).

Willy Mohr testified that after he arrived at Frau Romstadt's with Bruno he stood by the outside door "about five or ten minutes." He was there "about fifteen minutesafter" when "he" fired one shot with the gun (R43) and "about a half hour I was standing altogether." He left by the window "Because I felt myself in danger" (R44).

It was stipulated by and between the prosecution, the defense and the accused that if Captain Malvin M. Coren, Medical Corps, Second Cavalry Group, Mechanized, were present and sworn, he would testify as follows: "I certify that on 7 April 1945 at approximately 1800 at this medical installation in the town of Hofbieber, Germany, physical examinations were conducted on the following individuals to ascertain the medico-legal status of rape: Mrs. Rose Romstadt was given a cursory gynecological examination, principally externally as no instruments were available for intravaginal manipulation. The exact procedure employed was to place her in lithotomy position with legs drawn up and, by use of steripads, the lips of the vagina were separated for inspection. A slight amount of menstrual bleeding was observed, which conformed to her history of the menses in its terminal phase. There was a slight abrasion on the right Labia Majora and just a minimal gelatinous exudate visible at the commencement of vaginal canal. Private William Whitfield, ASN 36391506, Battery A, 452d AAA AW Battalion stripped down for examination of his external genitalia, no visible exudate or element of discharge was found in region of penile opening or circumference of penis. Observation of his underclothing revealed no evidence of blood or seminal stains." (R67-68)

4. For the defense, Private Williams, after being advised of his rights under Article of War 24 (R51), testified that he was on duty with accused the morning of 7 April 1945 at a gun position protecting the 771st Field Artillery in case of enemy air attack. They were engaged in

> "what we call an alert, two or three men were supposed to go out and stand at the gun in case any enemy planes on their return from bombing do any strafing we are there to engage them in a fight."

Although their time on this alert was not up until 1110 hours, at about 1000 or 1015 hours (R52) he and accused went to a village and at one house asked an old man and a young boy for "schnapps." They were given two eggs (R53) which were cooked for accused at another house by a young girl. At another house, Williams asked for "schnapps" which was obtained and they started drinking. Accused looked around the house and found some rifles, a pistol and German bayonets. A small boy who could speak English explained that these had been collected in the village by the burgermeister. Williams shot through the trigger mechanism of one gun, broke it up and then continued drinking. At another house, he was given more to drink by an old lady (R54-55). He does not know which woman is Frau Rosa Romstadt. He did not have sexual relations with any women in town that day. He was getting dizzy from so much drinking and knew he "must have been going down" (R56). He did not see accused attack or touch any woman (R57).

After his rights were explained (R57-58), accused testified he was off duty on the morning of 7 April and could properly leave the

immediate area of the gun (R58). He and Williams decided to go up and "take a look into the woods." From there they decided to go to the town they could see and obtain some cognac (R59). His description of their conduct in the village was substantially in accordance with that given by Williams (R59-61). He did not attack or assault Elizabeth Heng (R62). He did not remember seeing Frau Romstadt (R61). He denied having intercourse with any women in this village (R63). He knew he was violating standing instructions when he left the gun (R64).

On cross examination, he was asked, "What did you do with the pistol you found up in the attic?" He answered,"The pistol was turned in to the 2d Cavalry." Asked, "You broke up the rifles but you kept the pistol?" he replied, "Yes,sir" (R65). He remembered clearly everything that happened that day. He was not drunk; he was just drinking (R67).

5. Under Charge II and Specification, the prosecution was required to prove that (a) accused quit his post as alleged and that he was then in the presence of the enemy and (b) that he left with the intention of plundering and pillaging (MCM, 1928, par.141a, p.156; CM ETO 5445, Dann; CM ETO 3091, Murphy, et al.)

a. Both the prosecution and the defense evidence showed clearly that accused while "before the enemy" absented himself without leave from his place of duty at the time and place alleged.

b. The offense of pillage has been defined variously as follows:

(1) " * * * the forcible taking of private property by an invading or conquering army from the enemy's subjects" (Black's Law Dictionary (3d Ed.),p.1361). (Underscoring supplied).

(2) "The taking by violence of private property by a victorious army from the citizens or subjects of the enemy" (Bouvier's Law Dictionary, Vol.II,p.2591). (Underscoring supplied).

(3) "The plundering, ravaging, or carrying off of goods, commodities, or merchandise by open force or violence" (48 C.J.1181). (Underscoring supplied).

(4) "The term 'pillage' imports latrocination (analogous to highway robbery), or robbery by force and violence, and not a simple larceny merely. Merlin defines it to be the plundering, ravaging, or carrying off of goods, commodities, or merchandise by open force or violence." (American Ins. Co. v. Bryan, N.Y., 26 Wend. 563,573, 37 Am.Dec.278, citing 23 Merl.Reprt.art. "Pillage") (Underscoring supplied).

(5) "To strip of money or goods by open violence; to sack as in war; to spoil; loot; as, to pillage a captured town" (Webster's New International Dictionary, Second Edition). (Underscoring supplied).

(6) "It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private property * * * " (Winthrop's Military Law and Precedents (Reprint 1920), p.627). (Underscoring supplied).

The closely related word "plunder" has been defined as follows:

> "A word having no especial legal signification. As a noun it means booty; pillage; rapine; spoil; that which may be taken from the enemy by force. As a verb, in its most common meaning, it means to take property from persons or places by open force * * * " (49 C.J.1036). (Underscoring supplied).

It is noted from the foregoing that force and violence characterize the conduct referred to in Article of War 75 as "to plunder or pillage."

The evidence shows that accused and Williams discovered some weapons at the home of the burgermeister in Roedergrund (R20,24), which were broken up by a "man from the village" (R23). Williams testified that he broke the trigger mechanism of one gun (R54-55). Accused testified on cross examination that he had in his pocket a ".25 caliber" pistol which was taken from him when he was arrested. He was asked, "What did you do with the pistol you found up in the attic?" He answered, "The pistol was turned in to the 2d Cavalry." Asked "You broke up the rifles but you kept the pistol?" he replied, "Yes,sir" (R65).

As above indicated, the record fails to show that accused at any time took any property from anyone by force or violence. His taking the pistol implied only that he may have committed a different offense, not charged, of simple larceny. The evidence of the prosecution is wholly consistent with accused's testimony that they went to Roedergrund to get something to drink (R59). The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the court's findings of Guilty of Charge II and Specification (Cf: CM ETO 5445, Dann; CM ETO 3091, Murphy, et al). It is unnecessary to consider whether or not the specification contains an allegation of a lesser included offense of absence without leave in violation of Article of War 61, since such offense was already alleged under Charge I and Specification, of which accused was found guilty.

6. As to the other charges and specifications, there was substantial and convincing evidence, as alleged in each instance, that accused was absent without leave (Charge I and Specification), that he was drunk

and disorderly in uniform (Charge III and Specification), that he assaulted Frau Elizabeth Heng with intent to commit rape (Charge IV and Specification)(CM ETO 4428, Ross and cases therein cited), and did forcibly and feloniously, against her will, have carnal knowledge of Frau Rosa Romstadt (Charge V and Specification) (CM ETO 5009, Sledge and Sanders, and cases therein cited).

7. The charge sheet shows that accused is 26 years one month of age and was inducted 27 June 1942 at Chicago, Illinois. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as 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 insufficient to support the findings of guilty of Charge II and Specification, legally sufficient to support the findings of guilty of the remaining charges and their specifications and legally sufficient to support the sentence.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330. Federal Criminal Code (18 USCA 457,567) and of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The United States Penitentiary, Lewisburg, Pennsylvania, is the proper place of confinement (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. 3

17 JUL 1945

CM ETO 11729

U N I T E D S T A T E S	XII TACTICAL AIR COMMAND
v.	Trial by GCM, convened at Nancy, France, 7 and 13 April 1945.
Private HAROLD E. HELD (35601166), 340th Air Service Squadron, 83rd Service Group	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

2. The accused was found guilty of so much of Specification 2, Additional Charge I, as alleged that accused, with intent to do bodily harm, assaulted Monsieur Roger Laurencot by striking him on the body with his fists, in violation of Article of War 93. The evidence with respect to this Specification shows that on 4 March 1945 the accused and Laurencot, a civilian police inspector, were "holding each other", "wrestling", "fighting", or exchanging blows in the Bellevue Cafe, in Dombasle, France, and that Laurencot later ran from the cafe (R29-30,33,36,40,46,72-73,74,77). There is also testimony that accused "hit", or struck blows at, Laurencot, and

that another soldier held accused's arm and took a bottle from him (R34,43,72). It does not appear that accused attempted to strike Laurencot with the bottle, nor that the latter sustained any injuries as a result of the encounter. The evidence fails to show any acts committed by the accused, or any circumstances, which warrant the legal inference that accused intended to do bodily harm to Laurencot. Such intent is essential to show a felonious assault under Article of War 93 (MCM, 1928, par.149n, p.180). The evidence at most supports a finding of guilty of the lesser included offense of simple assault and battery, in violation of Article of War 96 (CM ETO 1690, Armijo; CM ETO 1177, Combess).

3. The accused was also charged with and found guilty of a simple assault and battery upon Madame Alphonse Genicot (Specification 3, Additional Charge II), and of destroying certain water and wine glasses and other property of Alphonse Genicot, owner of the Bellevue Cafe (Specification 5, Additional Charge II), each in violation of Article of War 96. The evidence clearly shows that these acts, as well as the assault upon Monsieur Laurencot, all occurred in the Bellevue Cafe and at the same approximate time. Accused was also charged with and found guilty of being drunk and disorderly in the Bellevue Cafe on the same occasion (Specification 4, Additional Charge II). The evidence shows that the disorderly conduct of which accused was convicted consisted chiefly in the two assaults and the destruction of the property, which were charged in separate Specifications. The Manual provides that

> "a soldier should not be charged with disorderly conduct and for an assault when the disorderly conduct consisted in making the assault" (MCM, 1928, par. 27, p.17).

It is therefore clear that there has been a multiplication of charges against the accused concerning his acts in the Bellevue Cafe. However, since he was found guilty of another Specification alleging absence without leave

from his station, for which offense there is at present no limitation as to punishment, and of other specifications under which the sentence is legally supported, the defective pleading cannot be said to have injuriously affected his substantial rights (CM 247391, Jeffrey, 30 B.R. 337). It is assumed that the court imposed punishment for the acts constituting the basis of these several specifications in their most important aspect only (CM 246523, Cardella, 30 B.R. 59).

B C S Leeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. C. Stevens Jr. Judge Advocate

11729

(278)

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

BOARD OF REVIEW NO. 2

11 JUN 1945

CM ETO 11757

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, 9 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 BERNARD C. MAGOON (31339761), Company C, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Bernard C. Magoon, Company "C", One Hundred and Twenty First Infantry, did, at or near Duren, Germany, on or about 24 February 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: engage in combat with the enemy, and did remain absent in desertion until he surrendered himself at or near Hermulheim, Germany, on or about 8 March 1945.

11757

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. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence for the prosecution shows that accused on 23 February 1945 was a member of the third squad of the second platoon of Company C, 121st Infantry, which was getting ready to cross the Roer River into Duren, Germany (R4). The 28th Infantry was attacking Duren at the time, had established a bridgehead and late in the afternoon was moving into the town. About 9:45 that night orders to prepare to "jump off" were received and passed on to the squad members including accused (R6,9,10). The squad including accused, moved out of Duren about ten o'clock (R5) toward the town of Binsfeld, Germany, some three (R6) miles away, which town they attacked that night. Accused was found to be missing when the squad was checked as it entered Binsfeld, where it was pinned down by German tank fire (R6) about midnight (R8). He was last seen on the edge of Duren after the men had dropped their equipment and received directions for the attack. There was some shelling (R6,11), small arms fire and enemy air activity. Accused had no authority to be absent and was not seen again in the company until it was back in reserve on 8 March (R7,11). The morning report of Company C, 121st Infantry, dated 10 March 1945, was admitted in evidence and shows accused "duty to AWOL 26 February time unknown * * * from AWOL 26 February to duty 1730 8 March * * * duty to arrest in company area 8 March" (R14; Pros.Ex.A).

4. Accused as the only defense witness, testified that his squad moved from Duren to Binsfeld on 24 February but though he knew it was moving to some other place, he was not told what the situation was (R16,18). At Binsfeld, a mile from Duren, he did not feel well so dropped out as they passed the "Battalion CP" (R16,20) and stayed there until he went back to the company (R16,17). He neither asked for nor received permission from anyone to leave the squad and admitted he had no authority to do so (R20-21). He claimed he was at the "Battalion CP" the entire time from 24 February to 8 March except one day when he made a trip with a jeep driver to a "PW" enclosure (R21). He did not know where his squad or company was and made no attempt to find an aid station or do anything for his illness. "What bothered me was my nerves, nothing much anybody could do, I merely went to pieces" (R23). He neither reported to the battalion (R24,34) or to anyone nor did he at any time see the battalion surgeon. He denied stopping at the

"Battalion CP" to avoid going into the attack (R24). There was rebuttal testimony to the effect that accused was with a military police platoon and around its prisoner of war enclosure for several days between 24 February and 8 March while located "about 200 yards" from the position of accused's battalion (R26-29).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM, 1928, par.130a, p.142; AW 28).

From the evidence it is difficult to arrive at any conclusion except that accused dropped out of the line of march knowing that somewhere just ahead of them was the dangerous enemy they must attack, that they probably would suffer casualties and that only by failing to go on with his squad could he avoid sharing that hazardous duty. The Board of Review is of the opinion that the findings of guilty of the Charge and Specification are supported by competent substantial evidence (CM ETO 4743, Gotschall; CM ETO 7988, Honokowicz).

6. The charge sheet shows accused is 20 years old and that he was inducted 25 May 1943 at Rutland, Vermont. He had no prior service.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

26 JUN 1945

CM ETO 11758

U N I T E D S T A T E S	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Captain ROBERT F. VOLLMER (O-1295800), 235th Replacement Company, 69th Replacement Battalion	Trial by GCM, convened at Stolberg, Germany, 29 March 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

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 96th Article of War.

Specification 1: In that Captain Robert F. Vollmer, 235th Replacement Company, 69th Replacement Battalion, did, on or about 23 January 1945, at or near Verviers, Belgium, wrongfully borrow 200 francs, lawful money of Belgium, of an exchange value of about $4.56 from an enlisted man, to wit: Technician Fifth Grade John E. Ramming.

Specification 2: In that * * * was, at or near Verviers, Belgium, on or about 28 February 1945, drunk in camp.

11758

Specification 3: In that * * * having accepted from Private Bill D. Koulis, a member of his command, on or about 10 February 1945, the sum of 10,686 francs, lawful money of Belgium, of an exchange value of about $243.64, to be deposited to the credit of the said Private Bill D. Koulis in a Soldier's Deposit account, did, at or near Verviers, Belgium, wrongfully, knowingly and through neglect fail to make said deposit until about 28 February 1945.

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

Specification 1: In that * * * did, at or near Verviers, Belgium, on or about 30 November 1944, present for payment a claim against the United States, by presenting to Major W. M. Cavin, Finance Department, an officer authorized to pay such claims, in the amount of $198.07, for services alleged to have been rendered the United States by the said Captain Robert F. Vollmer for the month of November 1944, which said claim was false and fraudulent in that the said Captain Robert F. Vollmer had on 14 November 1944, drawn a partial payment in the sum of $95.00, which he, the said Captain Robert F. Vollmer, failed to set forth in said claim, and was then and there known by the said Captain Robert F. Vollmer to be false and fraudulent.

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

He pleaded not guilty to and was found guilty of both charges and their respective specifications (Specification 2 Charge II by exceptions and substitutions). 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, Advance Section, Communications Zone, European Theater of Operations, disapproved the finding of guilty of Specification 2, Charge II, 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. a. Specification 1, Charge I:

Accused borrowed 200 francs on 23 January 1945 from Technician Fifth Grade John E. Ramming, of his company, which he did not repay until about the time charges were preferred (R6-7).

b. Specification 2, Charge I:

At about 1615 hours, 28 February 1945, accused was examined by medical officers for drunkenness and found to be "under the influence of alcohol to such a degree that his normal efficiency was impaired". Another officer thought he was not drunk, that he was capable of receiving and carrying out orders, but incapable of taking command of a company. Accused was "in camp" at the time (R8-15).

c. Specification 3, Charge I:

On 10 February 1945, Private Bill D. Koulis, of accused's company, gave him 10,686 francs to be deposited as a Soldier's Deposit. About the 16th or 18th of February, accused told the soldier that he had deposited the money but that he would have to wait a few days for his deposit book. Accused did not make the deposit until 28 February and then only when told by his commanding officer he must do so quickly (R15-18, 20-31; Pros.Ex.B).

d. Specification 1, Charge II:

On 14 November 1944 accused drew a partial payment of $95. On 30 November 1944, he signed a voucher claiming full pay for the month, presented the same, and received full pay. The $95. was not deducted from his vouchers or from his pay during subsequent months although he was warned in February and thereafter claimed and received February pay (R18-24; Pros.Ex.B).

4. Accused, after his rights were fully explained to him, elected to be sworn as a witness and testified in substance as follows:

He admitted borrowing the money from the enlisted man to buy steel wool for the company kitchen, and overlooked repayment. On the afternoon of 28 February 1945 he had only two drinks of cognac and a glass of beer. On 10 February 1945 he received francs of a value of about $250. for the Soldier's Deposit, and in a day or so he went to the Finance Office where he was informed of the necessity of first going to a personnel office in another area. The company was moving and he was so busy he did not have time to attend to the matter. He told the soldier of the delay and was enjoined to keep the money. Later he lost the entire sum out of his pocket, but nevertheless on 28 February deposited an equal amount. The November pay voucher was prepared for him by the Finance Office, and he did not notice that the $95. was not deducted, due to his promotion and consequent increase

in pay. He learned in February for the first time that it had not been deducted, and he did not have any knowledge of Army Regulations making him responsible for the correctness of these vouchers.

5. There is substantial evidence to support the findings of the court as to both charges and their specifications. Borrowing from enlisted men impairs discipline and is an offense in violation of Article of War 96 (CM 122920 (1918); 130989 (1919); Dig. Op. JAG, 1912-40, sec. 453 (5), p.341). There is substantial testimony as to drunkenness which falls within the technical definition of the Manual (MCM, 1928, par.145, p.160). The Board of Review is of the opinion that the accused was remiss in his duties in making the soldier's deposit. His legal relation was that of a fiduciary, and he will be held to the highest standard of care (CM FTO 10418, Blacker). The claim presented for November pay was patently false. Accused was responsible for its correctness (sec.IV (3), WD, Cir. No. 315, 4 Dec. 1943; pars.1c, 7, AR 35-1360, 11 April 1944). The presentation of such false pay voucher with knowledge that it was false and fraudulent constituted a crime under the first paragraph of the 94th Article of War (CM 241208, Russell, 26 B.R. 221,225).

6. The charge sheet shows that the accused is 39 years two months of age, and was commissioned a second lieutenant 8 October 1942 at Fort Benning, Georgia; he was promoted to first lieutenant 17 February 1943 and captain 16 October 1944. He had prior service from 1 February 1941 to 8 October 1942.

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

8. Dismissal, total forfeitures, and confinement at hard labor are authorized punishments for violation of the 94th and 96th Articles 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 Sep. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of Captain ROBERT F. VOLLMER (O-1295800), 235th Replacement Company, 69th 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 as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11758. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11758).

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

(Sentence ordered executed. GCMO 250, ETO, 9 July 1945).

11758

(286)

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

BOARD OF REVIEW NO. 1

28 JUL 1945

CM ETO 11775

U N I T E D S T A T E S	XII TACTICAL AIR COMMAND
v.	Trial by GCM, convened at Headquarters XII Tactical Air Command, APO 374, U. S. Army, 19 February 1945. Sentence: Dismissal and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Captain HENRY B. PORTER (O-447558), 406th Fighter Squadron, 371st Fighter Group	

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.

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

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

Specification: In that Captain Henry B. Porter, 406th Fighter Squadron, 371st Fighter Group, did without proper leave, absent himself from his organization at Y-1 Airfield near Tantonville, France, from about 27 December 1944 to about 14 January 1945.

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

11775

CONFIDENTIAL

Specification: In that * * * did, between Dole, France and Tantonville, France, from about 27 December 1944 to about 14 January 1945 knowingly and willfully misappropriate a certain motor vehicle, to wit, one 2½ ton truck, Apparatus Decontaminating, Power Driven, of a value of more than fifty ($50.00) dollars, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that * * * having received a lawful order from Captain Albert A. Domingue to go directly to Tantonville by the most expeditious means, the said Captain Albert A. Domingue being in the execution of his office, did enroute from Dole, France to Tantonville, France, on or about 27 December 1944, fail to obey the same.

Specification 2: In that * * * did, at Washington, District of Columbia, United States of America, on or about 31 December 1943 wrongfully borrow the sum of $100.00 from Master Sergeant Leo Richey, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 3: In that * * * did, at Richmond, Virginia, United States of America, on or about 1 February 1944 wrongfully borrow the sum of $100.00 from Staff Sergeant Orville R. Human, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 4: In that * * * did, at Bisterne, England, on or about 15 March 1944 wrongfully borrow the sum of ten pounds (10£), British currency, of a value of about $40.00 from Sergeant Lee B. Draper, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

11775

Specification 5: In that * * * did, at Bisterne, England, on or about 30 March 1944 wrongfully borrow the sum of eight pounds (8£), British currency, of a value of about $32.00 from Private First Class Lloyd V. Ash, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 6: In that * * * did, at Bisterne, England, on or about 5 May 1944 wrongfully borrow the sum of thirty-two pounds and ten shillings (32£ 10s), British currency, of a value of about $130.00 from Staff Sergeant Christopher J. Doyle, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 7: In that * * * did, at Bisterne, England, on or about 5 May 1944 wrongfully borrow the sum of five pounds (5£), British currency, of a value of about $20.00 from Staff Sergeant William F. Lawrence, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 8: In that * * * did, at Bisterne, England, on or about 12 May 1944 wrongfully borrow the sum of two pounds and ten shillings (2£ 10s), British currency, of a value of about $10.00 from Staff Sergeant William F. Lawrence, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline,

Specification 9: In that * * * did, at Bisterne, England, on or about 15 May 1944 wrongfully borrow the sum of six pounds and five shillings (6£ 5s), British currency, of a value of about $25.00 from Sergeant Steve J. Kropp, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

11775

Specification 10: In that * * * did, at Bisterne, England, on or about 19 May 1944 wrongfully borrow the sum of eleven pounds (11 £), British currency, of a value of about $44.00 from Sergeant Joseph L. Wyse, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 11: In that * * * did, at Bisterne, England, on or about 26 May 1944 wrongfully borrow the sum of four pounds (4£), British currency, of a value of about $16.00 from Staff Sergeant William F. Lawrence, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 12: In that * * * did, at Air Strip A-6 near Ste. Mere Eglise, France, on or about 25 June 1944 wrongfully borrow the sum of one thousand (1000) francs, French currency, of a value of about $20.00 from Staff Sergeant Lester W. Diehl, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 13: In that * * * did, at Dole, France, on or about 8 November 1944 wrongfully borrow the sum of five thousand (5000) francs, French currency, of a value of about $100.00 from Corporal Walter Burgess, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 14: In that * * * did, at Dole, France, on or about 11 November 1944 wrongfully borrow the sum of two thousand (2000) francs, French currency, of a value of about $40.00 from Corporal Walter Burgess, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

11775

Specification 15: In that * * * did, at Dole, France, on or about 5 December 1944 wrongfully borrow the sum of twenty-five hundred (2500) francs, French currency, of a value of about $50.00 from Sergeant Vernon B. Moore, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 16: In that * * * did, at Dole, France, on or about 15 December 1944 wrongfully borrow the sum of one thousand (1000) francs, French currency, of a value of about $20.00 from Sergeant Steve J. Kropp, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 17: In that * * * did, at Dole, France, on or about 21 December 1944 wrongfully borrow the sum of one thousand (1000) francs, French currency, of a value of about $20.00 from Sergeant Steve J. Kropp, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline .

Specification 18: In that * * * did, at Dole, France, on or about 23 December 1944 wrongfully borrow the sum of six hundred (600) francs, French currency, of a value of about $12.00 from Private Raymond M. Cassatt, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 19: In that * * * did, at Dole/Tavaux Airfield, France, on or about 26 December 1944 wrongfully borrow the sum of five hundred (500) francs, French currency, of a value of about $10.00 from Corporal Calvin M. Spanaugle, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

11775

Specification 20: In that * * * did, at Dole, France, on or about 24 December 1944, wrongfully gamble with Staff Sergeant William F. Lawrence, an enlisted member of the same organization as the said Captain Henry B. Porter, to the prejudice of good order and military discipline.

Specification 21: In that * * * being indebted to Staff Sergeant William F. Lawrence in the sum of five pounds (5£), British currency, value of about $20.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable or on about 6 May 1944, did, from 6 May 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 22: In that * * * being indebted to Staff Sergeant William F. Lawrence in the sum of two pounds and ten shillings (2£ 10s), British currency, value of about $10.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 May 1944, did, from 31 May 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 23: In that * * * being indebted to Sergeant Joseph L. Wyse in the sum of 11 pounds (11£), British currency, value of about $44.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 May 1944, did, from 31 May 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 24: In that * * * being indebted to Staff Sergeant William F. Lawrence in the sum of four pounds (4£), British currency, value of about $16.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 May 1944, did, from 31 May 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 25: (Disapproved by reviewing authority)

Specification 26: (Disapproved by reviewing authority)

11775

Specification 27: In that * * * being indebted to Sergeant Steve J. Kropp in the sum of one thousand (1000) francs, French currency, value of about $20.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 December 1944, did, from 31 December 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 28: In that * * * being indebted to Sergeant Steve J. Kropp in the sum of one thousand (1000) francs, French currency, value of about $20.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 December 1944, did, from 31 December 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 29: In that * * * being indebted to Private Raymond M. Cassatt in the sum of six hundred (600) francs, French currency, value of about $12.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 December 1944, did, from 31 December 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

Specification 30: In that * * * being indebted to Corporal Calvin M. Sponaugle in the sum of five hundred (500) francs, French currency, value of about $10.00 for money loaned to the said Captain Henry B. Porter, which amount became due and payable on or about 31 December 1944, did, from 31 December 1944 to 28 January 1945 dishonorably fail and neglect to pay said debt.

He pleaded not guilty to Specifications 1, 25, 26 and 29 of Charge III (R35), guilty to all remaining charges and specifications, except the word "dishonorable" in Specifications 21-24,27,28,30 of Charge III, and not guilty to such specifications of Charge III as they stood at the time of arraignment. He was found guilty of Charge 1 and its Specification, of Charge II and its Specification, and of Charge III and Specifications 1 to 21, inclusive, 23,24,27,28 and 30 thereunder, and guilty of the remaining specifications of Charge III with the following exceptions and substitutions:

11775

Specification 22: Guilty, except for the words "31 May 1944" wherever the same appears, substituting therefor the words "13 May 1944", of the excepted words not guilty, of the substituted words guilty.

Specification 25: Guilty, except for the words "which amount became due and payable on or about 30 November 1944" and the words "from 30 November 1944"; of the excepted words not guilty.

Specification 26: Guilty, except for the words "which amount became due and payable on 30 November 1944" and the words "from 30 November 1944"; of the excepted words, not guilty.

Specification 29: Guilty, except for the words "which amount became due and payable on or about 31 December 1944" and the words "from 31 December 1944"; of the excepted words, not guilty.

No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for 10 years. The reviewing authority, the Commanding General, XII Tactical Air Command, disapproved the findings of Specifications 25 and 26, Charge III, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. a. The Specification of Charge I:

The accused's plea of guilty, the evidence of the prosecution, clearly establish the absence without leave as alleged and support the findings of guilty by the court.

b. The Specification of Charge II:

The accused's plea of guilty, the evidence of the prosecution, and the stipulation entered into by and between the prosecution, defense and accused clearly establish the misappropriation of a United States Government vehicle as alleged and support the findings of guilty by the court.

c. Specifications 2-19, inclusive, of Charge III: 11775

These specifications allege that accused borrowed

various sums of money on various dates from enlisted men of his organization. The accused's plea of guilty and the evidence of the prosecution clearly establishthat accused borrowed the various sums of money as alleged. The act of an officer in borrowing money from enlisted men of his organization is conduct prejudicial to good order and military discipline (CM ETO 2972, Collins).

d. Specification 20 of Charge III:

This Specification alleges that accused gambled with enlisted men of his organization. The accused's plea of guilty and the evidence of the prosecution clearly establish that accused gambled as alleged. Such conduct is in violation of Article of War 96 (CM 260737, (1944) III Bull. JAG 423).

4. As to those specifications to which accused pleaded not guilty or guilty with exceptions, the prosecution introduced the following evidence:

On 26 December 1944 at Dole, France, accused was ordered by Captain Albert A. Domingue to proceed to Tantonville, France, by the most expeditious route. En route he ordered the driver of the vehicle in which he was riding to turn off the direct route and proceed to another locality. He made no effort to reach Tantonville until 14 January 1945 (R7-17; Pros.Exs.1,2).

Following is a summary of his financial transactions with enlisted men of his organization:

Specification number	Date Borrowed	Amount	Date of Promised Repayment	Page in Record
21	5 May 1944	5£	6 May 1944	25
22	12 May 1944	2£ 10s	13 May 1944	25
23	19 May 1944	11£	31 May 1944	30
24	26 May 1944	4£	31 May 1944	25
27	15 Dec.1944	1000 fr	31 Dec.1944	28
28	21 Dec.1944	1000 fr	31 Dec.1944	28
29	23 Dec.1944	600 fr	no date	33
30	26 Dec.1944	500 fr	31 Dec.1944	34

None of these sums was repaid as of 28 January 1945.

5. After an explanation of his rights, accused elected to make an unsworn statement in which he said that in October 1944 he was relieved as executive officer and made adjutant with nothing to do but to supervise the mess. He felt that he was not wanted in the organization and became despondent. In proceeding from Dole to Tantonville he did not realize the seriousness of taking as much

time as he did. During November 1944 he had paid debts amounting to $670. He read into the record two excerpts from his wife's letter which indicated that his bank account was in a state of depletion. His wife was ill (R38-41).

6. a. Specification 1 of Charge III:

This specification in effect alleges that accused failed to obey the lawful order of Captain Albert A. Domingue to proceed from Dole, France, to Tantonville, by the most expeditious route. The evidence shows that the order was given on 26 December 1944 and that accused made no real effort to reach Tantonville until 14 January 1945. A clear case of failure to obey a lawful order is thus made out (CM ETO 4619, Traub).

b. Specifications 21-24, 27,28 and 30:

Each of these specifications alleges that accused dishonorably failed and neglected to pay debts which he owed to enlisted men of his organization. Accused pleaded guilty to these specifications with the exception of the word "dishonorably" in each. The pleas thus admitted the existence of the obligation and the due date as alleged. The prosecution, in addition, introduced the evidence summarized above. The question thus raised is whether the mere failure by an officer to pay a debt to an enlisted man of his organization on the due date, without more, is a "dishonorable" failure and neglect in violation of Article of War 96. Winthrop speaking of "dishonorable" failure to pay debts says:

> "In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness,&c., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law" (Winthrop's Military Law and Precedents (Reprint, 1920) fn.42, p.715).

11775

The situation is different, however, where the obligee is an enlisted man in accused's own organization (CM 251490, Clift, 33 B.R. 263 (1944)). Each of the debts with which these specifications are concerned was overdue. The power and authority of an officer over an enlisted man of his own organization is such that the latter might well hesitate to demand that the officer pay what he owed. In such circumstances we think that an officer's failure to fulfill his obligation on the promised date is dishonorable. The record, accordingly, is legally sufficient to sustain the findings of guilty of these specifications.

c. Specification 29 of Charge III:

This specification to which accused pleaded not guilty alleges that accused dishonorably failed and neglected to pay a debt of $12.00 which he owed to an enlisted man (a private) of his organization. The evidence shows that the debt in question was contracted on 23 December 1944 and not repaid as of 28 January 1945, the date charges were preferred. Accused did not promise to repay it on any specific date. Despite the fact that the debt was not technically overdue, considering the person with whom accused was dealing and the amount involved, we think that there was an unreasonable delay in making repayment. Such conduct amounts to a dishonorable failure to pay a debt in violation of Article of War 96 (CM 251490, Clift, supra).

6. The charge sheet shows that accused is 34 years 10 months of age and was appointed a second lieutenant 6 April 1942. He had prior service as an enlisted man from 12 April 1938 until he received his commission.

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. Dismissal and confinement at hard labor are authorized punishments for violation of the 61st, 94th or 96th Articles 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

_____ Judge Advocate

_____ Judge Advocate

1775

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 HENRY B. PORTER (O-447558), 406th Fighter Squadron, 371st Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11775. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11775).

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

(Sentence ordered executed. GCMO 352, USFET, 27 Aug 1945).

(298)

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

BOARD OF REVIEW NO. 1

15 SEP 1945

CM ETO 11779

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Frankfurt, Germany, 13 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, BOHN for life; BOURBON for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Privates First Class SAMUEL J. BOHN (39463187), Company A, and FRANK C. BOURBON (39127006), Medical Detachment, both of 526th Armored Infantry Battalion	

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

1. The record of trial in the case of the 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 charged separately and tried together upon the following charges and specifications:

BOHN

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

Specification 1: In that Private First Class Samuel J. Bohn, Company "A", 526th Armored Infantry Battalion did, at or near Frankfurt a.M., Germany, on or about 27 March, 1945, with intent to murder, commit an assault upon Mrs. Margot Boeckel, by shooting her in the arm and chest with a dangerous weapon to wit; a U.S. Browning Automatic Rifle.

Specification 2: In that * * * did, at or near Frankfurt, a.M., Germany, on or about 27 March 1945, with intent to murder, commit an assault upon Mrs. Luice Boeckel, by shooting her in the arm and leg with a dangerous weapon to wit; a U.S. Browning Automatic Rifle.

Specification 3: In that * * * did, at or near Frankfurt, a.M., Germany, on or about 27 March, 1945, with intent to murder, commit an assault upon Alwin Fleck, by shooting him in the abdomen with a dangerous weapon to wit; a U. S. Browning Automatic Rifle.

Specification 4: (Finding of not guilty)

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

Specification: In that * * * did, at or near Frankfurt, a.M., Germany, on or about 27 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Maria Reiter.

BOURBON

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

Specification: In that Private First Class Frank C. Bourbon, Medical Detachment, 526th Armored Infantry Battalion did, at or near Frankfurt, a.M., Germany, on or about 27 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Miss Maria Reiter.

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

Specification: In that * * * did, at Frankfurt, a.M., Germany on or about 27 March, 1945, fail to comply with the standing orders of the Commanding General, Twelfth Army Group, by visiting German homes, accompanying Germans on the streets and talking with Germans, all without authorization.

11779

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, accused Bohn was found not guilty of Specification 4 of Charge I, and guilty of the remaining specifications and all charges. Two-thirds of the members of the court present at the time the vote was taken concurring, accused Bourbon was found guilty of the Specification of Charge I excepting the words "forcibly and feloniously, against her will, have carnal knowledge of Miss Maria Reiter", substituting therefor "with intent to commit a felony, namely rape, commit an assault upon Miss Maria Reiter by willfully and feloniously throwing himself upon her", not guilty of Charge I but guilty of a violation of the 93rd Article of War; guilty of the Specification of Charge II excepting the words "homes" and "accompanying Germans on the streets", substituting for the word "homes" the words "a home", and guilty of Charge II. The trial judge advocate stated that he had evidence of one previous conviction against Bohn which was not, however, introduced into evidence. No evidence of previous convictions was introduced against Bourbon. All of the members of the court present at the time the vote was taken concurring, accused Bohn was sentenced to be hanged by the neck until dead. Three-fourths of the members of the court present at the time the vote was taken concurring, accused Bourbon was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority, the Commanding General, Third United States Army, as to accused Bohn, approved the sentence and forwarded the record of trial for action under Article of War 48 and as to accused Bourbon, 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. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to accused Bohn but, owing to special circumstances in the case, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. a. Specifications 1,2 and 3, Charge I (Bohn).

Competent, substantial and undisputed evidence shows that on 27 March 1945, accused Bohn in the space of a few minutes and without provocation shot Miss Margot Boeckel, her mother, Mrs.

Luise Boeckel, and Alwin Fleck, a 15-year old boy. During the course of the shooting affray which occurred at the Boeckel home at Schadowstrasse 3, Frankfurt, Germany, Bohn said to Fraulein Boeckel, "Kill you". Frau Boeckel was shot twice, once in the right elbow and once in the right knee. Fraulein Boeckel was shot once in the right arm and breast. Fleck was shot twice, once in the chest and once in the abdomen. The evidence thus amply supports the court's action in finding accused Bohn guilty as charged (CM ETO 2899, Reeves; CM ETO 3911, Jackson; CM ETO 8801, McLaughlin).

b. Specification, Charge II (Bohn); Specifications, Charges I and II (Bourbon):

Within a short time of the incident related above, accused Bohn marched three or four German men and Fraulein Maria Reiter up Schadowstrasse. He was still armed and they were forced to hold their hands in the air. On reaching a store, he released the men, after firing a shot, and told the prosecutrix to enter the shop (R34,35,44,45). The shop was owned by Herr Wilhelm Walther and was used by him for a home as well as a shop (R61). When Bohn reached this shop, accused Bourbon was standing in the doorway (R35,37-38). He had been there for some undisclosed period talking with Walther (R61). Inside the shop Bohn directed the prosecutrix to go into an adjoining room and told her to remove her slacks. When she failed to comply he hit her on the head with his rifle and removed her slacks and panties. He pushed her against a table, held both her hands behind her back with one hand and tried unsuccessfully to have intercourse with her. He then made her lie down on the floor by gesticulating toward his rifle. On this occasion he effected penetration. She did not resist him with her hands and feet although she did move her body in an attempt to prevent copulation. She believed no one could come to her assistance and therefore did not attempt to summon help by shouting (R35,36,40,47,51-53).

In the meantime, accused Bourbon repeatedly opened the door and looked in. Finally, when Walther indicated that he would like to have Fraulein Reiter and Bohn come out of the room, Bourbon went in and Bohn came out (R55,60). Bourbon removed her slacks which she had put on in the interval, made her lie on the floor, and tried to have sexual intercourse with her, but he did not succeed in effecting penetration (R36-39,42). She might have been able to offer more resistance than she did but she was tired. She did, however, ask him to let her go (R38-39).

After an interval Bohn returned to the room and Bourbon left. Fraulein Reiter was still lying on the floor and Bohn flung himself on her and had sexual intercourse with her for the second time (R39-40,50). On this occasion she offered no resistance whatever (R53).

By the time Walther, who in the confusion had left to get assistance, returned with Lieutenant Colonel William H. Blakefield. Colonel Blakefield testified that allied forces had entered Frankfurt on the evening of the 25th and that the city was partially occupied on the 27th. On entering Walther's shop he saw Bourbon lying on the counter in a drunken sleep. There was a Browning Automatic Rifle leaning against a door leading to another room. On entering this room, the witness saw Bohn copulating with a woman on the floor. In his opinion, the woman was trying to resist as best she could. She was in an extreme state of nervousness, in fact, hysterical, and alternately cried and laughed (R64-69).

A physical examination of Fraulein Reiter on the next day by a United States Army medical officer revealed that she had abrasions on the left ear and behind it, and contusion of the back and right thigh. Genital examination was negative. The abrasions on and about the left ear were consistent with having been caused by a blunt instrument, such as a rifle, or by a hand (R69,70).

There was evidence as to Bourbon's intoxicated condition. Fraulein Reiter testified that he was "very drunk" (R49). Walter was of the opinion that he was drunk and testified that he vomited once (R58,61).

4. Bohn, after an explanation of his rights, elected to be sworn and to testify (R75-76).

He stated that he saw Fraulein Reiter on the street and solicited sexual intercourse with her. She replied "to my room" and led him into Walther's shop. He left his Browning Automatic Rifle in the shop proper and went with her into an adjoining room where she voluntarily, without any resistance, and without the use force on his part, engaged in an act of sexual intercourse. Bourbon opened the door and asked him if he could have intercourse with Fraulein Reiter and Bohn told him to ask her. Bohn left the room then and Bourbon went in. After Bourbon was finished Bohn went in again. Fraulein Reiter was still lying on the floor unclothed from the waist down and he laid down on top of her. She did not resist on this occasion either, and at no time did he strike her, frighten her or intimidate her in any way (R76-79).

He denied that he had marched Fraulein Reiter and German civilians up the street at the point of a rifle and he denied that she was crying and laughing when Colonel Blakefield found them together (R79-83).

Captain Irving Berlin testified that Bourbon had been a member of his command for a little more than a year and that his work as a soldier had been satisfactory and his character excellent (R73).

Bourbon, after being advised of his rights, elected to remain silent (R74-75).

5. Accused although charged separately were tried together. The convening authority did not direct that they be so tried. Neither accused consented to such trial nor did either object thereto. No motion for separate trials was made. Each accused was accorded his right to one peremptory challenge against any member of the court except the law member (R4). Warrant for the consolidation of these trials is found in the fact that the charge of rape raised similar issues and involved similar evidence as to both accused. In our opinion neither accused was prejudiced by the common trial (Cf: United States v. Glass, 30 F.Supp.397 (W.D. Ky. 1939); CM ETO 6148, Dear and Douglas; CM ETO 13575, Lamb et al). The fact that the convening authority did not specifically direct a common trial is not controlling, particularly in view of his ratification of the proceedings by approval of the sentence as to both accused.

6. Accused Bohn was found guilty of rape. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). He conceded that he had carnal knowledge of Fraulein Reiter, and the only question is whether she consented thereto. On this point the evidence was in direct conflict. In such circumstances we have repeatedly held that such a conflict presents no more than an issue of fact which it is the peculiar province of the court to resolve and that, present substantial evidence in the record, we have not the power to disturb their conclusion (CM ETO 13369, McMillon, et al CM ETO 11621, Trujillo, et al and cases therein cited). The court could properly find that Fraulein Reiter was marched up the street together with other civilians by accused at the point of a rifle; that accused released the others and shot at them; that he forced her to go with him to the back room of a shop and struck her with his rifle when she manifested unwillingness to have sexual intercourse with him. Moreover, her version of the incident received substantial corroboration from her injuries and Colonel Blakefield's testimony as to her mental condition (CM ETO 2625, Pridgen). All the elements of the offense were thus established (CM ETO 14040, McCreary; CM ETO 13369, McMillon, et al, supra; CM ETO 14256, Barkley, and cases cited).

7. Accused Bourbon, although charged with rape, was found guilty of the lesser included offense of assault with intent to rape in violation of Article of War 93 (MCM, 1928, par.148b, p.165). The court was warranted in finding that he attempted to have sexual intercourse with Fraulein Reiter but was prevented from doing so because he could not effect penetration. The serious question which the case presents is whether because of accused's admittedly drunken condition he could and did formulate the requisite specific intent, viz, to have carnal knowledge with force and without her consent

(CM ETO 10728, Keenan; Hammond v. United States (App. DC 1942) 127 F (2nd) 752,753). There is evidence that accused knew what was going on around him despite his drunkenness. He knew that Bohn was having sexual intercourse because he spoke to Bohn about it. He understood Walther's suggestion that he get Bohn and Fraulein Reiter out of the room. Able to understand this much, he could not have failed to appreciate the surrounding atmosphere of violence created by Bohn and her unwillingness to engage in intercourse. He, Bourbon, was standing in the door of the shop when Bohn marched Fraulein Reiter and the civilians up the street. Although he may not have seen this, he at least must have heard Bohn discharge his rifle. He knew enough of what he was about, to remove her slacks and make her lie on the floor. Although she testified she did not offer much resistance--thereby implying she offered some--she did state that she requested him to let her go. We conclude then that the court's finding that accused could and did formulate the necessary intent to have carnal knowledge of the prosecutrix by force and without her consent was supported by competent and substantial evidence and under the principles set forth in paragraph 6 of this holding must remain undisturbed (CM ETO 3280, Boyce; CM ETO 10097, Rosas; CM ETO 764, Copeland, et al; II Bull.JAG 427).

8. Accused Bourbon was also found guilty of failing to comply with the standing orders of the Commanding General, Twelfth Army Group, by visiting a German home and talking with Germans, all without authorization. The record, however, is barren of any evidence that this accused was not authorized to visit Walther's "home" or talk with him. In some circumstances, not difficult to imagine, a soldier may not only have been authorized but ordered to enter a German home and communicate with its occupants. Accused was of medical personnel, and there is in the case the circumstance that Walther had a cut on his face. The prosecution chose to allege accused's lack of authority and consequently must prove it. The record is legally insufficient to sustain the findings of guilty of the Specification. Manifestly, Bourbon's actions with Fraulein Reiter, since they involved the commission of a crime against her person, did not constitute a violation of a non-fraternization decree (CM ETO 10967, Harris; CM ETO 10501, Liner).

9. The charge sheets show that accused Bohn is 25 years two months of age and was inducted 10 March 1943, and that accused Bourbon is 33 years three months of age and was inducted 11 March 1943. Each was inducted to serve for the duration of the war plus six months. No prior service is shown as to either.

10. 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 either accused were committed during the trial. The Board of Review is of the

opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to accused Bohn. As to accused Bourbon, the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge II and Charge II, legally sufficient to sustain the finding of guilty of the Specification of Charge I and Charge I, and legally sufficient to sustain the sentence.

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

Wm. F. Sprow Judge Advocate

Edw. C. Stevens, Jr. Judge Advocate

Donald K. Powell Judge Advocate

(306)

1st Ind.

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

1. In the case of Private First Class SAMUEL J. BOHN (39463187), Company A, 526th 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 11779. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11779).

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

(Sentence as commuted ordered executed. GCMO 452, USFET, 3 Oct 1945).

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

BOARD OF REVIEW NO. 3 10 AUG 1945

CM ETO 11790

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Hurth, Germany, 18 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private THEODORE H. ANDES (33589646), Company H, 36th Armored Infantry Regiment	)	

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

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 Theodore H. Andes, Company H, 36th Armored Infantry Regiment, did, in the vicinity of Floret, Belgium, on or about 5 January 1945, misbehave himself before the enemy by refusing to advance to his company, which was then engaged with the enemy, after he had been ordered to do so by First Lieutenant Merritt E. Hulstedt.

He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of the Specification and the Charge. No evidence of previous conviction was introduced.

All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 3rd Armored Division, approved the sentence, recommended commutation to dishonorable discharge, total forfeitures and life imprisonment, and forwarded the record of trial pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to special circumstances and the recommendation of the convening authority, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, but withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that, on 5 January 1945, First Lieutenant Merritt E. Huldstedt was motor officer, Oscar D. Smith, first sergeant, and accused, a member of the third platoon, Company H, 36th Armored Infantry Regiment (R6,12). The company was then "fighting hand to hand combat" with the enemy - components of the German army - approximately a mile south of Floret, Belgium, having originally "crossed the line of departure [for active combat] the third of January about seven o'clock in the morning" (R7,8). They "were passed through by another company on that same day and they were off the line one day and on the 5th they were committed in the morning" (R8). During the course of the two days during which they were on the line, they sustained heavy casualties from mortar and small arms fire (R7). On the afternoon of the 5th their fighting strength had been reduced by "enemy activity and cold weather" from "about 158 to 160 fighting men on the line" to less than 100 (R8,10).

The company motor pool was approximately a mile and a half behind the front lines, and Lieutenant Hulstedt was charged with the duty of checking and dispatching military personnel arriving there, sending to the "medics" anyone who seemed to him in need of medical care and "if they send him back to the motor pool I send him up to the front. If a man comes up from the rear I see to it that they get up to the front" (R7,9).

Accused's last assignment, prior to the commission of the alleged offense, was platoon runner. He was reported to have left his unit on the 3rd - presumably with permission - and on the 5th to have arrived at the motor pool from some unit in the rear, "through channels" (R8). On the afternoon of the 5th, the first sergeant, who was then back with the company vehicles at the motor pool, reported to Lieutenant Hulstedt that accused was there. Hulstedt

> "told Sergeant Smith to bring Andes to me or tell him to come to me and at that time I ordered Andes to get his equipment and * * * go to the front, there would be a vehicle ready, and at that time he told me that he would not go and he would rather suffer the consequences; he said he would not fight" (R7).

According to Smith, Lieutenant Hulstedt was then "preparing to take men and rations back up to the organization" (R11-12). At that time he ordered Private Andes to go forward with him. Private Andes refused to go because he said he "could not take it with the organization" (R12). There was "no enemy activity at all" at the motor pool (R8). Accused remained in the area under arrest until the company was pulled back the next day for a reorganization period (R15). He was one of "four or five men that refused orders to go at one time and /Lieutenant Hulstedt/ offered them all a chance and they refused to go up" (R16).

On cross-examination, Smith testified that he had observed accused in combat on previous occasions and that "he acted as any rifleman should act; he did his part" (R12-13).

After both sides had rested, the court, after closing, reopened to permit Lieutenant Hulstedt's recall by the prosecution for the purpose of expressing an opinion which the trial judge advocate thought "would be of benefit to the court regarding this case". The defense indicated affirmatively that it had no objection to this further proffered testimony. Reminded that he was still under oath, Hulstedt stated that accused

> "might have been polluted or swayed by two other members of his squad that are right now under arrest, one has been tried and another is awaiting court martial. The other squad members were ahead of Andes so to speak, in getting into trouble and these other members might have gotten Private Andes into this trouble he is in right now. They might have swayed him" (R14).

The witness characterized the three offenders (including accused) as "eight balls" under one of the best squad leaders in the company, but thought accused "must have been a good man to be platoon runner at one time" because "the company commander had always said he wanted good platoon runners". Until he refused Hulstedt's order, accused "must have been a fair soldier" (R15).

4. No evidence was presented by the defense, and defense counsel announced that the rights of accused had been fully explained to him by counsel and it was his desire to remain silent (R13).

5. Accused was charged with misbehavior before the enemy by refusing to advance to his company after he had been ordered to do so by Lieutenant Hulstedt, in violation of Article of War 75.

> "This offence may consist in:-
> * * * Such acts by any officer or soldier as - refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; * * * refusing to do duty or to perform some particular service before the enemy (Winthrop's Military Law and Precedents (Reprint, 1920), pp.622-623).

The uncontradicted evidence shows that Lieutenant Hulstedt, at the time and place alleged, was authorized to order accused to leave the motor pool and join his platoon which was then engaged in hand-to-hand combat with the enemy. Accused's unequivocal refusal to fight, accompanied by his statement that he would rather suffer the consequences than obey the order, constituted disgraceful behavior before the enemy within the clear purview of the cited authority (see also CM ETO 7391, Young; CM ETO 6177 Transeau; and CM ETO 5004, Scheck).

Lieutenant Hulstedt's testimony, when recalled, was in the nature of evidence in extenuation of accused's conduct, presented only after the defense had stated affirmatively that it had no objection to its admission. Under the circumstances, no prejudicial error was shown. Compelling uncontradicted evidence sustains the findings of guilty.

6. The charge sheet shows that accused is 21 years of age and that, with no prior service, he was inducted at Philadelphia, Pennsylvania, 4 March 1943.

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

8. The 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. Becker Judge Advocate

Valentine C. Sherman Judge Advocate

E. C. Carey Jr Judge Advocate

(312)

1st Ind.

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

1. In the case of Private THEODORE H. ANDES (33589646), Company H, 36th Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 11790. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11790).

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

(Sentence as commuted ordered executed. GCMO 351, USFET, 27 Aug 1945.)

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

BOARD OF REVIEW NO. 2

15 SEP 1945

CM ETO 11830

U N I T E D S T A T E S v. Privates First Class JOHN GREEN, JR. (36171592), GEORGE BERNARD (32312530), and Private ALVIN LANE (36151915), 567th Port Company, 399th Port Battalion, Transportation Corps	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Marseille, France, 12, 13 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, 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 were tried upon the following charges and specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private First Class John Green, Jr., and Private First Class George Bernard, both of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 2 November 1944, wrongfully and knowingly sell about ninety-six (96) bags of sugar, of a value in excess of fifty dollars ($50), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at Marseille, France, on or about 2 November 1944, knowingly and willfully apply to their own use and benefit one (1) two and one-half (2½) ton truck, of a

11830

value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Private First Class John Green, Jr., Private First Class George Bernard, and Private Alvin Lane, all of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 4 November 1944, wrongfully and knowingly sell about eighty (80) cases of Ration Accessory Convenience Packets, of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Private First Class John Green, Jr., Private First Class George Bernard, and Private Alvin Lane, all of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 4 November 1944, knowingly and willfully apply to their own use and benefit one (1) two and one-half (2½) ton truck, of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 5: In that Private First Class John Green, Jr., Private First Class George Bernard, and Private Alvin Lane, all of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 6 November 1944, wrongfully and knowingly sell an aggregate of about eighty (80) cases of corned beef and sausages, of a total value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 6: In that Private First Class John Green, Jr., Private First Class George Bernard, and Private Alvin Lane, all of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 6 November 1944, knowingly and willfully apply to their own use and benefit one (1) two and one-half (2½) ton truck, of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 7: In that Private First Class John Green, Jr., Private First Class George Bernard, and Private Alvin Lane, all of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 12 November 1944, wrongfully and knowingly sell about one hundred (100) cases of Ration Type 10 in 1, of a total value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 8: In that Private First Class John Green, Jr., Private First Class George Bernard, and Private Alvin Lane, all of the 567th Port Company, 399th Port Battalion, acting jointly, and in pursuance of a common intent, did, at Marseille, France, on or about 12 November 1944, knowingly and willfully apply to their own use and benefit one (1) two and one-half (2½) ton truck, of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

SEPARATE CHARGES AS TO PRIVATE FIRST CLASS JOHN GREEN, JR. 36171592, 567th Port Company, 399th Port Battalion

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

Specification: In that Private First Class John Green, Jr., 567th Port Company, 399th Port Battalion, did, without proper leave, absent himself from his camp at Marseille, France, from about 8 October 1944 to about 11 October 1944.

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

Specification 1: In that * * * did, at Marseille, France, on or about 15 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 21 October 1944.

Specification 2: In that * * * did, at Marseille, France, on or about 21 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 17 November 1944.

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

Specification: In that * * * having received a lawful order, viz., a standing order contained in Paragraph 3, Section II, Circular Number 35, dated 29 March 1944, Headquarters, European Theater of Operations, United States Army, promulgated by command of General Eisenhower, prohibiting the carrying of weapons, the said General Eisenhower being in the execution of his office, did, at Marseille, France, on or about 17 November 1944, wrongfully fail to obey the same.

SEPARATE CHARGES AS TO PRIVATE FIRST CLASS GEORGE BERNARD
32312530, 567th Port Company, 399th Port Battalion

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

Specification: In that Private First Class George Bernard, 567th Port Company, 399th Port Battalion, did, at Marseille, France, on or about 1 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 17 November 1944.

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

Specification: In that * * * having received a lawful order, viz., a standing order contained in Memorandum, Headquarters, Sixth Port, Transportation Corps, dated 18 October 1944, promulgated by order of Colonel Clarkson, prohibiting personnel of Sixth Port and all attached units from carrying weapons unless deemed necessary in the performance of duty, the said Colonel Clarkson being in the execution of his office, did, at Marseille, France, on or about 17 November,1944, wrongfully fail to obey the same.

SEPARATE CHARGES AS TO PRIVATE ALVIN LANE
36151915, 567th Port Company, 399th Port Battalion

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

Specification: In that Private Alvin Lane, 567th Port Company, 399th Port Battalion, did, at Marseille, France, on or about 29 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France, on or about 17 November 1944.

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

Specification: In that * * * having received a lawful order, viz., a standing order contained in Memorandum, Headquarters, Sixth Port, Transportation Corps, dated 18 October 1944, promulgated by order of Colonel Clarkson, prohibiting personnel of Sixth Port and all attached units from carrying weapons unless deemed necessary in the performance of duty, the said Colonel Clarkson being in the execution of his office, did, at Marseille, France, on or about 17 November 1944, wrongfully fail to obey the same.

Each accused consented to a common trial of both the joint and separate charges and specifications. Each accused pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications preferred against him. Evidence was introduced of three previous convictions against Lane, one by special court-martial for disobeying order of a non-commissioned officer in violation of Article of War 65, and two by summary court, each for one day absent without leave, in violation of Article of War 61; of one against Bernard by summary court for loitering while on duty as a watchman, in violation of Article of War 96, and against Green, none. Three-fourths of the members of the court present when 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 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 as follows:

Specifications 1 and 2 of the Charge:

Private Richard Jordan, a truck driver of the 3488th Quartermaster Trucking Company, testified that while driving a 2-1/2 ton G.M.C. truck (R12) the afternoon (R19) of 2 November 1944 in Marseille, France, he met Private Willie Lyons who asked Jordan if he wanted to make some easy money (R12-13). Lyons rode with him to the dock where they picked up a load of 96 100-pound bags of sugar to be delivered to the 567th (R14,23-24) but on the way he turned off his road and when shown a sketch of the roads in that locality (Pros.Ex.I) he indicated the route that he followed and that he went to Leo's Bar and parked (R15,24). Lyons was still with him and they there met accused Bernard and Green (R15). Lyons went in the bar but Green and a Frenchman went with and directed Jordan (R19-20) to a garage where the sugar was unloaded. They then returned to Leo's Bar (R16), Bar Cyrnos (R16,24), where in the backroom the Frenchman gave Green some money. Green in

turn gave Jordan $500 (R17,26). The truck belonged to the 3488th Quartermaster Truck Company and both it and the sugar were property of the United States (R17). Present when the money was paid to him (Jordan) were two Frenchmen, Green, Bernard and Lyons (R18,25-27). Jordan identified in court M. Armel Jacopini as the Frenchman who paid the money to Green (R18).

Private Willie Lyons, of accused's unit testified practically the same as to the load of sugar. The money was paid over in "Papa's" house (R26). He got $170 (R27). He did not see Green give Bernard any money but it was in four piles and the four men in the room were Lyons, Green, Bernard and Jordan (R27-28).

Monsieur Armel Jacopini, a bricklayer of Marseille, France, testified that early in November 1944, Green offered to sell him a truck load of merchandise but he had no money. On 2 November 1944 at four o'clock in the afternoon, he went to a garage with Green, who had a truckload of sugar (R29-30), to see if they could put it there and it was unloaded. Green was to leave him a few bags (of sugar) for his services but he paid Green no money. The only soldiers present were Green and the driver (R20-31).

Specifications 3 and 4 of the Charge:

Private James Adams, Jr., of accused's unit testified that he saw the three accused on 4 November 1944 at Leo's Bar, also known as Bar Cyrnos, at about eight thirty at night (R33-34). Green asked him if he wanted to make some easy money and they went to the All Night Bar where Lane and Bernard were drinking (R35). They heard a truck and Green went outside and then called them all out (R37). Green and Lane got on the truck (R42). He and Bernard were directed to walk behind the truck which was loaded with about 100 wooden boxes of Ration Accessory Packet type (R36-37, 42). The truck was a G.M.C. 2-1/2 ton "Bulldog Six by Six" marked "334AAA" (R37). This occurred about ten o'clock at night (R40). They followed close behind (R37,42) until they came to a house which he located on the map (Pros.Ex.I) where the truck was unloaded by the three accused and a couple of Frenchmen, Adams standing guard under instructions of Bernard who gave him a small .25 caliber automatic. Then they all got on the truck and returned to the All Night Bar (R38-40). The three accused went into a back room and on their return Green gave Adams 10,500 francs (R43) and Adams then returned to camp (R39). The cases of Ration Accessory Packets belonged to the United States Army (R42) and witness could identify them by the green corners on the boxes (R37,41-42,44).

Madame Josephine Papa testified that early in November, 10 or 15 cases similar to Ration Accessory Packets were left at her house (R45,50) by three colored Americans and one civilian (R46,49). One box was opened by a negro American who gave her some cigarettes and took himself something (R46). They were in bed when the Frenchman came and asked to leave some boxes (R48) which were removed by civilians the next day (R47). Though she did not see Green that night, she identified him as the soldier who said the next day that he saw

her that night (R48,50).

Monsieur Francois Papa, a boiler maker, testified to approximately the same story that sometime early in November three colored American soldiers brought some cases to their house. He thought accused Green was one of them (R50-51).

Specifications 5 and 6 of the Charge:

Private First Class Charles Grimes of accused's unit testified that he saw the three accused (R52) about eight o'clock the night of 6 November outside the All Night Bar (R54). A G.M.C. 2½ ton American truck came along (R55) and Green told Grimes if he wanted some easy money to get on the truck with them (R55,57). It was loaded with cases marked "Pork Sausage" (R55). They went to a house indicated by Grimes on the map (Pros.Ex.I) where about 70 cases were unloaded and Green and Grimes returned on the truck to the bar (R56) where later Lane and Bernard joined them. Lane gave Grimes 12500 francs, and he then returned to camp (R57-58).

Specifications 7 and 8 of the Charge:

Private Leonard Keaton of accused's unit testified that he met the three accused on 12 November at night on the street (R60) near Leo's Bar. They asked if he would like to make some money and when he agreed they all went in a bar. Lane went back outside and a little later they all went out to a G.M.C. 2-1/2 ton truck loaded with ten in one rations (R62). They followed the truck which backed up to a door and they all unloaded about 100 cases (R63) at a house into which some Frenchmen took the cases (R64). They then returned on the truck to the bar and went upstairs to Green's room where Green, Bernard, Lane and Adams each gave him (Keaton) 2000 francs (R64-65). They did not owe Keaton anything and nothing was said when the money was given him except "This is your share". He did not know if the load was sold to the French (R66-67).

Private Adams saw the three accused again about eight-thirty the night of 12 November 1944 at the All Night Bar. They all sat around and drank and said that the same thing would happen as before (R68). Soon a G.M.C. 2-1/2 ton, "334 AAA" truck containing 100 to 150 cases of ten in one rations came up (R68-69). The driver, Green and Lane got on the truck which went to a house and was unloaded by Lane, Bernard and (the driver) Keaton, Adams being told by Bernard to follow the truck and look for suspicious persons at the corner (R69-70). They all returned to the All Night Bar on the truck where the three accused went in back. Later Green returned and gave Adams 2000 francs and he then returned to camp. The rations and truck were the property of the United States Army (R71-72). Adams knew nothing more of what happened than that he was on guard and received some money (R73).

The charges and specifications generally:

O. R. Carlucci, agent of the Criminal Investigations Division identified the three accused. He took a signed statement from Green on 20 November 1944 (R74) which was admitted in evidence (Pros.Ex.2; R79), from Lane on 23 November 1944 (Pros.Ex.3; R83) and from Bernard on 23 November 1944 (Pros.Ex.4; R83,88). He had seen the three accused first on 17 November in a bar while investigating a truck load of sugar and a truck which had been picked up from some Frenchmen. He had found that Jordan had been driving the truck when he picked up Lyons and visited a bar. The bar owner had some sugar in his house and they found "Papa's" (Dettori) place across the street where Jordan said the money was divided (R38-90,99). They then found the three accused in a locked room upstairs over the Bar Des Amis. Green was lying on the bed (R91,104,106). On a table lay a French .32 caliber pistol and a British Sten gun stood next to the bed. A German machine pistol was under a pillow on the bed (R92,105). The officers who had been informed that accused were armed (R98), broke in with drawn guns and lined accused up and searched them (R92). In Green's clothes was found a small .25 caliber pistol and in Lane's clothing was a 6.25 caliber pistol (R92,95). All the weapons were loaded with full clips and shell in barrel (R96,105). Green said the machine pistol was his (R93). Nine pictures of accused (R102) and three letters addressed to Green were found in the Dettori home (R103). Bernard, in his statement (Pros.Ex.E), admitted possession of a machine pistol and a .32 caliber French Brevet.

Captain Richard J. Dora, 28th Quartermaster Group, testified that the 3488 Quartermaster Trucking Company was under his supervision on 2 November 1944 (R79). Vehicles of 334 AAA Battalion were also under his supervision and all the trucks and the loads they were hauling were United States property intended for the military use thereof at the times in question (R80-81). The court took judicial notice that the value of a 2-1/2 ton truck listed in War Department Bulletin was on 2,4,6 and 12 November 1944, valued in excess of $50 (R101).

Captain Albert Merz, Quartermaster Corps, testified that on 2 November 1944, sugar prices were $3.60 per 60 pound bag and on 23 November $6 per 100 pound bag (R107). Ration Accessory Packets were listed at $17 per case on 4 November 1944 (R107-108) case of sausage, $15.12 on 6 November 1944, and case of 10 in 1 ration $12.50 on 12 November 1944. Sugar on way from Port to Quartermaster ration dump would be property of the United States intended for the military service (R108-109).

First Sergeant George W. Barnes of accused's unit identified each accused (R109) and the morning reports of the units as affecting accused on the dates shown, as Green - "fr dy to AWOL - 8 Oct 44" and "fr AWOL to dy - 11 Oct 44" (R110-111; Pros.Ex.11 and 12); "fr dy to AWOL - 15 Oct 44" and "fr AWOL to dy 0100 hrs; dy to AWOL 0800 Hrs" 21 October 1944 (R112-113; Pros.Ex.13 and 14); Lane - "fr dy to

AWOL - 29 Oct 44" (R114; Pros.Ex.15); Bernard - "fr dy to AWOL 1 November 1944" (R115; Pros.Ex.16) and Lane, Green, Bernard - "fr AWOL to apprehension by mil auth and returned to mil control since 17 Nov 44" (R116; Pros.Ex.17). He further testified that on 8 October 1944 Green was reported absent and was not found in the company area after search (R116); that on 15 October Green was wanted for a detail and again could not be found, and the same thing occurred on 21 October (R117). On 1 November 1944 Bernard was wanted for a detail and could not be found and Lane was not seen in the company area after 1 November 1944 (R118). The military police records show Green was apprehended 21 October 1944 for illegal possession of weapons, no pass and no identification tags (R121). The three accused were identified as received at military police station on the morning of 21 October 1944 (R123). Both the 6th Port memorandum of 18 October 1944 and the "ETOUSA" circular No. 35 of 29 March 1944 relating to the carrying of unauthorized weapons were admitted in evidence (R124). All of accused had been seen by officers of their unit during their absence and each given direct orders to return to camp (R125-128).

Green in his signed statement dated 20 November 1944 told of going "AWOL" about two months previous and of staying at "Papa's" house. About three weeks later Lane, who was carrying a pistol came there, said he was going "AWOL" and stay with Green. Lane also told Green a few days after he came, to carry a pistol. He and Lane disposed of the load of 75 cases of sausages for which a Frenchman gave Lane $2000 in francs. The truck driver was from the 28 Quartermaster and Lane gave him $500. Then he and Lane went home, split the $1500, discussed future deals and agreed on a partnership. Two or three days later Lane informed him they had another deal that night. The truck was from the 3445 Quartermaster and they unloaded 80 cases of "P.X." rations, Lane collecting $2000 for the load, giving the driver $500 and he and Lane going home and splitting the $1500. Two days later they got a truckload of 80 cases of corned beef for which Green collected $2000 and divided it equally with the truck driver, Lane and himself. The very next night Bernard, who also had a gun, came to the house where he and Lane lived and asked them to take him in, which they did, agreeing that all money was to be split three ways. The following morning a load of sugar on a truck marked 3485 or 3486 Quartermaster arrived at Leo's Bar, was sold and the money divided four ways, the driver getting a share. Several days later they were arrested. Each had a pistol and Bernard also had a Sten gun (Pros.Ex.2).

Lane in his signed statement dated 23 November 1944, stated he went "AWOL" to a house across the street from Leo's Bar known as "Papa's" house where Green and he talked of their both being "AWOL". A few days later Bernard came to Lane and Green at "Papa's" house and said he was "AWOL" and wanted to stay with them. Some two weeks later they disposed of the truckload of "P.X." rations for $2000 which they split five ways, including the truck driver and the driver's friend. A week later he

met Green and Bernard in Leo's Bar and they told him of the load of sugar they had disposed of that afternoon. He states he did not take part in, or receive, any money for the sugar. The .25 caliber pistol was his, bought with black market money (Pros.Ex.3).

Bernard in his signed statement dated 21 November 1944 states that about four weeks before he decided to go "AWOL" and went to a French house where Green and Lane lived, known as "Pappa's" across the street from Leo's Bar where he told them he was not going to return to camp. They said he could stay with them. It was a week later when Green and Lane got a Frenchman to buy the sugar, the proceeds being divided four ways, the driver of the truck, Lane, Green and himself each getting $500.00. An "F.F.I." gave him the machine pistol as security for a loan of $200.00. The French automatic pistol he brought from Africa (Pros.Ex.4).

4. The defense produced but two witnesses, each accused remaining silent.

Madame Serra, a bar-restaurant keeper in Marseille, France, identified the three accused as customers of her place (R131) to whom she rented a room between 8 and 17 November, used part time by them with women (R132,135-136). They were good customers and were apprehended in the room at her place about nine o'clock on the night of 17 November (R135).

Monsieur Francois Papa simply denied ever renting a room to accused or having a room to let (R137).

5. As to Specifications 1 and 2 of the Charge - Green and Bernard's confessions fully corroborate the evidence of their guilt. Bernard received a full share of the money. The unlawful use of the truck, its value and that of the merchandise, together with its ownership, was established.

As to Specifications 3 and 4 of the Charge - both Green and Lane confessed their participation. Although Bernard did not admit participation in his statement, the evidence otherwise fully establishes him as a participant. The unlawful use of the truck and the value and ownership of it and its load were properly established.

As to Specifications 5 and 6 of the Charge - the participation of all three accused and the unlawful use of the truck are fully established by the evidence and the confessions of Green and Lane, as is the value and ownership of both truck and load.

As to Specifications 7 and 8 of the Charge - the stories of the various witnesses were the same substantially and sufficiently in detail to identify the transaction, the unlawful use of the truck and the participation of all three accused therein. The value and ownership of both truck and load were shown.

As to separate Charge I (Green) - the morning report fully shows and Green admits the absence.

As to Specifications 1 and 2 of separate Charge II (Green); Specification of separate Charge I (Bernard), and Specification of separate Charge I (Lane):

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

The stories of each of the three accused show plainly that they used the term "AWOL" as synonymous with the expression to desert. Green says he was "AWOL" about two months. Lane says he went "AWOL" and went to stay with Green at "Papa's" house where later Bernard showed up and wanted to stay with them. He told Green and Lane, according to his confession, that he (Bernard) was not going to return to camp. They entered into a partnership for a continuing business and provided themselves with hideout and an arsenal to defend them with every evidence of intent to do so. They were near their own camp but did not surrender and remained absent until apprehended at gun point. They made no attempt to explain their absence and the inference is inescapable that they intended to remain away permanently.

Specification of Separate Charge III (Green), and Specification as to Separate Charge II (Lane and Bernard) - each accused admitted ownership and was found in possession of a fully loaded gun in violation of both local and theater orders of which they were at least chargeable with notice.

6. The charge sheets show that accused Lane is 27 years and one month of age and, without prior service, was inducted 28 February 1941; accused Bernard is 22 years and eight months of age, and without prior service was inducted 10 April 1942; and that accused Green is 23 years and five months of age, and was inducted without prior service on 11 February 1942.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58); for absence without leave, such punishment as directed, except death (AW 61). Confinement in a penitentiary is authorized upon conviction of desertion in time of war (AW 42), and of larceny of property of the United States of a value exceeding $50 by Article of War 42 and section 35 (amended), Federal Criminal Code (18 USCA 82). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

18 AUG 1945

CM ETO 11838

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Dudelange, Luxembourg, 14 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private AARON AUSTIN, JR. (34232824), 658th Quartermaster Truck Company	

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

1. The record of trial in the case of the 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 Private Aaron Austin, Jr., 658th Quartermaster Truck Company, did, at or near Filliers, France, on or about 24 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Albine Kolodziej.

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

Specification: In that * * * did, at or near Filliers, France, on or about 24 January 1945, knowingly and willfully apply to his own use and benefit one 2-1/2 ton cargo truck,

11838

(326)

USA No. 4252298, of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty and, all of the members present at the time the vote was taken concurring, was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Third United States Army, disapproved so much of the finding of guilty of the Specification of Charge II as includes the letters and figures "USA #4252298", 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 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 1500 hours on 24 January 1945, the prosecutrix, Mademoiselle Albine Kolodziej, aged 18, left her home and walked along a road toward the town of Serrouville. It was snowing and the snow was "up to the knees". A truck "that they carry munitions in" drove up to her and accused, its driver, said to her, "Get in, Mademoiselle". She refused and walked away, but the truck continued behind her and accused again told her to get in. When she declined again, accused got out of the truck and pointed a carbine at her and forced her to get into the truck, in spite of protests by her. She saw nobody on the road and could not have run away in the heavy snow (R9-10,23-25,41). Accused then got in the truck, placed the carbine between his legs and drove rapidly toward Serrouville. She screamed as they passed some workers on the road and when she tried to open the door accused pulled her hand away (R25-26). When they passed through Serrouville she shouted at accused to stop, but he drove through the town toward Filliers, telling her to keep quiet. She did not grab his hand because she "would have been powerless against him" (R10-11,27-28). He drove rapidly past Morfountaine and turned on a little road in the direction of Filliers, then turned into the woods between the railroad station and the town of Filliers, driving for about an hour in all (R11,29-30). He stopped on the road in the woods and said to her, "Mademoiselle, 'zig-zig'". She pretended not to understand and he repeated it again. She could not get out of the truck "because he was there next to the door" and also she thought if she got out "he would run after me and hurt me".

11838

Accused got out of his seat, put a blanket on the seat and told her to lie down. She refused and resisted him, but he pushed her down on the seat anyhow, so that her head was near the steering wheel (R12,31-33). He did not strike or grab her. She kept pushing him with her hands but did not strike, scratch or kick him. She was afraid of colored soldiers and was never able to look at them. She saw him unbuttoning his pants. He pulled her dress over her head, and "from my fear I didn't look very much". She was not able to resist and "could not move because of the position he was in on top of me" (R12-13,20,33-34, 39,41). He pulled aside her drawers and put his sexual organ into her female organ. She "was fighting with him -- I didn't want to" (R13-14,16,17,34-35). She was "very much afraid" and believed "he might shoot me in the head and that would be the end" (R35-37,42). He wanted to kiss her in the mouth but she kept turning her head so that he only kissed her on the cheeks (R22). "He stayed on a long time and it was enough and I tried to push him off and he said 'again, again, again.'" She was angry and "turning in all directions" so he stopped. He then started the truck and went back through Filliers. Just outside Filliers, on a narrow road, he passed another vehicle carrying white American soldiers and an accident occurred, probably because she was waving her arms. She got out of the truck and asked the soldiers for an officer, but when she found there was none she showed a sergeant her skirt which was full of blood (R17-19,37-39).

A staff sergeant of an engineer aviation regiment, stationed at Morfountaine, France, testified that at about 1600 hours on 24 January, near Filliers, a 3/4-ton weapons carrier in which he rode was "side-swiped by a two and a half ton GMC" truck driven by accused. The truck was a government vehicle worth more than $50.00. A French girl waved at him as he walked in front of the truck, and she later got out of the cab. She seemed excited "to a certain extent" and was "kind of crying". She spoke rapidly in French and lifted her dress about half-way between the knee and hip (R53-59).

Prosecutrix gave the sergeant her address and walked crying to Serrouville, arriving about 1800 hours at the home of a relative who afterwards, at about 2000 hours, accompanied her to her home, where she told her mother and stepfather what had happened (R21-22,40). Her stepfather testified that she was crying and trembling and red-faced as a result of "the fear that she had" (R44-47).

The panties worn by prosecutrix were introduced in evidence (R59-60; Pros. Exs. 2,3), having previously been examined for presence of blood by the biochemist for the Third United States Army who found on them hemoglobin, one of the constituents of blood (R61-63).

At about 2100 hours on 24 January, prosecutrix was examined by an officer of a medical detachment who found no evidence of violence on her body (R52; Pros.Ex.1). She was also examined for evidence of rape by a medical officer at 0100 hours on 25 January, at an evacuation hospital. Her body showed no evidence of violence, but her underclothing had blood spots on it, particularly in the lap area. The spots were not caused by the normal monthly period. She was apparently not accustomed to sexual intercourse. The external genitalia showed a recent rupture of the hymen, and a microscopic examination of the vagina showed dead spermatozoa. Spermatozoa generally live from two to six hours in the vagina, and the presence of dead ones in the vagina usually indicates that intercourse was had during the preceding 24 to 48 hours (R48-51).

On 1 February 1945 an agent of a Criminal Investigation Division saw accused and, after warning him of his rights under Article of War 24, took a written statement which accused voluntarily signed (R64-76). The statement was introduced in evidence over objection of the defense that it was not shown to be voluntary (R75-76; Pros.Ex.4). In it accused stated that about twenty minutes before he had the accident a young lady "flagged" him and asked for a ride. As they drove along he asked for "zig-zig". She wanted to know what he would give her, whereupon he gave her cigarettes, chocolate and gum. He stopped the truck, took blankets out and went on another side of a little snow hill. They hugged and kissed and he "felt her tits", ran his hand up her leg and "felt her cunt". She pulled her dress up but would not pull her pants off. He pulled them to one side and inserted his penis in her, using a rubber. She cooperated with him and offered no resistance (Pros.Ex.4).

4. After his rights as a witness were explained to him, accused elected to testify under oath with reference to Charge I and to remain silent as to Charge II (R79-80,101-102). He had gone as far as the fourth grade in school and could read a little but could not write. He denied that the agent warned him properly of his rights or that he understood his rights thoroughly before making the statement. He went on a convoy the morning of 24 January and was left by the convoy on the return trip when his truck ran out of oil and received a broken spring, which he had repaired by an ordnance outfit. On the way back to his company he picked up the prosecutrix, who "flagged" him and asked for a ride. His carbine was in the gun rack of the truck and had no ammunition or magazine in it. He speaks French a "little bit" and asked prosecutrix for some "zig-zig". She asked what he would give her, and he told her cigarettes, chocolate and gum. She wanted him to go to her house, but he was in a hurry. After driving about 15 minutes he stopped the truck and got blankets out. She got out with him and they went across the road behind a snow hill.

She lay down upon the blankets and pulled up her dress. He did not threaten or strike her and she did not appear afraid. He "felt her tits" and "between her legs" and they "hugged and kissed". He pulled her pants aside and then they "zig-zigged" or had intercourse. She was cooperative. When they got back to the truck she went around the truck and urinated and then got back in the truck, whereupon he gave her cigarettes, gum and candy. She asked for food also, but he told her he had none. She rode back with him until he "side-swiped" a weapons carrier which "didn't give none of the road". A sergeant and other soldiers took him back to their company and locked him up in a room until the following morning. He had denied having intercourse with the girl to the sergeant "because he didn't need to know my business" (R80-101).

For the defense, accused's company commander testified that on or about 25 January, accused gave him a work order dated 24 January from an ordnance outfit for repair of a left spring. Accused performed his duties with the company in a satisfactory manner (R77-78). Accused's first sergeant testified that accused performed his duties "all right" (R78-79).

5. a. Carnal knowledge of prosecutrix at the time and place alleged is shown by her testimony and admitted by accused. His testimony states that she consented to the act of intercourse. Her testimony affirmatively negatives consent, showing that she protested and resisted accused's advances with some degree of physical force. She did not resist to any greater degree because of fear of accused engendered in her by his color, manner and actions, and by use of the carbine in initially forcing her into the truck. Her testimony is corroborated in part by competent medical and lay testimony regarding her appearance and physical condition immediately following the act of intercourse. Thus substantial evidence for the prosecution shows all of the essential elements of the crime of rape (CM ETO 3740, Sanders et al; CM ETO 10841, Utsey; CM ETO 3933, Ferguson et al) and findings of guilty based thereon may not be disturbed by the Board of Review (CM ETO 10715, Coynes; CM ETO 10644, Clontz).

b. The evidence further shows that accused knowingly and willfully applied a government 2½ ton truck to his own use and benefit by stopping to pick up a French civilian, driving her some distance, part of which was inferentially off his regular route, and stopping the truck to engage in sexual intercourse with her in the truck. His conduct is patently a violation of Article of War 94 (see MCM 1928, par.150i, pp.184-185; CM 249009, Pemberton, 32 B.R. 17 (1944)).

11838

c. Since accused voluntarily testified under oath at the trial to substantially the same facts as were contained in his written confession, any error committed by the court in admitting the confession over his objection was thereby rendered harmless and his substantial rights could not have been prejudiced (see CM 234561, Nelson, 21 B.R. 55 (1943); CM 252772, Gentry, 34 B.R. 181 (1944)).

6. The charge sheet shows that accused is 25 years and one month of age and was inducted 22 February 1942. 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 as approved and the sentence as commuted.

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

(ON LEAVE) Judge Advocate

Judge Advocate

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 AARON AUSTIN, JR. (34232824), 658th 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 as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11838. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11838).

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

(Sentence as commuted ordered executed. GCMO 367, USFET, 30 Aug 1945).

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

BOARD OF REVIEW NO. 3

28 JUL 1945

CM ETO 11845

U N I T E D S T A T E S	XII TACTICAL AIR COMMAND
v.	Trial by GCM, convened at Headquarters, XII Tactical Air Command, APO 374, U. S. Army, 20, 21 February 1945. Sentence: Dismissal and total forfeitures.
Second Lieutenant WILLIAM N. STARK (O-1288808), Air Corps, Detachment "A", 24th Mobile Reclamation and Repair Squadron (Heavy), 312th Service Group	

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

---

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

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

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

Specification: In that Second Lieutenant William N. Stark, Detachment "A", 24th Mobile Reclamation and Repair Squadron (Heavy), 312th Service Group, did, at USAAF Station A-90, near Toul, France on or about the 29th day of December 1944, lift up a weapon, to wit, a pistol, against Major Robert J. Bell, his superior officer, who was then in the execution of his office.

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

Specification 1: In that * * * did, at USAAF Station A-90, near Toul, France, on or about the 29th day of December 1944, with intent to do him bodily harm, commit an assault upon Corporal Nick T. Lomonte, by

11845

shooting at him, with a dangerous weapon, to wit, a pistol.

Specification 2: In that * * * did, at USAAF Station A-90, near Toul, France, on or about the 29th day of December 1944, with intent to do him bodily harm, commit an assault upon Private Victor P. Georgio, by shooting at him, with a dangerous weapon, to wit, a pistol.

Specification 3: (Finding of not guilty).

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

Specification 1: In that * * * was, at USAAF Station A-90, near Toul, France, on or about the 29th day of December 1944, drunk and disorderly in camp.

Specification 2: In that * * * did, at USAAF Station A-90, near Toul, France, on or about the 29th day of December 1944, wrongfully and with wanton disregard of the lives and property of others, discharge a pistol in the camp area.

He pleaded guilty of Charge III and its specifications and not guilty to the remaining charges and specifications. Two-thirds of the members of the court present at the time the vote was taken concurring in each finding of guilty, he was found, of the Specification, Charge I, guilty except the words "lift up a weapon, to wit, a pistol, against Major Robert J. Bell, his superior officer, who was then in the execution of his office", substituting therefor the words "commit an assault upon Major Robert J. Bell by wrongfully lifting up a weapon, to wit, a pistol, against him, the said Major Robert J. Bell", of the excepted words, not guilty, of the substituted words, guilty, of Charge I, not guilty, but guilty of a violation of the 96th Article of War, of Specifications 1 and 2, Charge II, guilty, except, in each instance, the words "with intent to do him bodily harm", of Specification 3, not guilty, of Charge II, not guilty but guilty of a violation of the 96th Article of War; of Charge III and its specifications, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, XII Tactical Air Command, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

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

Some days prior to 29 December 1944 (during the "Battle of the Bulge") a report was received at USAAF Station A-90, located near Toul, France, that German parachutists had been dropped in the vicinity. As a result, a double guard was posted and several alerts occurred (R13,33-36,39). On the evening of 29 December 1944, while these precautions were still in effect, a number of the officers at the station gathered at the officer's club to celebrate the birthday of one of their number (R21). Working at the bar that evening were Corporal Nick T. Lomonte and Private Victor P. Georgio (R7,17,18). Accused drank rather heavily at the party and consumed, according to Lomonte, sixteen double whiskies (R25) or, according to Georgio, about six or seven (R12). All of the officers left the club at about 2240 hours except accused, who remained until the bar closed at approximately 2300 hours when, after securing a final drink, he also left (R8,11,19). Lomonte and Georgio departed a moment or two later and, upon doing so, noticed accused ahead of them on the road, proceeding in an uneven fashion in the direction of his quarters (R8,10,12, 19,22,23).

In returning to their quarters, Lomonte and Georgio followed him for a short distance but later turned off the road and started across a field on a direct route to the enlisted men's area (R8,18). While crossing the field, they heard the sound of shots and, not knowing their exact source, threw themselves to the ground. They remained prone for a few minutes and then, hearing nothing further, they started to arise, Lomonte first and then Georgio (R8,16,18,19,22,26). As Lomonte did so, Georgio saw a man standing in the road with his arm outstretched in their direction (R8,9,13,14,15,28). It was a bright moonlit night and, although the person seen was some 300 feet distant, from his stance and the manner in which he wore his cap, Georgio was virtually certain that the man in question was the accused (R9,15,51). When Lomonte and Georgio got to their feet, this "individual" again fired at them and the two men again "hit the ground" (R8,18). They remained there until they heard the sound of voices coming from the direction from which the shots had been fired. They then arose and made their way to their area (R8,10,18).

First Lieutenant Gilbert H. Bertie, who was Officer of the Day on 29 December, testified that he heard the sounds of shots in the station area at about 2300 hours and thereupon left his tent to investigate the matter. On going through the area to the location from which the sounds appeared to be coming, he saw accused standing in the road and asked him if he had heard any shots. When accused replied, "What shots", Bertie, noting that he was drunk, did not question him further but proceeded to organize a searching party (R28,29).

After his encounter with Lieutenant Bertie, accused returned to his tent. While he was there, Private First Class Homer Ortego, who had

started toward the orderly room on hearing the disturbance, stopped for a moment and looked in (R34,35). When Ortego resumed his progress toward the orderly room, accused challenged him. Ortego was startled by the challenge and answered "Who is this?" While he was answering, a shot was fired and, while Ortego did not see accused fire it and was unable to state whether it was fired at him, accused had a small pistol in his hand and the circumstances were such that it could have been fired only by the accused (R35). Accused then questioned Ortego, asking him among other things to state his middle initial, and ultimately dismissed him (R35,37).

The searching party, which by this time had been joined by Major Robert J. Bell, heard the shot and proceeded to accused's tent (R29). Upon arrival, Major Bell entered first. As he did so, accused, who was drunk and did not appear to recognize him, pointed a revolver at him and directed him to state his middle initial (R29,30,32). After some discussion and persuasion, accused was relieved of a partially loaded pistol by Lieutenant Bertie (R30,31,38). Examination of the pistol disclosed that it recently had been fired (R31). During subsequent questioning, accused was rambling and incoherent (R30).

On cross-examination, Major Bell testified that he had had close daily associations with accused from June 1944 to the time of the incident, that prior to the night in question he had never seen him intoxicated, that his reputation for sobriety was good, that both his character and military efficiency were excellent, and that his general reputation as an officer and soldier was good (R41).

4. After having been advised of his rights as a witness, accused elected to be sworn as a witness on his own behalf. He testified that he attended a birthday party on the evening in question but was not certain how many drinks he consumed. He remembered playing checkers with another officer while at the party and he also had a "hazy recollection" of talking with Major Bell later that evening. He remembered nothing that occurred in the interval between these two incidents (R45).

Three officers of accused's organization were called as character witnesses by the defense and all testified that accused's reputation both for sobriety and as a soldier and an officer was good (R48,49).

5. It is apparent that the court, in reaching its findings, proceeded on the theory that accused was too drunk on the evening in question to be capable of entertaining the specific intent necessary for the commission of the offense charged in the Specification, Charge I, and Specifications 1 and 2, Charge II. This was not improper under the evidence here presented and, since drunkenness operates as a defense only to those offenses in which a specific intent is a necessary element, it was like-

wise not improper for the court to find accused guilty of the lesser included offenses of an assault on Major Bell and of assults with a dangerous weapon on Lomonte and Georgio, in violation of Article of War 96. It is clear that accused pointed a loaded pistol at Major Bell and there is substantial, competent evidence to support the court's finding that accused fired his pistol at Lomonte and Georgio. The court's findings with respect to Charge III and its specifications are similarly fully supported by the record of trial. Accused pleaded guilty to these offenses and, in addition, their commission was amply shown by substantial evidence independent of the plea.

6. The charge sheet shows that accused is 32 years two months of age, enlisted 17 January 1941 at Hope, Arkansas, and was appointed a second lieutenant on 24 July 1942 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.

8. A sentence of dismissal is authorized on conviction of offenses in violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(337)

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 Second Lieutenant WILLIAM N. STARK (O-1288808), Air Corps, Detachment "A", 24th Mobile Reclamation and Repair Squadron (Heavy), 312th Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11845. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11845).

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

(Sentence ordered executed. GCMO 369, USFET, 29 Aug 1945).

(338)

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

BOARD OF REVIEW NO. 2

29 AUG 1945

CM ETO 11856

U N I T E D S T A T E S	1ST INFANTRY DIVISION
v.	Trial by GCM, convened at Cheb, Sudetenland, Czechoslovakia, 12 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania
Private WILBUR E. DEBEAU (36569555), Company F, 16th Infantry	

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

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

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

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

Specification: In that Private Wilbur E. Debeau, Company F, 16th Infantry, did, in the vicinity of Heistern, Aachen, Rheinprovinz, Germany, on or about 19 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself at Liege, Liege, Belgium, on or about 20 January 1945.

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

Specification: In that * * *, having been duly placed in confinement in 16th Infantry Stockade on or about 25 January 1945, did at Kleinhau, Aachen, Rheinprovinz, Germany, on or about 6 February 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, at Kleinhau, Aachen, Rheinprovinz, Germany, on or about 6 February 1945, desert the service of the United States by absenting himself without proper leave from the 16th Infantry Stockade, and did remain absent in desertion until he was apprehended at Liege, Liege, Belgium, on or about 5 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 charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for absence without leave for 16 days and one by summary court for absence without leave for one day, 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 approved the sentence designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused is a rifleman in Company F, 16th Infantry Regiment (R9). On 18 November 1944 his company was starting an attack near Heistern, Germany, at which time he and three others were detailed to take some prisoners to the rear. The other men returned to the company on the same day but accused did not. He had no permission to be absent on 19 November 1944, except with reference to his duties on the prisoner detail, and he was not present with his organization at any time between then and 20 January 1945. He was not authorized to be absent at any time between these dates (R9,10). At the time accused left with the prisoners, his company was receiving small arms, machine gun and automatic weapons fire and the

enemy was about 200 to 300 yards in front of them. The evening before the attack accused was present when his squad was briefed as to the place, time and objective of the attack and the company had been in the attack for about an hour when accused was sent to the rear with the prisoners, who had just been captured. (R11,12).

After the regimental adjutant testified as to its voluntary nature (R15,16), a sworn statement signed by accused was received in evidence. Accused therein relates that on 20 January 1945 he turned himself into the military police in Liege, Belgium. He further stated that on 19 November 1945 after turning over the German prisoners to the aid station, he remained there all night and the next day he went to Liege where he remained throughout the entire period of his absence (R16; Pros.Ex.A).

Accused was placed in confinement in the 16th Infantry Regimental Stockade on 25 January 1945 and on 6 February 1945 he was one of eight prisoners on a work detail under guard. That night as the detail was preparing to bed down in a wooded area near Kleinhau, Germany, accused escaped. He had not been set at liberty nor did he have permission to be absent on this day and although the area was searched, he was not found (R21,22,24,25).

It was stipulated by the prosecution, defense counsel, and the accused that he voluntarily surrendered to the military police at Liege, Belgium on 20 January 1945, and that he was apprehended by the military police in the same city on 5 April 1945 (R25,26).

4. Accused after his rights as a witness were fully explained to him (R27), elected to remain silent and no evidence was introduced in his behalf.

5. Accused's unauthorized absence on 19 November 1944 is established by competent testimony and the admissions contained in his sworn pretrial statement. Under the circumstances disclosed by the uncontradicted evidence in the record, the court was fully justified in inferring that he left his organization with the intent to avoid hazardous duty (CM ETO 13762, Allen). All the elements of the offense charged in the Specification of Charge I are fully established by the evidence (MCM, 1928, par.130a, pp.142,143).

6. Concerning the offense alleged in Specification 1 of Additional Charge I, there is competent, substantial evidence that accused, having been duly placed in confinement, escaped therefrom before he was set at liberty (MCM, 1928, par.139b, p.154).

7. The Specification of Additional Charge II alleges desertion terminated by apprehension. The uncontradicted evidence establishes accused's unauthorized and unexplained absence for 58 days and its termination by apprehension. The court was warranted in inferring, from such a prolonged and totally unexplained absence in an active theater of military operations, that he intended to remain permanently absent from military control (MCM, 1928, par.130a, pp.143,144). Substantial evidence sustains the findings of guilty of the offense (CM ETO 10212, Balsamo).

8. The charge sheet shows that accused is 22 years nine months of age and was inducted 10 February 1943 at Saginaw, Michigan. He had no prior service.

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

10. 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

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

BOARD OF REVIEW NO. 2

31 AUG 1945

CM ETO 11869

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Sangerhausen, Germany, 30 April 1945.
Private EULAN J. HISE (36313607), Company D, 83rd Armored Reconnaissance Battalion.	)	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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private (then Technician Fifth Grade) Eulan J. Hise, Company "D", 83rd Armored Reconnaissance Battalion, did, at Duren, Germany, on or about 26 February 1945, desert the service of the United States with intent to avoid hazardous duty, to wit: Combat against the German Army and did remain absent in desertion until he was apprehended at Duren, Germany, on or about 20 March 1945.

He pleaded not guilty to 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 was introduced of previous convictions. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may

direct, for the remainder of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that for several days prior to 25 February 1945 the armored reconnaissance platoon of which accused was a member occupied a town near Duren, Germany, not in contact with the enemy, but waiting for the infantry to clear Duren of the enemy (R8). It moved into Duren after it was cleared during the evening of 25 February 1945 and occupied two buildings. The squad leaders were told that it would move out early on the morning of the 26th and proceed toward the enemy "on the other side of the Roer River". It moved out between 0530 and 0600 that morning. The accused was reported as missing when the platoon was about to move out. He had no authority to be absent (R7,8,12). An enlisted man saw him on guard during the night and awakened him fully the following morning. Accused said he was awake (R10). The platoon, leaving its vehicles behind, proceeded to another town on foot expecting to meet the enemy (R8-9). They were marching towards the Roer River to attack the enemy and did attack on the 26 February taking prisoners (R10-11). The vehicles were brought up later. On 20 March 1945 accused was apprehended in the basement of an abandoned house in Duren. He came out of the basement when summoned and gave his correct name and organization (R9). On 24 March 1945 he voluntarily signed a statement admitted in evidence without objection (R12; Pros.Ex.A), in which he stated that he was on guard for one hour during the night of 25 February 1945 at Duren and went to bed in the cellar of the building he had been guarding at 11:30 pm. He did not awaken until 12:30 the next day and found his platoon and all of its vehicles gone. He waited on the front porch of that building until 1600 that day and spent that night inside. The next day he also remained in or about the building as he did not know what to do. Thereafter he ran out of food and joined some colored troops who came to work on the road. He did not turn himself in to the military police because he felt sure he would then be court-martialed. He felt that if he could eventually find someone from his own outfit and get back to his outfit he would be safe from court-martial. He was entered in the morning report of his organization as "AWOL 26 Feb 45" (R14;Pros.Ex.C).

It was stipulated that the accused was examined on 22 March 1945 and found to be sane and mentally responsible (R13;Pros.Ex.B).

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

5. The accused has been found guilty of desertion in violation of Article of War 58 under Article of War 28 circumstances. The following elements are necessary to establish such desertion:

(1) that the accused was absent without leave; (2) that his organization was under orders involving a hazardous duty; (3) that he 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 (CM ETO 1921, King; CM ETO 5958, Perry and Allen).

That the accused was absent without leave from his organization was clearly shown by the evidence whether his absence was due to his actually leaving his organization in Duren or whether his organization left him and he failed to join it as it moved out. In either event, he was not at the place where he was required to be at a time when he should have been there (MCM, 1928, par.132, p.145). The evidence also shows that his organization was under orders to proceed toward the enemy in prospective attack given to the squad leaders and which information gets down to the members and that therefore it was under orders involving a hazardous duty. There was no evidence that the accused was actually and specially notified or informed of the hazardous duty his organization was to undertake on the morning of the 26th of February, but as he was present with it for days preceding he must have known that it was moving toward the enemy and that the nearer it came to the enemy the greater the hazard. His knowledge of the tactical situation may be inferred from the circumstances (CM ETO 11404, Holmes; CM ETO 7688, Buchanan; CM ETO 6934, Carlson). Such proximity to the enemy while operating in enemy country is sufficient to satisfy the requirements of proof as to this element of the offense and to distinguish the case from such cases as CM ETO 5958, Perry and Allen, supra.

There therefore remains for discussion the sole question of whether the accused had the intent to avoid the hazardous duty at the time when he absented himself. In the absence of a confession, intent can only be shown by inference from the facts shown. The only direct evidence on this subject was introduced by the prosecution and consisted of the accused's voluntary pre-trial statement. In it the accused claimed that he went to bed late on the night of the 25th and did not awaken until after his organization had gone and that he remained in and around that place for two days thereafter. It would therefore appear, if believed, that at the time the separation took place the accused was asleep and that therefore he could not have intended to avoid hazardous duty at that time and did not intend to do so during the few days following.

On the other hand, there was evidence that he was fully awakened on the early morning of the 26th by one of the enlisted men and that he made no appreciable effort to join his organization for a period of 22 days. If fully awakened, he must have observed the evacuation of the building by the platoon and the subsequent movement of the vehicles. The determination of factual questions rests solely in the court's province and we are of the opinion that the evidence was sufficient to legally sustain the inference that the accused was aware of the platoon's movement toward the enemy and consciously evaded joining it in order to avoid its hazardous duty.

6. The charge sheet shows the accused to be 25 years two months of age. He was inducted 23 January 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). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

(346)

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

BOARD OF REVIEW NO. 3

CM ETO 11903

U N I T E D S T A T E S	)	89TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Geisenheim, Germany, 12 April 1945. Sentence: Dismissal
	)	
Second Lieutenant WILLIAM G. WOFFORD (O-1291744), Company B, 354th Infantry	)	

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

---

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

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

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

Specification: In that 2d Lieutenant William G. Wofford, Company "B", 354th Infantry, APO 89, U. S. Army, was, at Becherbach, Germany, on or about 20 March 1945, found drunk while on duty as a platoon leader of 3d Platoon, Company "B", 354th Infantry.

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that * * * did, at Becherbach, Germany, on or about 20 March 1945, wrongfully urinate on the floor of the squad room.

Specification 2: In that * * * did, at Becherbach, Germany, on or about 20 March 1945, wrongfully fraternize with Dr. Theol Johannes Muller, a German, by giving him six cans of "C" rations and coffee.

He pleaded not guilty, and was found guilty of Charges I and III and their specifications and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 89th 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 execution of the sentence pursuant to Article of War 50½.

3. Summary of evidence for the prosecution:

On 20 March 1945 American troops occupied Becherbach-oberzobenheim, Germany (R6,13). The Muller family, Dr. Johannes Muller, his wife, Maria, and her sister, Franziska Kirmes, were required to vacate their home. Later they returned (R6,13,18) and at about 1530 hours accused came to the house and looked it over with Dr. Muller. He indicated that ten men would be billeted there and that the family could remain (R7,14,18), asked Dr. Muller if he believed in God (R7) and inquired if the family had any food (R7,18,20).

Sometime during the afternoon a watch, emblem, candles, and bottles of intoxicants were taken from the house. The watch was returned by a major (R7,8,14). About 1900 accused, accompanied by a soldier, returned with six cans of C rations and a sack of coffee which he delivered to the Muller home (R10,16). Dr. Muller testified he "gave us" the described articles (R7,8), while Mrs. Muller's testimony was that accused "brought me" the supplies referred to (R14). About 2200 accused and two enlisted men of his company went to the Muller home. Accused was drunk and when he motioned to Miss Kirmes to go into a dark room with him, others stepped between them. The women went upstairs and locked themselves in a room. No soldiers stayed in the Muller home that night (R8,15,16,17,19,22,23).

Three enlisted men of B Company's third platoon, commanded by accused, brought him to the room where they were quartered. He was drunk - staggering, laughing, talking. He bit the ears and faces of various enlisted members of the platoon who in turn pushed him away. He then urinated on the floor, left the building, fell and "sort of passed out" (R21-22,24,25). First Lieutenant Edward Dixon, of accused's regiment, found him lying in the street in front of the third platoon's billet, placed him in arrest and ordered two guards to bring him to his feet and escort him to the regimental command post (R25,27; Pros.Ex.A). Captain John A. Hetherington, Medical Corps, battalion surgeon (R27), later examined accused. He was asleep, but was finally aroused and Captain Hetherington found evidence of alcohol on his breath, that his speech was sluggish and thick, and that he lacked coordination as revealed by his attempts at walking and fingerpointing. Extreme fatigue might have caused everything to have slowed down somewhat, but he was under the influence of liquor (R28-30).

4. Summary of evidence for the defense:

Staff Sergeant Frederick A. Ponting, of accused's company, saw him at about 2000, 20 March 1945 (R31). He was sober (R33), was not drinking, and did not have a bottle (R31). Together they went to the home of a minister (R33) to whom accused gave some coffee. There accused made a remark about serving "the same Man" and they left after a few moments (R34). He first heard of non-fraternization the first part of March (R34) through booklets distributed in the command (R35).

About 2130, 20 March 1945, Private Marion M. Barnhart, Company B, 354th Infantry, saw accused who was not drunk (R35;Def. Ex.1).

After his rights were explained accused elected to make a sworn statement (R36). He was tired for he had had a strenuous week. Each day beginning with 14 March, they had marched 12 or 15 miles, up and down mountains, fighting as they went. They were marching on the night of the 15th and he got no rest. On the night of the 16th it was too cold to sleep. He was up practically all of the night of the 19th (R38,39). On the 20th, they arrived in Becherbach after a 12 or 15 mile march. Shortly after the men were billeted, a corporal of the anti-tank battalion asked assistance in obtaining billets for his men. They went to Muller's home where he met Muller, his wife and sister-in-law, to whom he explained that billets were required for 10 men. He then returned to his quarters (R36-37). Later, around 1700 or 1800, the corporal reported that

the anti-tank unit was moving out. He then went to Muller's thinking he might move some of his men there. Through an interpreter, he learned that Muller did not have much food, was not a Nazi and was of the same religion (R37). He gave "them" (R37) some C rations and coffee he had accumulated. He considered himself to be acting in an official capacity and not infringing upon the articles dealing with fraternization. He remembered no prohibition against the giving of food. Dr. Muller was a priest and not a Nazi. He then returned to his billet later to be called to the CP where straws were drawn for guard. Nothing was there said about his being drunk (R37). His feet were frost bitten at "Lucky Strike" and his "stability is rather uncertain" (R38). On the 20th his legs were slow and wobbly due largely to fatigue (R39).

About 2200 he went to Dr. Muller's (R41) to see about moving some of his men over there (R39). At that time, he noticed he was wobbling (R39). His gestures there were not directed toward Miss Kirmes, but to his men to come with him (R41-42). He decided not to move any men to the Muller home because they could have been Germans (R40). As to biting Sergeant Boyenga's ear,

> "The beds were close together and the lights were weak; and when you are under fire together you're in close contact with each other and I'd get the men aroused and we'd scuffle now and then" (R41).

He urinated in a bucket, not on the floor (R39,41), went outside, sat down, and went to sleep. He had two drinks, one about 1600 and the other about 1800 (R40).

5. a. The record supports the findings of guilty of Charge I and its Specification - drunk on duty in violation of Article of War 85. The prosecution presented substantial evidence that accused was drunk and he was on duty. He was a platoon leader and, for a period of about a week, his unit had been engaged in active combat. The stop at Becherbach was one in a series in the drive forward against the enemy.

> "In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of" Article of War 85 (MCM, 1928, par.145, p.160; See also Winthrop's Military Law and Precedents (Reprint, 1920), p.615).

b. The record supports the findings of guilty of Charge III and its specifications. Some comment is in order as to Specification 2 -

fraternization by giving food to a German. The various orders upon which this Specification is based were neither referred to in the Specification nor introduced into evidence by the prosecution. The defense, in its argument, did read (R42) paragraph 6c of "Special Orders for German-American Relations" signed by Lieutenant General O. N. Bradley, Commanding General, 12th Army Group:

> "'6. Never to associate with Germans.
>
> c. American soldiers must not associate with Germans. Specifically, it is not permissible to shake hands with them, to visit their homes, to exchange gifts with them, to engage in games or sports with them, to attend their dances or social events, or to accompany them on the street or elsewhere. Particularly, avoid all discussion or argument with them. Give the Germans no chance to trick you into relaxing your guard.'"

Even though no introduced into evidence, the court on its own initiative could properly take judicial notice of orders issued by higher authority forbidding fraternization with Germans (CM ETO 4054, Carey; CM ETO 3649, Mitchell; CM ETO 3456, Neff; CM ETO 2273, Sherman). That accused was aware of such orders is shown by his testimony and, inferentially, by the "special orders" read to the court in argument. The term "fraternization" as used in connection with the relationship of American soldiers and Germans concerns friendly association and comradely social relationship (CM ETO 10967, Harris). The conduct of accused as alleged and proved constituted fraternization (CM ETO 6203, Mistretta; CM ETO 7269, Van Houten). That Dr. Muller was a cleric, of the same religion, and not a Nazi, did not excuse the conduct of accused. Fraternization is prohibited with Germans - an inclusive term embracing all German nationals.

6. Some incompetent testimony was admitted in evidence. That some articles disappeared from the Muller home was clearly irrelevant and immaterial. The Board of Review is of the opinion that no substantial rights of the accused were prejudiced thereby. There was substantial and compelling evidence to support the findings. Under the findings the minimum sentence was imposed.

7. The charge sheet shows accused is 33 years two months of age. He served as an enlisted man for approximately one year and was commissioned 27 August 1942. He stated he was in the National Guard and was "activated in service" 15 September 1940 (R43).

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

9. The penalty for violation of Article of War 85 by an officer in time of war is dismissal and such other punishment as the court-martial may direct.

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

11903

(352)

1st Ind.

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

1. In the case of Second Lieutenant WILLIAM G. WOFFORD (O-1291744), Company B, 354th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11903. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11903).

E. C. McNEIL
Brigadier General, United States Army,

Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 254, ETO, 10 July 1945).

11903

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

BOARD OF REVIEW NO. 3 2 AUG 1945

CM ETO 11905

U N I T E D S T A T E S)	2ND AIR DIVISION
)	
v.)	Trial by GCM, convened at AAF
)	Station F-356, 2 April 1945.
Captain CHARLES F. HOWSE)	Sentence: Dismissal and confine-
(O-561317), 334th Fighter)	ment at hard labor for three
Squadron, 4th Fighter)	years. United States Peniten-
Group)	tiary, 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 officer named above has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

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

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

Specification 1: (Withdrawn by direction of Appointing Authority).

Specification 2: In that Captain Charles F. Howse, 334th Fighter Squadron, 4th Fighter Group, did at AAF Station F-356, on or about 3 March 1945, feloniously embezzle by fraudulently converting to his own use English money in the amount of £74-7-0, value of about $300.00, the property of

1st Lieutenant Edward J. Wozniak, 334th Fighter Squadron, 4th Fighter Group, entrusted to him by the said 1st Lieutenant Edward J. Wozniak for the purchase of War Bonds.

Specification 3: In that * * * on or about 3 March 1945, feloniously embezzle by fraudulently converting to his own use English money in the amount of £ 24-15-8, value of about $100.00, the property of Staff Sergeant Raymond A. Larmouth, 334th Fighter Squadron, 4th Fighter Group, entrusted to him by the said Staff Sergeant Raymond A. Larmouth for the purpose of sending to Mrs. Willie M. Larmouth, Earlington, Kentucky under the P.T.T.

Specification 4: In that * * * on or about 10 February 1945, feloniously embezzle by fraudulently converting to his own use English money in the amount of £79-6-2, value of about $320.00, the property of Sergeant Neil F. Killen, 334th Fighter Squadron, 4th Fighter Group, entrusted to him by the said Sergeant Neil F. Killen for the purpose of sending to Mrs. Lloyd H. Killen, Uhrichsville, Ohio under the P.T.T.

CHARGE II: Violation of the 95th Article of War. (Withdrawn by direction of Appointing Authority).

He pleaded not guilty, and was found guilty of Charge I and Specifications 3 and 4, and guilty of Specification 2 except the words "3rd March 1945" substituting therefor the words "1st November 1944", of the excepted words, not guilty, of the substituted words, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commahding General, 2nd Air 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 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. Accused was adjutant of the 334th Fighter Squadron (R15). Sergeant Kenneth Ettner, 334th Fighter Squadron, worked in the squadron personnel section (R14) and had charge of "enlisted men's payroll, records and allotments, P. T. T. /"personal transmission transfer"/, and War Bonds" (R13). Whenever he received money for War Bonds or "P.T.T.", he customarily made out a "Form 38", in triplicate, showing, among other things, the amount received, the transmitter, and transmittee. The forms, together with the money, would then ordinarily be placed on accused's desk for signature by him or the executive who shared the same office (R13,21-22). The signed triplicate would be returned to Ettner (R14) and given to the depositor. The original and duplicate, together with the money, would be transmitted to the finance officer, presumably by accused. After verification of the amount, the duplicate would be acknowledged and returned as a receipt. The original would be kept in the finance office as a permanent record (R22,23).

On 1 November 1944, First Lieutenant Edward J. Wozniak, 334th Fighter Squadron, gave Sergeant Ettner £74-7-0 for the purchase of War Bonds (R7,9,10,14). Ettner filled out Form 38 in triplicate and placed the three copies, together with the money, on accused's desk (R14, 45). Later the triplicate, signed by accused, was returned to Ettner through normal office channels. In due course it was returned to Wozniak (R8,14,16-18,45; Pros.Ex.A). On 6 February 1945, Staff Sergeant Raymond A. Larmouth gave Sergeant Ettner £24-15-8 to send to Larmouth's mother in the States (R11,18). Ettner filled out Form 38 in triplicate and delivered the forms and the money to accused who took the same, signed and returned the triplicate to Ettner who, in turn, delivered it to Larmouth (R11,18-19,46; Pros. Ex.B). On 10 February 1945, Sergeant Neil F. Killen, 334th Fighter Squadron, gave Sergeant Ettner £79-6-2 to send to his father, Lloyd K. Killen, in the States (R12,19,45). Ettner filled out Form 38 in triplicate and placed them, together with the money, on accused's desk (R19-20,45-46). The triplicate, signed by the accused, was returned to Ettner through normal office channels and, in due course, delivered to Killen (R12,19-20; 45-46; Ex.C).

The station finance officer testified that a check made by him at his office failed to disclose any record of the money having been received there (R24-25,28). However, within 15 or 20 miles of the station were other finance offices - probably ten (R26). He would have accepted without question small amounts turned in from other stations (R30) and he would say that any finance office would have accepted money turned in with the proper form (R26). [Cir.215, WD, 1 June 1944, sec.I, par.2(1) and Cir.290, WD, 11 July 1944, sec.IV,par.25 prescribe that such money shall be delivered without delay to "the nearest local disbursing officer or Class B agent officer"]. The originals of Exhibits A, B and C (representing Wozniak's, Larmouth's and Killen's deposits) were not in his office files (R24-25). Although the files were not kept locked there had been no losses therefrom since he took office on February 1945 (R22,26). "The form [387] itself is merely a medium of posting to other records, and consequently if it has been posted and then the form is lost, you still have a permanent record of what the abstraction was" (R28). A check made of his various schedules failed to disclose any deposit of money represented by Exhibits A, B and C (R24-25,28).

Major Summer S. Webster, 45th Service Squadron, testified that he and Captain [Kenneth C.] Patton [1126th Quartermaster Company], as members of a board of officers, visited accused in his quarters (R31). Accused was warned of his rights under Article of War 24 (R32). Major Webster told accused he wished he was not a member of the Board (R35); that if five or ten years went by until he saw accused again, they would still be the best of friends; that he could dig out all the necessary information, but if accused wanted to make a statement, it would be that much easier for the board (R36). Accused made and signed a statement. Defense objected to introduction of this statement on several grounds which were overruled (R32-34). Defense then asked to have accused testify solely "in repudiation of the confession". The law member ruled if accused took the stand, he would be "open to cross-examination on any issue". Thereupon defense called Captain Patton to testify "about these facts" (R37-38). He testified that accused was warned of his rights. After Captain Howse indicated he desired to make a statement, "Major Webster stated that, in his opinion, he did think

it would make things more simple" (R39-40). Accused made a statement which was taken down at that time. It was typed and signed by him several days later (R41-42).

At the conclusion of Captain Patton's testimony, accused was again denied the right to testify solely in repudiation of the statement (R43). Over objection by defense the court then ruled that the statement would be received in evidence (R43-44). An extract of the statement was then agreed upon by prosecution and defense (R34,44) and admitted in evidence (R44-45; Pros.Ex.D). Accused's statement, as abstracted, reads, in part, as follows:

> "Approximately four months ago, I was badly in need of money, brought about by consistent gambling.
>
> Lieut. Wozniak, about the first of November 1944, turned in to me the sum of seventy-four pounds, seven shillings (£74-7-0) for the purpose of purchasing four $100.00 War Bonds. At that time a receipt, triplicate copy of Form #38, signed by myself was given Lieut. Wozniak, the original and duplicate of this form were destroyed, and the money never reached Finance. In the past month the same thing happened with monies belonging to Sgts. Larmouth and Killen of the squadron. Sgt. Larmouth in the amount of twenty-four pounds, fifteen shillings and eight pence (£24-15-8) and Sgt. Killen, seventy-nine pounds, six shillings and two pence (£79-6-2)".

4. Five character witnesses were called on behalf of accused. His commanding officer estimated his character as excellent and his military efficiency as superior (R47). A captain who had known accused since September 1942 stated, "I would say he had a good character. I would trust him wherever I went" (R49-50). A sergeant who had served with accused when he was an enlisted man said, "From the enlisted man's viewpoint I have never seen a better man - soldier" (R50). The station provost marshal found accused to be "punctual and very efficient"

(R53). A captain who had known accused for two and one-half years thought "he had a good character" (R54).

Introduced into evidence were copy of accused's honorable discharge as an enlisted man to accept a commission (R51, Ex.F), copy of his Officer's Qualification Card (Form 66-1) showing eight efficiency ratings of excellent and one of very satisfactory (R51, Ex.G) and three letters of commendation (R51,52,54, Ex.I,J,K).

After his rights as a witness were explained, accused elected to remain silent (R55).

5. While accused had no right to take the stand for the sole purpose of repudiating his confession, the record indicates that defense counsel may have used the term inartfully. If he intended to raise an issue merely as to the voluntary character of accused's confession, it was accused's right to take the stand for the sole purpose of testifying, concerning the circumstances under which it was made, without subjecting himself to cross-examination on the issues of his guilt or innocence of the offenses therein admitted (CM ETO 9128, Houchins, et al). Assuming defense's request constituted an attempt to exercise this right, the law member's refusal to permit accused so to do was error and the confession improperly admitted. As in the Houchins case, the question then becomes "whether the evidence which remains after eliminating the confession 'is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty'". With the confession excluded there remains the following uncontradicted evidence: On 6 February 1945 accused received Larmouth's money and gave his receipt (Form 38) therefor. On 1 November 1944 and 10 February 1945 respectively Wozniak's money and Killen's money were placed on accused's desk. Receipts (Form 38) therefor, signed by accused, were returned through normal office channels. Accused's duty was to deposit, without delay, such money in the nearest finance office. Records of the nearest finance office failed to disclose any such deposits.

While there was no direct evidence that accused received either Wozniak's or Killen's money, his receipts therefor compel the inference that he did, in fact, receive the money. This money should have been deposited without delay in the nearest finance office. According to the

records of the station finance office it was not deposited there. While it was tacit in the evidence that the finance office would have had no record should the Form 38 have been lost prior to posting, the likelihood of such losses occurring on three separate occasions, namely, 1 November 1944, 6 February 1945 and 10 February 1945, is so improbable as to fail to support any inference that they were lost and to compel the inference they were not posted because they, together with the money represented thereby, were not received. Moreover, the finance officer testified there had been no losses since he took office on 6 February 1945. True, there were other finance offices nearby at which it appears probable the money would have been accepted. But deposits and acceptances there would have been contrary to the provisions of the circulars hereinbefore mentioned, and no reason is suggested by the evidence why it would have been easier or more convenient or practicable for accused to go elsewhere than the station finance office to deposit any of the three amounts in question. Moreover, violations of the circulars are not to be inferred in the absence of evidence in support thereof.

The Board of Review is therefore of the opinion that, independent of the confession, the evidence was "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty".

6. The charge sheet shows that accused is 30 years one month of age and that he enlisted, without prior service, 23 September 1940, and was appointed a Second Lieutenant 5 August 1942.

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

8. The penalty for embezzlement by an officer is such punishment as a court-martial may direct. Confine-

ment in a penitentiary is authorized upon conviction of embezzlement where the amount involved, as here, is over $35.00 (AW 42; Sec.22-1202 (6:76) 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

Madison C. Sherman Judge Advocate

E. L. Lewis Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 2 AUG 1945 - TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain CHARLES F. HOWSE (O-561317), 334th Fighter Squadron, 4th Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 11905. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 11905).

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

(Sentence ordered executed. GCMO 345, ETO, 25 Aug1945).

63605

(362)

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

BOARD OF REVIEW NO. 2

CM ETO 11914

11 AUG 1945

U N I T E D S T A T E S	XIX CORPS
v.	Trial by GCM, convened at Oschersleben (Bode), Germany, 2 May 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor, LAWLER for 15 years and O'HEARN for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates JOSEPH W. LAWLER (33481754), and EDWARD T. O'HEARN (31162574), both of Company B, 234th Engineer Combat 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 soldiers named above has been examined by the Board of Review.

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

LAWLER

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Joseph W. Lawler, then Private First Class, Company B, 234th Engineer Combat Battalion, did, at Verl, Germany, on or about 3 April 1945, with intent to commit a felony, viz, rape, commit an assault upon Maria Echterhoff, by willfully and feloniously threatening the said Maria Echterhoff with a pistol, removing her clothes and forcing her to get in a bed.

11914

O'HEARN

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Edward T. O'Hearn, Company B, 234th Engineer Combat Battalion, then Private First Class, did, at Verl, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Helene Echterhoff.

Specification 2: In that * * * did, at Verl, Germany, on or about 3 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Echterhoff.

Each consented to a common trial. Each pleaded not guilty and each was found guilty of the respective Charge and specifications preferred against him. No evidence of previous convictions was introduced against either accused. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the receiving authority may direct, Lawler for a period of 15 years and O'Hearn for the term of his natural life. The reviewing authority approved each sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence in substance shows that: Frau Elizabeth Echterhoff, a housewife lived on a small farm near Verl, Germany, on and about 3 April 1945. She testified that on that day two soldiers whom she identified as the two accused came to her house (R7). O'Hearn entered the house about 5:00 in the afternoon with a Mr. Heinemeier whom he forced with his pistol to sit on the sofa in the living room. Immediately afterwards Lawler entered, her husband coming in from the laundry kitchen at the same time. Lawler forced the husband to face the wall, pointing his pistol at his back. Then she, her children and Heinemeier were led to the kitchen and threatened with the gun if they did not sit down. O'Hearn is dark haired and taller than Lawler. She further testified that O'Hearn then

"opened the kitchen door and winked at my daughter Helene to follow him. They went upstairs (R8,27).

* * *

We all heard my daughter crying (R8,11) and all of us were afraid that he might kill her upstairs. However, the other soldier /Lawler/ who was still in the kitchen told us again to sit down and keep quiet (R8)".

Lawler went upstairs several times and they heard him knock at the door but could not understand what he said. A neighbor, Mrs. Heinemeier and her child came in and on one of Lawler's trips upstairs Mr. Heinemeier indicated to his wife to leave and she ran out to the road and stopped an American vehicle and two American soldiers came to the house and went upstairs, knocked at the doors and finally broke one door open. They both came back downstairs and shortly after, the two accused "dashed out into the field". One daughter, Clara, had gone in the meantime to "report to the Commanding Officer" and four soldiers came (R9,19) and examined the place, found several cartridges and noticed that someone had vomited on the floor "in that room" and then left after promising her that the two accused would not return. She further testified that during the time they were in the kitchen and about an hour and a half after the first soldier went upstairs, the second soldier (Lawler) took her daughter Maria upstairs with him after locking one of the kitchen doors and taking the key. He had a pistol in his hand when "he motioned her to come out" (R10). During this time each of the daughters left the kitchen twice, Helene once with each of the two accused (R12). Her husband had given the soldiers a quantity of cognac. Helene made no protest but was crying when she left the kitchen (R13).

Helene Echterhoff, a 16 year old office apprentice (R15) testified that she was at home when two soldiers came there in the afternoon of 3 April and entered the kitchen. One of them locked the door toward the hall and the other soldier stationed himself in front of the other door. Her father, mother and six more people were in the kitchen. They asked for schnapps and her father gave them part of a bottle. They kept pointing a pistol at each of them. O'Hearn then pointed a pistol at her,

grabbed her by the arm and made her go upstairs, following her holding the pistol in his hand (R17-18). He took her in her parent's bedroom, locked the door and motioned her to take off her clothes. She "dashed to the window, opened it and tried to jump out" but he pulled her back, tore her housecoat open (R17,20), made her undress, hit her and pushed her into the bed. He took his blouse off and let his pants down and tried to have intercourse with her. "He penetrated but I struggled so that he had to get out again. He tried again" but was interrupted by the other soldier knocking at the door several times and finally the one with her (O'Hearn) got up to open the door. On the way to the door he vomited and when he opened the door she put on her dress in a hurry and "dashed downstairs". She had cried and yelled during all this time (R17,18,19). "I don't know if it was an hour or more" (R19). After she had been downstairs five or ten minutes, the other soldier (Lawler) who had been upstairs came down and motioned her to come along. She said she had already been upstairs but he grabbed her by the arm and she went upstairs followed by Lawler who indicated she should go in the other bedroom and take off her clothes and get into the bed. He "let his pants down and at that moment I heard two soldiers coming upstairs. I jumped off the bed, put my dress on, and ran downstairs" (R16-17). She identified O'Hearn as the first soldier she was upstairs with and Lawler as the other one (R20-21).

Maria Echterhoff, 18 years of age identified the two accused as the American soldiers who came to her home on the afternoon of 3 April 1945. She testified that she first saw her father coming into the kitchen followed by one of the soldiers holding a pistol at his back. They were all told to sit down. At that time the other soldier came in with Mr. Heinemeier and locked the kitchen door. They all "had to sit tight and were not allowed to make any noises. He (Lawler) was pointing the pistol at each one of us". O'Hearn took her sister Helene from the kitchen and after a while this short fellow (Lawler)who had a pistol in his hand indicated that she should go upstairs. He took her by the arm and then followed her upstairs holding the pistol in her back until they reached the bedroom. He opened her apron and indicated to her "strongly to undress or otherwise he would shoot, pointing his pistol" at her. She undressed "and then I had to lie

down on the bed". He "then let his pants down and placed himself on top of me. He (Lawler) tried it once but did not succeed", and "after a few minutes I was allowed to put on my clothes again and go downstairs". He did not penetrate her. Teh or fifteen minutes after she arrived at the kitchen her sister also came downstairs. Lawler then once again pointed the pistol at them and motioned them to go upstairs. She testified she had to go to the bedroom where her sister Helene had been before. Lawler then went back downstairs. O'Hearn then locked the door and motioned for her to take her clothes off. She started to yell loud but he put his hand over mouth pointing the pistol at her saying "toad" (translated 'dead'). She undressed and he made her go to bed (R22-23). He then placed himself on top of her "and tried but he did not succeed and did not penetrate". When asked "did he penetrate you further than the small soldier" (Lawler) she answered, "Yes, a little but not much". Hhe was however, sure that O'Hearn penetrated her a little but before he got any further the two soldiers arrived, broke open the door and she put on her clothes in a hurry and ran away (R24). On cross-examination, she again stated that Lawler did not penetrate her "though he tried it but not for very long". O'Hearn "penetrated a little" (R25). She was so afraid of the two soldiers that she "could not even yell any more" for they were always threatening her with the pistol (R26).

Private First Class Jasper C. Mistretta of accused's organization, had known them a year and a half. He was on guard on 3 April 1945 (R28) with Technician Fifth Grade Francis McEnroe when a civilian ran to them. They made out that two American soldiers were in his home and they went to the house with him. Eight or nine people were sitting at a table when they went in the door. When asked where the two soldiers were they pointed upstairs and on opening the first door he saw Lawler dressing and a girl on the bed. On knocking on the next door which was locked a man in the room told him to open it himself and with Lawler's help he pushed the door in and "saw him having intercourse with a girl". He ordered O'Hearn who was stripped from the waist down, to get out and he had gotten practically dressed when Mistretta and McEnroe left to return to their post (R29-30). O'Hearn's clothes and pistol were on a dresser seven or eight feet from the bed (R33). The girl appeared to be enjoying it as much as he was (R34).

The two accused were found, each wearing a pistol, "staggering" around a field and were ordered to camp. Examination of the bedroom showed the door broken and the room in disorder (R35-36). Accused were not so drunk but that they knew at least part of what was going on and they handed over their pistols when requested to do so. They had been good workers in their platoon and had given no prior trouble (R36-37).

4. The two accused were the only defense witnesses. O'Hearn was sworn and testified to the same occurrences as did the prosecution witnesses, denying, however, that he had his pistol out of its holster except to threaten a dog there in the house with it. He admitted calling Helene out of the kitchen but said she went upstairs ahead of him of her own free will and "before I got a chance to proposition her like I intended to". He used no force, he did not slap her or offer her anything. He had intercourse with Helene twice (R38-39) and she made no objection either time, "she got quite a kick out of it". He also had intercourse with Maria who made no objections to his advances and got "undressed of her own free will". He had a pistol with him, a German P-38 in a homemade holster on his belt. When he went to bed the first time he took off all his clothes but his undershirt, putting the pistol on the table (R40). He testified that he locked the bedroom door at the time of intercourse with each of these girls, as "that is a precaution I always take" (R41). Neither of the girls screamed or cried and he did not induce them to take off their clothes. "They evidently knew what they were there for so they took them off". When he "closed the door and turned around she was taking off her clothes". He got the other girl by calling "down to Joe" and he sent her up. None of the other people in the house came upstairs and he did not know where they went after he went upstairs as he did not go down again until he left the house (R42).

Lawler testified similarly. He denied ever having his pistol out of the holster. He stayed in the kitchen "a half hour or so I guess" after O'Hearn left. He got Maria out of the kitchen by motioning to her. None of the three men in the kitchen interfered and Maria did not object but went of her own free will. "We went in the bedroom and right away she motioned that she should take her clothes off". He did not have intercourse with her. He had had some drinks downstairs and felt "sort of out of sorts so I felt like I should get out of there". He

was in the room with her 15 or 20 minutes but did not threaten her with the gun. She made no objection to going to O'Hearn when O'Hearn asked him to send her over. "She went over" (R43-44). He denied he locked any doors or saw O'Hearn do so (R45). He testified that he and O'Hearn had been drinking that afternoon enough so "We were feeling dam good" (R46). He sat with the people in the kitchen and drank but O'Hearn did not drink in the kitchen. He admitted he attempted to have interccurse with Maria and testified that Maria then went back downstairs and he brought her up the second time at O'Hearn's request, following her upstairs because "I was going to take the other girl". Helene stayed upstairs. When he took Maria to O'Hearn, he and Helene got in bed in the other room but he did not have intercourse with her as the guards came within a few minutes. He was downstairs altogether about two and a half hours (R48) during which time everybody (the civilians) stayed in the kitchen and talked among themselves. They did not drink (R49).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p. 165). O'Hearn admits having intercourse with both the girls. Lawler denies having intercourse but admits he intended to do so and tried. Helene testified that O'Hearn penetrated her and Maria testified first that O'Hearn did not penetrate her then later that he penetrated a little farther than Lawler did. Both accused claimed there was no objection from the family or people downstairs or from the girls themselves to all their actions and denied any force, coercion or threats by them toward anyone. The mother testified to their all being herded together in a room of which one door at least was locked and all under threat of a pistol pointed at them. The girls both testified to the force and threat of shooting by accused causing them to fear for their lives, leaving as the only question involved the one of fact, did the girls voluntarily consent to the acts of intercourse, or did they submit by reason of the force used and of fear of the guns displayed. The court observed the witnesses and could judge of the truth or falsity of their stories. Questions of fact are for determination by the court alone and when their findings are substantially supported by the evidence, will not be disturbed on review (CM ETO 11971, Cox,et al; CM ETO 13425, Kelley). Lawler may well have been charged and tried for rape,also as an accessory to the rapes by O'Hearn.

6. The charge sheets show that accused Lawler is 24 years of age and without prior service was inducted 11 November 1942 at Allentown, Pennsylvania; that accused O'Hearn is 27 years six months of age, served in the National Guard from 3 December 1935 to 3 December 1938, and was inducted 21 August 1942 at Boston, Massachusetts.

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

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 assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

15 JUN 1945

CM ETO 11924

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Hagenau, France, 26 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ARMONDO F. POLIDORO (32326260), Company H, 12th Infantry	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Armondo F. Polidoro, Company "H", 12th Infantry did, in the vicinity of Losheimergraben, Germany on or about 6 November, 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Liege, Belgium on or about 9 December, 1944.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present 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. Captain Benjamin P. Compton, 12th Infantry, the only prosecution witness, testified that he was Executive Officer of Company H, 12th Infantry, on 6 November 1944, of which company accused was a member in the first machine gun platoon. On that date Company H was located at Losheimergraben, Germany, in an assembly area prior to moving to the Hurtgen Forest. There was no tactical activity at that time though the company went into a defensive position about 24 hours later, engaging in active combat, being pounded with artillery and mortar fire and with patrols coming through. These operations lasted about a month during which the company suffered many casualties (R4-5). There were, at the time of the trial, no members of accused's platoon as of 6 November 1944 remaining with Company H. An extract copy of the morning report of Company H, 12th Infantry (Pros.Ex.A) was admitted to evidence with the consent of the defense. It shows in pertinent part:

"Period ending 2400 20 November 1944
32326260 Polidoro Armondo F 504 Pvt.
Dy to MIA and drpd fr.asgmt 15 Nov 44
Auth: Cir.44 ETOUSA 31 Aug 44.
* * *
Period ending 2400 19 December 1944
correction (20 Nov 44)
32326260 Polidoro Armondo F 504 Pvt
Dy to MIA and drpd fr asgmt 15 Nov 44
erroneously entered
* * *

Period ending 2400 17 February 1945
Polidoro Armondo F 32326260 Pvt
Dy to AWOL 0700 6 Nov 44 * * * * * "

A stipulation was entered into by the prosecution, accused and his counsel that accused was apprehended at Liege, Belgium, on or about 9 December 1944 (R6-7).

4. Captain Compton testified as a character witness for the defense that in his opinion accused was not an "habitual criminal type and did not realize the seriousness of his act at this time * * * and I think he deserves some type of leniency" * * *. Accused, advised of his rights as a witness, elected to remain silent (R7-8).

5. The extract copies of the morning reports offer the only evidence of the date of accused's original absence and they present a somewhat confusing situation, with the second entry apparently cancelling the first entry and the third entry made 17 February 1945 changing the date of the original absence, as first recorded on 20 November, from 15 November to 6 November. The reasonable inference to be drawn from a consideration of all three entries taken together is that accused was first discovered absent about 15 November, that his absence was ascribed to enemy action, and that a delayed entry to this effect was recorded at the first opportunity on 20 November. Subsequently, on 19 December, it was learned that accused's absence was not due to enemy action and a correction was intended to be entered in the morning report cancelling only that portion of the first entry which had erroneously accounted for accused's absence. The third entry on 17 February endeavored to set the entire record straight. Obviously, this change of the date of original absence to 6 November, found in the entry of 17 February reflected subsequent information rather than current knowledge. Otherwise the earliest entry, that of 20 November, would have recorded the date of original absence as 6 November had such fact been known at that time. The entry of 20 November as to the date of initial absence must be accepted rather than that of 17 February. The earlier record is certainly more likely to reflect personal knowledge of the event than an entry made months after the event. The date of initial absence as established by competent evidence is 15 November 1944.

The evidence is convincing that accused left his organization, his place of duty, on or before 15 November 1944 and he admits being apprehended at Liege, Belgium, on or about 9 December 1944, 24 days later. On the 6th of November, Company H, in which he was a member of the first machine gun platoon, was in an assembly area. They shortly after moved into defensive positions but it is not shown that accused had any knowledge of impending moves involving hazardous duty or important service nor is he charged with any intent to avoid such duty or service. The record is bare of any proof of intent on the part of accused to desert the service of the United States, unless such intent can be inferred from his unauthorized absence from his place of duty for the period of time shown. The only proof that such absence, or at least part of it, was not authorized is the morning report entry dated 103 days later and the admitted termination of such absence by arrest. Mere unauthorized absence for 24 days under the circumstances as shown herein does not in itself constitute a substantial basis, nor is any other circumstance shown to support an inference of the requisite intent to establish desertion. In the opinion of the Board of Review, the record of trial is legally sufficient to support only findings of guilty of absence without leave for the period alleged (CM ETO 5593, Jarvis; CM ETO 6497, Gary, Jr.).

6. The charge sheet shows that accused is 32 years of age and was inducted 28 April 1942 at New York, 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 the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves finding accused guilty of absenting himself without proper leave, from his organization at the place and beginning 15 November 1944 in violation of Article of War 61 and legally sufficient to support the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2 2 JUN 1945

CM ETO 11926

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Bad Mergentheim, Germany, 16 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Federal Reformatory, Chillicothe, Ohio.
First Sergeant EDWARD J. HUGHES (6918158), Company E, 22nd Infantry	)	

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

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

2. The evidence of the value of the property of which accused was found guilty of stealing was only sufficient to prove as to each of the three specifications that the property was of some value not exceeding $20 (CM ETO 6217, Barkus). The record of trial is therefore legally sufficient to support only so much of the sentence as approved as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year and six months.

3. The Federal Reformatory is authorized only for prisoners subject to penitentiary confinement who are 25 years of age or less and with sentences of not more than ten years (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a, as amended by Cir.25, WD, 22 Jan 1945). Inasmuch as none of the offenses of which accused was convicted is punishable by penitentiary confinement, designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is not proper (AW 42).

Judge Advocate

Judge Advocate

Judge Advocate

11926

CONFIDENTIAL

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

BOARD OF REVIEW NO. 3 9 JUN 1945

CM ETO 11929

U N I T E D S T A T E S	)	87TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Jossnitz,
	)	Germany, 9 May 1945. Sentence:
Technician Fifth Grade	)	Dishonorable discharge, total forfeit-
FRANCIS T. BRATTESANI	)	ures and confinement at hard labor
(32806573), Medical De-	)	for 25 years. Eastern Branch,
tachment, 345th Infantry.	)	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 on the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Technician Fifth Grade Francis T. Brattesani, Medical Detachment, 345th Infantry, did, at Roth, Germany, on or about 1 March 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and to shirk important service, to wit: duty with the company to which he was assigned during an attack, and did remain absent in desertion until he was apprehended in the vicinity of Luxembourg City, Luxembourg, on or about 27 March 1945.

He pleaded guilty to the Specification except the words "desert the service of the United States by absenting himself without leave from

his organization with intent to avoid hazardous duty and to shirk important service, to wit; duty with the company to which he was assigned during an attack and did remain absent in desertion", substituting therefor the words "absent himself without leave from the company to which he was assigned and did remain absent without leave", of the excepted words not guilty, of the substituted words guilty; and not guilty to the Charge, but guilty of a violation of the 61st Article of War. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of the Specification and 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 and 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 25 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Accused, after being warned of his rights by the law member, elected to remain silent and no evidence was introduced for the defense (R12). Prosecution's evidence therefore was uncontradicted. It shows that accused was a member of the Medical Detachment, 345th Infantry, and was assigned to duty with Company E of the regiment as an aid man (R5,7). His duties when the company was in combat required him to be with its forward elements to administer first aid to the wounded, and since he was not a litter bearer, there was no reason under such circumstances for him to go to the rear (R8-9). On 1 March 1945 the company was engaged in an attack against the enemy near Roth, Germany. Actual contact was made, small arms and artillery fire were encountered, and casualties were incurred (R7-11). The company commander passed word back for accused to come forward to give treatment to the wounded (R7). Accused was next seen about 50 yards behind the attacking group enroute to the front. A few moments later he came back remarking "This is no place for me" (R9-10). He went to the rear and was absent from the command until he was apprehended in Luxembourg, Luxembourg, on 27 March 1945 (R7,10,12; Pros.Ex.2). His absence was without authority (R6,8; Pros.Ex.1). The evidence thus adduced proves beyond any doubt that accused absented himself without leave from his organization at a time when he knew that it was actually engaged in hazardous duty and remained so absent until he was apprehended some 27 days later. The inference that his purpose in absenting himself was to avoid such duty is inescapable and the record of trial is therefore legally sufficient to sustain the findings of guilty (CM ETO 4988, Fulton, and authorities therein cited).

4. The charge sheet shows that accused was 20 years and four months of age and was inducted 15 February 1943 at New York, New York. He had no prior service.

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

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 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

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 3

9 JUN 1945

CM ETO 11930

U N I T E D S T A T E S	87TH INFANTRY DIVISION
v.	Trial by GCM convened at Jossnitz, Germany, 9 May 1945.
Private JOSEPH F. KENEHAN (32976404), Company H, 345th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 Joseph F. Kenehan, Company H, 345th Infantry, did at Auw, Germany, or in the vicinity thereof, on or about 14 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at St Vith, Belgium, or in the vicinity thereof, on or about 2030 24 February 1945.

Specification 2: In that * * * did near Roth, Germany, or in the vicinity thereof, on or about 26 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at St. Dizier, France, or in the vicinity thereof, on or about 18 March 1945.

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

Specification: In that * * * having been duly placed under arrest near Roth, Germany, or in the vicinity thereof, on or about 24 February 1945, did, near Roth, Germany, or in the vicinity thereof, on or about 26 February 1945, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to Specifications 1 and 2, Charge I, except, in each instance, the words "desert the service of the United States and did remain absent in desertion until he was apprehended", substituting therefor the words "absent himself without leave from his organization and did remain absent without leave until he voluntarily returned to military control", of the excepted words not guilty, of the substituted words guilty; not guilty to Charge I, but guilty of violation of the 61st Article of War; and not guilty to Charge II and its Specification. Three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of Specifications 1 and 2, Charge I, except, in each instance, the words "was apprehended", substituting therefor the words "voluntarily returned to military control", of the excepted words not guilty, of the substituted words guilty; and guilty of Charge I and of Charge II and the Specification thereof. Evidence was introduced of three previous convictions by special court-martial, two for absence without leave for five and seven days respectively in violation of Article of War 61, and one for breach of restriction in violation of Article of War 96. 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 only so much of the findings of guilty of Specification 1, Charge I, as involves a finding of guilty of absence without leave from about 14 February 1945 to about 24 February 1945 in violation of the 61st Article of War, 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 absented himself without leave from his organization at Auw, Germany, on 14 February 1945, remaining absent until 24 February 1945 when he voluntarily surrendered himself at St. Vith,

Belgium (R6,10; Pros. Exs. 1 and 2). He was returned to his company at about 2200 hours on the latter date and was informed by the company commander that he was under arrest in quarters and would move with the company wherever it went (R7,11). The organization was preparing for an attack on the enemy the next day and it was explained to accused that although he was in arrest, it would be impossible in view of the proposed attack to keep him in any one place and that he therefore would travel with the company command post (R7,8,11). Accordingly, he was sent to the assembly area where he was turned over to the first sergeant (R7,11). Accused had been an ammunition bearer, but it was the company commander's intention not to restore him to such duty but rather to carry him with the company in arrest until opportunity arose to turn him in to higher headquarters (R8-9,11-13). The assembly area was located near Roth, Germany, and during this period was subjected to sporadic shelling by the Germans (R9). Accused was put to work erecting a tent, and at about this time he disappeared (R11). He had no permission to leave and was not seen again until he voluntarily returned to military control at St. Dizier, France, on 18 March 1945 (R6,9,12; Pros. Exs. 1 and 3). The company's proposed attack was launched the morning following accused's departure (R8,11). There is some confusion as to the exact date of accused's departure. The morning report shows it to be 25 February 1945 (Pros. Ex.1), the company commander's testimony indicates that it occurred on 24 February 1945 (R7-8), and the testimony of another witness that it occurred on 26 February 1945 (R10-11).

4. Accused, after being warned of his rights, made an unsworn statement through counsel to the effect that he had not been advised on 24 February 1945 of the impending attack (R13-14).

5. The finding of guilty of desertion on 14 February 1945 (Specification 1, Charge I) was modified by the reviewing authority to a finding of guilty of absence without leave. As such it is amply supported by the evidence contained in the record of trial. As for the conviction of desertion on 26 February 1945 (Specification 2, Charge I), the evidence shows that at the time of accused's departure the company was in a position subjected to sporadic shell fire and was about to attack the enemy the following day. Accused was shown to be aware of these circumstances and the court was therefore justified in inferring that his absence without leave was designed for the purpose of avoiding the hazardous duty inherent in the situation. He had just been returned to the company from an unauthorized absence of ten days. The specification is sufficient to sustain a finding of guilty on this basis despite the

absence of an allegation of specific intent (CM ETO 5958, Perry and Allen). It is immaterial that accused at the time of departure was in arrest in quarters (CM ETO 7339, Conklin; CM ETO 8300, Paxson). The variance between proof and specification as to the exact date of the commencement of the absence is likewise immaterial (CM ETO 6842, Clifton).

Charge II and its Specification allege a breach of arrest in violation of Article of War 69. All elements of this offense as set forth in the Manual for Courts-Martial (MCM, 1938, par.139a, p.153) are proved beyond a reasonable doubt and the record of trial is therefore legally sufficient to sustain the finding of guilty.

6. The charge sheet shows that accused is 24 years of age and was inducted 29 June 1943 at New York, 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 as modified and the sentence.

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

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Davey Jr Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 11936

5 JUN 1945

U N I T E D S T A T E S

v.

Privates WILLIE H. THARPE, SR. (34181075) and JUNIOUS O. PERRY (32268907), both of 568th Port Company, JOHN H. BENTELY (34220096), 569th Port Company, and HARDING BYRD (33593437), (formerly 334th Antiaircraft Artillery Searchlight Battalion) 566th Port Company, all of 399th Port Battalion	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Marseille, France, 7 April 1945. Sentences as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, THARPE, PERRY and BENTELY each for 15 years and BYRD for seven years; and fines payable to the United States of America as follows: THARPE, $4000; PERRY, $5000; BENTELY, $3000; and BYRD, $3000. Places of confinement: THARPE, PERRY and BENTELY, United States Penitentiary, Lewisburg, Pennsylvania; BYRD, Federal Reformatory, Chillicothe, Ohio.

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

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

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

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

Specification: In that Private Willie H. Tharpe, Sr., 568th Port Company, 399th Port Battalion, Private Junious O. Perry, 568th Port Company,

11936

399th Port Battalion, Private John H. Bentely, 569th Port Company, 399th Port Battalion and Private Harding Byrd, then of the 334 AAA Searchlight Battalion, now of the 566th Port Company, 399th Port Battalion, acting jointly and in persuance of a common intent, did, at or near Marseille, France, on or about 29 December 1944, conspire to feloniously take, steal and carry away, and wrongfully sell, in a foreign theater of operations, property of the United States, furnished and intended for the military service thereof, such taking, stealing, carrying away, and selling, constituting a hindrance, impediment, and obstruction to the successful conduct of the military operations of the United States against the enemies thereof.

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

Specification 1: In that * * * acting jointly and in persuance of a common intent, did, at or near Marseille, France, on or about 29 December 1944, feloniously take, steal and carry away about ninety-nine (99) cases of cigarettes of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * acting jointly and in persuance of a common intent, did at or near Marseille, France, on or about 29 December 1944, wrongfully and knowingly sell about ninety-nine (99) cases of cigarettes of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Private Willie H. Tharpe, Sr., 503th Port Company, 399th Port Battalion, Private Junious O. Perry, 568th Port Company, 399th Port Battalion, and Private Harding Byrd, then of the 334 AAA Searchlight Battalion, now of the 566th Port Company, 399th Port Battalion, acting

jointly and in persuance of a common intent, did, at or near Marseille, France, on or about 29 December 1944, knowingly and willfully apply to their own use and benefit one (1) two and one-half (2½) ton C.O.E. (cab over engine) truck, of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of both charges and the specifications thereunder preferred against him. No evidence of previous convictions was introduced as to accused Tharpe and Byrd. Evidence was introduced of two previous convictions by summary court of accused Perry, one for wrongfully climbing over a barbed wire enclosure surrounding his camp area and one for violating standing order by entering a house of prostitution, both in violation of Article of War 96, and evidence was introduced of one previous conviction of accused Bentely by summary court for being drunk and disorderly in a public place in violation of Article of War 96. 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, Tharpe for 35 years, Perry for 40 years, Bentely for 30 years and Byrd for 20 years. In addition the sentences required the payment of fines by each accused to the United States as follows: Tharpe, $4000.00; Perry, $5000.00; Bentely, $3000.00; and Byrd, $3000.00. The reviewing authority approved each of the sentences but reduced the period of confinement of accused Tharpe, Perry and Bentely each to 15 years and of accused Byrd to seven years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Tharpe, Perry and Bentely, and the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Byrd, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence, supplemented by the voluntary pretrial confessions of each accused, established a conspiracy by and between the accused to take, steal, carry away and wrongfully sell 99 cases of cigarettes, property of the United States furnished and intended for the military service. Evidence independent of the confessions proved that a truckload of cigarettes, property of the United States, was sold and delivered on 29 December 1944 to French civilians in Marseille, France; that the delivery and putative sale of said cigarettes to the French Civilians were effected by three colored American soldiers who received at the time of delivery part of the purchase price; that the transaction was consummated in the nighttime clandestinely and under circumstances of extreme secrecy; and that the French civilians thereby illegally obtained possession of the cigarettes which were property of the United States. This evidence was of such substance and worth as to present the inference that two or more American soldiers

were engaged in an illegal confederation having for its purpose the theft and illegal sale of Government property (CM ETO 8234, Young et al). The confession of each accused proved his connection with the conspiracy and his full, conscious participation therein. The reclamation of the major part of the money received by each accused as a result of the criminal transaction by agents of the Criminal Investigation Division of the Provost Marshal General's office, who acted upon disclosures made by each accused, irrefragably confirmed the confessions. The record is legally sufficient to support the findings of guilty of all accused of Charge I and its Specification (CM ETO 8234, Young et al, supra; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al).

4. The theft of the cigarettes and their subsequent unauthorized disposition (Charge II, Specifications 1 and 2) were separate offenses under the 94th Article of War (CM ETO 9784, Green; CM NATO 1135 (1944), III Bull. JAG 13). The corpus delicti of each crime was proved by the evidence of unauthorized possession by negro soldiers of cigarettes furnished and intended for the military service and their delivery to the French civilians (CM 202213, Mallon 6 B.R. 1 (1934); CM 202712, Sostre; CM 202928, Cooley, 6 B.R. 371 (1935). The confessions of each accused were properly admitted in evidence and they established the guilt of each accused beyond all doubt of a joint theft of 99 cases of cigarettes and their disposition by sale of same to the French civilians (CM ETO 5539, Hufendick; CM ETO 6232, Lynch; Cm ETO 6268, Maddox; CM ETO 11072, Copperman). The value of the stolen property was proved to be $4702.50 (99 cases at $47.50 per case) (R47).

5. The cigarettes were transported from the dock to the garage in a Government truck which had been entrusted to Byrd for legitimate haulage purposes. Evidence independent of the confessions proved the obvious misuse and misapplication of the truck for the illicit purpose of hauling the stolen Government property to the point of delivery to the French civilians. The confessions connected accused Tharpe, Perry and Byrd with the misuse of the truck and fixed their responsibility therefor. The court was authorized to take judicial notice that the truck possessed a value of more than $50.00 (CM ETO 5666, Bowles et al). The record of trial is legally sufficient to support the findings of the guilt of each of the named accused of Specification 3, Charge II (CM ETO 128, Rindfleisch; CM ETO 5666, Bowles et al supra; CM ETO 9288, Mills).

6. a. The maximum legal sentences which may be imposed upon the accused for the crimes of which they were found guilty includes dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor as follows:

(366)

Offense	Maximum Confinement	Authority
Charge I and Specification (Conspiracy)	2 years	sec.37 Fed. Crim. Code (18 USCA 88)
Charge II, Specification I (Larceny of Government property of a value in excess of $50.00).	5 years	Table of maximum punishments (MCM, 1928, par.104c, p.100).
Charge II, Specification 2 (Wrongful and knowing sale of Government property of a value in excess of $50.00)	5 years	"
Charge II, Specification 3 (Misapplication of Government property of a value in excess of $50.00) (Accused Bentely not charged)	5 years	"
Total	17 years as to accused except Bentely; 12 years as to Bentely.	

b. Although the 94th Article of War specifically authorizes the imposition of a fine in addition to all other punishments a court-martial may direct, upon conviction of any accused for violation thereof, the Table of maximum punishments prohibits the imposition of a fine in the case of an enlisted man convicted of a violation of the Article. The maximum punishment for larceny and wrongful and knowing sale of Government property furnished and intended for the use of the military service is as to each offense dishonorable discharge, total forfeitures and confinement at hard labor for five years (MCM, 1928, par.104c, p.100). However, a fine may properly be included in the punishment in the case of an officer convicted of an offense under the 94th Article of War (CM ETO 11072, Copperman). Therefore, the fines imposed upon the accused in the instant case may not be attributed to their conviction of the specifications under the 94th Article of War.

c. Section 37, Federal Criminal Code (18 USCA 88), which denounces the crime of conspiracy to commit an offense against the United States, prescribed as punishment that

> "each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both".

The Table of maximum punishments does not list the crime of conspiracy. Hence it is punishable as authorized by statute or by the custom of the service (MCM, 1928, par.104c, p.96).

> "It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment" (CM 199369, Davis, 4 B.R.37, 42 (1932); See also CM 212505, Tipton, 10 B.R.237 (1939)).

The above principle was adopted and applied in CM ETO 8234, Young, et al, supra. Therefore by reference to section 37, Federal Criminal Code, supra, the sentence in the case of enlisted men convicted of the crime of conspiracy to commit an offense against the United States may properly include, in addition to other penalties, a fine not exceeding $10,000.00. The fines imposed upon the several accused in the instant case are therefore valid.

7. The charge sheet shows the following with respect to the services of accused: Tharpe is 27 years, six months of age and was inducted 3 December 1941, Perry is 30 years, ten months of age and was inducted 4 June 1942, Bentely is 28 years, ten months of age and was inducted 1 March 1942, Byrd is 20 years, three months of age and was inducted 18 March 1943. Each accused was inducted to serve for the duration of the war plus six months. None had prior service.

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

9. Confinement in a penitentiary is authorized upon conviction of the crime of conspiracy to commit an offense against the United States by Article of War 42 and section 37 Federal Criminal Code (18 USCA 88); upon conviction of larceny of property of the United States furnished and intended for the military service thereof of a value exceeding $50.00 by Article of War 42 and section 35 (amended), Federal Criminal Code (18 USCA 82); and upon conviction of wrongfully and knowingly selling property of the United States of a value exceeding $50.00 and knowingly applying to one's own use property of a value exceeding $50.00, furnished and intended for the military service thereof by Article of War 42 and section 36, Federal Criminal Code (18 USCA 87) (See CM ETO 1764, Jones and Mundy). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Tharpe, Perry and Bentely (Cir.229, WD, 8 June 1944,

sec.II, pars.1b(4), 3b) and of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of accused Byrd (Cir.229, WD, 8 June 1944, sec.II, par.3a, as amended by Cir.225, WD, 25 Jan. 1945) is proper.

_____ Judge Advocate

_____ Judge Advocate

_____ 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 11950

U N I T E D S T A T E S v. Private ALVIN ABBOTT (34153139), 3412th Quartermaster Truck Company	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Paris, France, 15 March 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 on rehearing 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 Alvin Abbott, 3412th Quartermaster Truck Company, did, in conjunction with Private Edward Caldwell, 3412th Quartermaster Truck Company, at or near Chartres, France, on or about 6 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Claudine Champroux.

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

Specification: In that * * * did, at or near Chartres, France, on or about 6 October 1944, with intent to do him bodily harm, commit an assault upon Edmond Champroux by cutting him on the arm with a dangerous weapon, to-wit: a knife.

These proceedings are on rehearing and the record of the former trial on 13 December 1944 is attached to the record of the instant proceedings. He pleaded not guilty and, three-fourths of the members present when the vote was taken concurring, was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for two days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused and Private Edward Caldwell were members of the 3412th Quartermaster Truck Company, which was stationed at Chartres, France, on 6 October 1944. About 2100 or 2130 hours that evening they left their camp and started walking along the road towards Chartres. They came up behind a little girl and a man, who was pushing a bicycle. Accused grabbed the man by the neck and told Caldwell, "Boy, get that woman", who had begun to say "Papa, Papa". Caldwell caught her by the hand and took her off the road down into a field. Caldwell testified he looked back and not seeing accused and the man, he went back and found them on the ground. Accused said to him, "Boy, don't you want no pussy?" to which Caldwell replied, "No, this is a little girl". Accused then said, "Come and hold this man, I'll get it", and when Caldwell answered,"I can't hold that man", accused, who held a knife, threatened, "I'll cut your head off if you don't hold this man". Caldwell then squatted down by the man and accused took the little girl by the hand and walked off with her. After about a minute, Caldwell got up and started to run but accused caught him and brandishing a knife said, "I'll cut your head off, you'll get me in trouble". Accused forced Caldwell to again sit down with the man and accused returned to the girl. Caldwell assisted the man to his feet and accused said, "Don't bring that man on me" so Caldwell sat down and accused came over to him saying, "You don't want no pussy". Caldwell replied, "No, I don't want none" and accused returned to the little girl. At this point, Caldwell testified, he ran away, and, although accused chased him for approximately 25 feet, he succeeded in getting away (R5-7,13,14). At the request of the prosecution, accused and witness Caldwell stood up side by side and the law member observed for the record that accused was slightly taller and stockier than Caldwell--the difference being very slight (R7).

Edmond Champroux testified that about 2130 hours on 6 October 1944, while he and his 12 year old daughter Claudine were walking along the highway in the direction of Chartres, he was attacked by the "bigger" of two negro soldiers, who appeared to come out of the ditch on the side of the road. His daughter called out "Papa, Papa" and he was seized

by the throat from behind. He fought back and he and the "big one" fell into the ditch at the side of the road. In the ensuing struggle he received a violent blow on his left arm, causing it to bleed. The big soldier "squatted" on him, put a knife to his throat and indicated by saying "shh, shh, shh" that he wanted silence. Meanwhile the smaller soldier carried his daughter away in his arms and in a short while the two soldiers exchanged places and the "little one" then held the knife to his throat and the "big one" went over into the field. A little later the "big one" came back and carried him into the field and put him on the ground. His daughter was lying in a little hole about two meters away from him and the "big one" went over and laid down on her. He could see that her legs were in the air. A little later he saw this soldier (the "big one") put on his trousers and he noticed that he wore white underwear (R17,18). The "little soldier" then allowed him to get up and go over to his daughter and the "big one" said something in English. They threw some money on the ground and left. Monsieur Champroux told his daughter to put on her pants, which were on the grass near her, and they went over to the highway. He laid down on the side of the road because he had been bleeding a great deal and was very weak. He fainted and when he recovered, he sent his daughter to Chartres for help. He next saw her the following day at a hospital in Chartres, where she was examined by a physician (R19). At the request of a member of the court, he raised the sleeve of his coat revealing a wound one-half inch by one-eighth inch on his left arm near the elbow. He testified he received it when the "big one" stabbed him (R22).

Mademoiselle Claudine Champroux, 12 years of age, after stating that she understood the meaning of an oath was sworn as a witness. She corroborated the testimony of her father as to the attack by the two colored soldiers on 6 October 1944, adding that when the "little one" took her into the field he put his hand down into her pants. She fought with him and meanwhile the "big one" came over and laid her down on the ground. He told her to take off her pants and he unbuttoned his trousers. The "big one" then "hurt me twice", although she tried to resist him. He then left and the "little one" came over to her but he did not "hurt" her. He then left and the "big one" returned to her and laid on top of her. He left and then returned a third time. On this last occasion he laid on top of her and again "hurt" her. Each time that the "big one" "hurt" her, she was shouting but she could not make herself understood. She was bleeding at this time. She identified a pair of trousers as the ones she wore on the night in question and they were received in evidence (R22,23,24;Pros. Ex.A). Between the time she saw these two soldiers on the road and the time a doctor examined her the next day no one else attacked her (R25).

A written stipulation signed by the prosecution, defense counsel and the accused as to what the testimony of Doctor Andre Haye, Chartres, France would be, were he present in court, was received in

evidence (R26; Pros.Ex.B). It reads as follows:

> "On the 7th of October 1944, I examined Mademoiselle Claudine Champroux, who was said to have been assaulted and raped on the 6th of October 1944. She showed evident signs of recent penetration with a gaping vulva and a rupture of the hymen which was still bleeding. At the time it was impossible to know what the consequences would be. The examination revealed that the girl was never regularly formed".

Doctor Pierre Boissonat, Paris, France testified his examination of Claudine Champroux on 11 October 1944 disclosed a complete rupture of the hymen, ordinary inflammation and a superficial wound on the outward side of the right thigh. He also found secretions but no gonococci. Due to the lapse of five days he could not determine if they were male or female secretions (R28).

4. Accused after his rights as a witness were fully explained to him (R30,31), elected to remain silent and no evidence was introduced in his behalf.

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). The evidence sufficiently establishes all the essential elements of the offense charged in the Specification of Charge I. Accused's identity is proved by the testimony of his accomplice and, while the victim did not expressly testify that she resisted to the extent of her ability or that she did not consent to the intercourse, the circumstances established by the evidence fully justify the inference that she did not in fact consent and that accused had carnal knowledge of her by force (CM 227909, Scarborough, 16 B.R.13). Penetration was adequately proved by the medical testimony, together with the youthful victim's assertions that she was "hurt" and "bleeding".

Concerning the Specification of Charge II wherein accused is charged with assault with intent to do bodily harm with a dangerous weapon against the person of Edmond Champroux, the record contains abundant proof that he struck Monsieur Champroux with his knife, a dangerous weapon. All the elements of this offense is thus sustained by substantial evidence (MCM, 1928, par.149m, p.180; CM ETO 3366, Kennedy).

6. The charge sheet shows that accused is 25 years of age and was inducted 24 October 1941 at Homer, Louisiana. He had no prior service.

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

to support the findings of guilty and the sentence.

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

(TEMPORARY DUTY) Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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

BOARD OF REVIEW NO. 1

28 AUG 1945

CM ETO 11958

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class PABLO R. FALCON (38555739), Company A, 156th Infantry	Trial by GCM, convened at Cherbourg, France, 7 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
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 First Class Pablo R. Falcon, Company A 156th Infantry, did, at or near Herqueville, Manche, France, on or about 14 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Willie R. Matthews, a human being, by shooting him with a rifle.

He pleaded guilty to the Specification except the words "with malice aforethought, deliberately, and with premeditation", to the excepted words not guilty and not guilty to the Charge, but guilty to a violation of the 93rd Article of War. Two-thirds of the members of the court present at the time the vote was

taken concurring, he was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the period 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 is clear and undisputed, and accused in his plea admitted, that at the time and place alleged, he shot and killed Private Millie R. Matthews. The proof established that after accused and Matthews, who were "buddies", had been out on pass together during the day in question, accused returned to his billet, secured a Browning Automatic Rifle, walked about three-quarters of a mile down a road to where Matthews was by the side of the road, and, after talking with him, shot him through the chest and right lung. Accused testified at the trial that he and Matthews, while on pass, had been drinking; that Matthews attacked him, hit him in the face, and said he had better get his rifle because if he did not "it will be too bad"; that he, accused, then secured his weapon in order to scare Matthews, walked up to him, and fired to one side; that his rifle went off after he heard Matthews, who was unarmed, say, "You already fired on me. You better finish the job, because it won't be easy to forget".

The sole issue is whether the evidence sufficiently shows that the killing was with malice aforethought, an essential element of murder. 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). Substantial evidence in the record fully justifies the court's finding of malice.

The fact that accused had been drinking prior to the fatal shooting is established by the record, but the evidence is conflicting as to the degree of his intoxication. While his company commander testified that accused was "about half drunk", though he did recognize the witness (R24), accused on the witness stand was able to recall in detail the events surrounding the shooting, and the battalion surgeon, who examined accused an hour or hour and a half after the shooting, testified that he was in full possession of his faculties and that his talk was rational (R27).

In all events, there was substantial evidence in the record to support the court's implied finding that accused's intoxication was not of such severe or radical quality as to render him incapable of possessing the requisite intent and to support the court's finding that accused was guilty of murder under Article of War 92 (CM ETO 1901, Miranda; CM ETO 11269, Gordon; CM ETO 12850, Philpot). It was the function and duty of the court and the reviewing authority to weigh the evidence and to determine whether drunkenness, or passion under adequate provocation, not cooled by the passage of time, reduced the crime from murder to manslaughter (CM ETO 6682, Frazier), and, since there is sufficient evidence in the record to sustain the finding, the Board if Review is without power to disturb such determination.

4. The charge sheet shows that accused is 19 years ten months of age and was inducted 20 August 1943 at Fort Sam Houston, Texas, to serve for the duration of the war plus six months. He had no prior service.

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

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

Wm. T. Sumner Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Daniel L. Cornell Judge Advocate

11958

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

BOARD OF REVIEW NO. 2

21 JUN 1945

CM ETO 11970

U N I T E D S T A T E S	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private LEO F. MANKO (35516906) and Private First Class ANDREW J. WORTHEAM (19020287), both of Company B, 1271st Engineer Combat Battalion.	Trial by GCM, convened at Mannheim, Germany, 16 May 1945. Sentence: As to Manko, dishonorable discharge, total forfeitures and confinement at hard labor for six years. United States Disciplinary Barracks, Greenhaven, New York; as to Wortheam, dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

Eastern Branch,

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

---

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

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

MANKO

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Pvt Leo F Manko, Company "B", 1271st Engineer Combat Battalion, did, at Adelsheim-Hergenstadt, Germany, on or about 15 April 1945, with

intent to do him bodily harm commit an assault upon Richard Kolbenschlag by striking him on the chest with a dangerous weapon, to wit, a Rifle.

Specification 2: In that * * * on or about 16 April 1945, with intent to do him bodily harm, commit an assault upon Stefan Szezerba, by willfully and feloniously striking him, the said Stefan Szezerba, in the head with his fist.

WORTHEAM

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Pfc Andrew J Wortheam, Company "B", 1271st Engineer Combat Battalion, did, at Adelsheim-Hergenstadt, Germany, on or about 15 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Agnes Kolbenschlag.

Specification 2: In that * * *, on or about 16 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Hedwig Franzle.

Specification 3: In that * * * on or about 16 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Agnes Kolbenschlag.

Each accused pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken, in the case of accused Manko, and three-fourths in the case of accused Wortheam, concurring, each was found guilty of the charges and specifications preferred against him. No evidence of previous convictions was introduced as to accused Manko. Evidence was introduced of one previous conviction as to accused Wortheam for absence without leave for eight days, in violation of Article of War 61. Accused Manko was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for six years. All members of the court present when the vote was taken concurring, accused Wortheam was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the

period of his natural life. The reviewing authority approved each sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for accused Manko and the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for accused Wortheam, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution shows that on 15 April 1945, Private Leo F. Manko and Private First Class Andrew J. Wortheam were members of Company B, 1271st Engineer Combat Battalion, which organization was stationed in the vicinity of Adelsheim-Hergenstadt, Germany (R8,12,15). At about seven o'clock on that evening, both accused, armed with M-1 carbines, entered the house of Herr Richard Kolbenschlag and searched for German pistols and "SS" troopers. They were told that there were no "SS" or guns in the house. They found a quantity of "schnapps" spirits in the attic and removed it to the kitchen (R9,13,15). Both soldiers then left the house but returned about an hour and a half later that evening. They appeared drunk at this time. The taller one (Manko) staggered (R12,12). They drank "schnapps" in the kitchen, asked about the girls and children in the house and again departed, taking a quantity of liquor with them. About fifteen minutes later they reappeared at the back door and upon finding it locked, demanded that the door be opened (R10,14). Upon entering the house, Manko seized Herr Kolbenschlag by the throat and accused him of putting water in the schnapps. He hit him on the shoulder, dragged him outside, forced his rifle against his chest, and hit him in the face with his fist (R10,18). Several shots were fired into the air and the German man ran into the woods and did not return until the next afternoon (R12).

In the meantime, accused Wortheam grabbed Herr Kolbenschlag's wife, Agnes, by the throat, carried her into the kitchen and laid her on the couch. He put his gun on the floor nearby, pressed his mouth against the woman's mouth to prevent her from screaming, pulled her pants down and despite her struggles engaged in a complete act of sexual intercourse with her (R10). She identified in court accused Wortheam, "the smaller one", who accomplished the acts against her will and consent (R10).

The following morning, April 16th, about seven o'clock, both soldiers again returned to the house. As the door was locked they broke into the house by entering through a door in the connecting barn (R11,15). Both were armed with rifles at this time and asked for Herr Kolbenschlag and one Stefan Szezerba. They again searched the house. Later, Wortheam went into a small room and called for Frau Agnes. She entered the room, whereupon he threw her on the bed,

seized her by the throat, said "Nix,Nix" when she tried to scream and escape. She testified that "He had the same intention as before * * * I said * * * 'I have a husband. I don't do it', and I resisted and resisted but he kept on forcing me and completed his act once more", tearing apart her pants and again penetrating her private parts with his penis (R12).

Later, the taller soldier, Manko, ordered Frau Hedwig Franzle, the sister-in-law of Frau Kolbenschlag, to proceed upstairs. She testified that she understood that she was to carry a key to the smaller soldier, Wortheam, who was searching the rooms for schnapps. When she ascended the stairs he (Wortheam) pointed his gun at her, forced her into the attic, threw her on the floow and by force engaged in the act of sexual intercourse with her. She was unable to call out because he was on top of her and pressing his mough against her lips. She protested saying she was married and the mother of a young daughter but he took down her pants, pried her legs apart and put his penis into her private parts. She identified "the small blond one", Wortheam, as her assailant (R15,16). Following these sexual acts, the women cooked breakfast, and Frau Franzle asked the soldiers whether they wanted coffee (R12,14). Relatives of the women and some other persons were present in the room at this time. They did not notify the military authorities because they did not know where they were located and because they lived some distance away (R12).

Stefan Szezerba, a Polish farmer working in Germany, testified that on the evening of 15 April 1945, a tall American soldier, whom he identified as Manko, stopped at his house and hit him on the face with his hand. Later he took him into a nearby woods and asked him many questions and hit him "about thirty times with his hand" (R21). He was unable to account for the reason therefor, stating that he "did not swear a bit" (R22).

4. After their rights as witnesses were fully explained to them, each accused elected to make an unsworn statement (R23-25). Manko stated that on 15 April 1945, he was withdrawn from infantry line duty and joined with men of his organization in searching for "SS" troopers. He admitted drinking excessively on the evening in question. He remembered meeting some Polish refugees and drinking and singing with them. He recalled stopping one Szezerba, who called him a "son of a whore", but remembered nothing more until he was awakened and found himself on a doorstep the next morning (R23-24).

Accused Wortheam stated that on 15 April 1945, he left camp at about five o'clock pm and joined with accused Manko and others in searching for German soldiers in nearby woods. Finding none, they went to town and drank with Polish refugees. He became so drunk that night that he had no recollection of what transpired until the

following day when he returned to camp. He is married but has no children. Prior to joining the army, by voluntary enlistment, he was a member of the "CCC". He has served in the army almost five years (R24-25).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The extent and character of resistance required in a woman to establish her lack of consent depends upon the circumstances of the case and the relative strength of the parties, and not necessarily upon the presence or absence of physical injuries or bruises suffered by the victim. Undisputed evidence shows that both accused Manko and Wortheam entered the home of Herr Richard Kolbenschlag, a discharged German soldier, searched the house and obtained a quantity of liquor therein; an argument ensued between Manko and Kolbenschlag, resulting in Manko striking the latter; that thereafter several shots were fired which terrorized and frightened Kolbenschlag and caused him to escape into a woods. Accused Wortheam seized his wife, Agnes Kolbenschlag, laid her on a couch, and forcibly engaged in sexual intercourse with her. The following morning both soldiers returned and finding the house locked and doors barred, broke into the residence through a door connecting with a barn. Wortheam again seized Frau Agnes, pushed her onto a bed and again forcibly engaged in sexual intercourse with her. Later, he committed the same act with Frau Franzle after pointing his rifle at her and forcing her into the attic. Although the evidence fails to disclose that the woman forcibly resisted the accused, and does show that neither cried out for help, the facts indicate that both verbally protested and that each soldier was armed with a weapon. Accused Wortheam after carrying or forcing the women into separate rooms, placed his rifle on the floor nearby where it would be available for ready use if necessary. Lack of consent may appear where a female submits through reasonable fear of death or impending bodily harm (1 Wharton's Criminal Law (12th Ed., 1932) sec.701, p.942). The German witnesses' testimony is corroborated by the fact that both accused were armed; that Manko assaulted two civilians and by the accused's own admissions that they were drinking that night. Neither denied committing the various offenses alleged. Such evidence affords sufficient corroboration of the direct testimony of the German women that accused Wortheam committed the offenses of rape as charged (CM ETO 9611, Prairiechief). Although Wortheam claims that he did not remember what occurred that evening and stated that he was under the influence of alcohol, the evidence shows that he remembered searching for German troopers, that he found a group of refugees with whom he engaged in singing and drinking and that he remembered the details of

other occurrences of the evening. The law is well settled that voluntary drunkenness does not constitute an excuse for the crime of rape nor destroy the responsibility of the accused for his misconduct (1 Wharton's Criminal Law (12th Ed., 1932), sec.66, p.95; CM ETO 5609, Blizard; CM ETO 5641, Houston; CM ETO, 8691, Heard). Furthermore, the determination of the state or degree of accused's intoxication was essentially a question for the court and its determination, where supported by substantial evidence, will not be disturbed by the Board of Review on appellate review (CM ETO 1953, Lewis; CM ETO 3937, Bigrow; CM ETO 5561, Holden and Spencer).

Concerning the alleged assaults on the German civilian and Polish refugee, the evidence shows that force was employed in such manner as was likely to cause fear of death or serious bodily harm. The use by Manko of a rifle butt as a club against the German the firing of the shots and the striking of the Polish farmhand some 30 times in the face with his fist, warrants the court's inference that accused intended to inflict serious personal injuries on his victims. He was therefore properly found guilty of the assaults with intent to do bodily harm, as charged (CM ETO 3475, Blackwell; CM ETO 4332, Sutton; and authorities cited therein).

6. The charge sheet shows that accused Manko is 36 years and eight months of age and was inducted on 14 October 1942 at Cleveland, Ohio, and that accused Wortheam is 23 years and three months of age and enlisted on 18 October 1940 at Fort Francis E. Warren, Wyoming. Neither accused had prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). The offenses of assault with intent to do bodily harm with a dangerous weapon and assault with intent to do bodily harm under Article of War 93 are punishable by confinement for periods of five and one year respectively. 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, for accused Wortheam, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, for accused Manko, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

26 JUN 1945

CM ETO 11971

UNITED STATES	)	CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Technician Fifth Grade ALBERT F. COX (39405513), and Private EARLAN W. BOWEN (36253104), both of 965th Ordnance Heavy Automotive Maintenance Company.	)	Trial by GCM, convened at Mannheim, Germany, 11 May 1945. Sentence: 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.

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

COX

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

Specification: In that Technician Fifth Grade Albert F. Cox, 965th Ordnance Heavy Automotive Maintenance Company, did, at Mannheim, Germany, on or About 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Louise Herrmann.

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

CONF

11971

(404)

Specification: In that * * * did, at Mannheim, Germany, on or about 1700 8 April 1945, with intent to do him bodily harm, commit an assault upon Karl Spath by shooting him in the right leg, with a dangerous weapon, to wit, a Carbine,

BOWEN

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Earlan W. Bowen, 965th Ordnance Heavy Automotive Maintenance Company, did, at Mannheim, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Louise Herrmann.

The accused consenting thereto were tried at a common trial. Each pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, each was found guilty as charged. Evidence was introduced of two previous convictions by special court-martial of accused Cox, one for wrongfully failing to obey a lawful order and one for wrongful use of a truck and absence without leave for three hours in violation of Article of War 96 and of Article of War 96 and 61 respectively; and of one previous conviction by summary court of accused Bowen for absence without leave for one day in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, 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 pursuant to Article of War 50½.

3. The prosecution's evidence was substantially that Louise Herrmann, a 20 year old (R12) unmarried (R22) house servant, was on 8 April 1945 at about 1800 hours, in the courtyard of her home at No. 314 Spiegelfabrik, Mannheim, Germany, when she heard several shots and being frightened arose to go in the house when she saw an American soldier with a carbine in his hand in the garden next door who motioned her to come to him. She ran into the house to her stepfather and the soldier ran after her and forced both to go into an adjoining house (R12,13). The stepfather, Karl Spath, ran out of this house into the street and the large soldier, accused Cox, fired at him (R14), striking him in the lower right leg, shattering both lower leg bones (R25), requiring the leg to be amputated (R26).

Louise saw accused Cox fire the shots.

She also ran out into the street to her stepfather but accused Cox forced her to return to the house. The little soldier, accused Bowen, was in the hall (R14,16,18) and he forced Louise, by holding her tightly by the arm (R14,18,19), to go first to the kitchen and on to another room, where despite her struggles, he threw her on the bed (R14,20), took off her pants (R20), and had sexual intercourse with her, penetrating her two or three times during a period of approximately 45 minutes. She screamed once but thereafter he pressed her throat so she couldn't scream (R15,19). He also removed her ring and wrist-watch and put them in his pocket (R15). He then let her go and she tried to get away but accused Cox came in, gave Bowen his carbine and Cox again threw her on the bed. He took off his outer clothing and when she refused his demand that she undress, he undressed her (R15) in spite of her resistance, and had sexual intercourse with her. While still on top of her the military police came into the room (R21). She was then disheveled, naked, crying and calling, "Help me" (R21,22,23). She was examined by a doctor the following day and found to have fresh scratch wounds on her throat and body and her vagina was inflamed and hymen bleeding from a tear (R23,24).

Without objection a sworn signed statement of accused Cox (Pros.Ex.2) was admitted in evidence (R27) and a sworn signed statement of accused Bowen was similarly admitted in evidence (R29; Pros. Ex.3). Accused Cox in his statement says that he left with accused Bowen in a truck shortly after dinner to get some liquor. After leaving the brewery they visited their old company area and leaving the truck where the military police found it, visited around the neighborhood, finally deciding to go into a house which was locked. They entered after shooting the lock off and, on walking through to the rear yard, saw a girl in the adjoining yard. His story is substantially similar to the prosecuting witnesses' testimony. The girl's ring and wrist-watch were found on accused Bowen's person when he was picked out of a lineup by the girl and searched.

4. The defense evidence was as follows:

Cox, sworn as a witness, told in detail the same story as that contained in his pre-trial statement. He did deny pointing the gun at the girl or that he used any force whatever on her. He admitted and described the shooting and his intercourse with the girl (R30-35). He admitted the girl was apparently afraid of him and that he aimed at and shot the man while the man was running away (R37-38).

Bowen in an unsworn statement denied using any force towards the girl and insisted that if she had wanted to escape she could have done so when he (Bowen) had finished with her and before Cox arrived (R39).

The officer who signed the charges testified only that both accused were excellent soldiers and that he had observed no scratches on the girl's neck, that he saw her pick out Bowen and that her ring and wrist-watch were found in Bowen's possession (R40).

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

Both accused admitted having intercourse with the girl, at the same time both denying that force was used and implying consent by her. The use of the carbine, the compelling of both her and her stepfather to enter the neighboring house, the man's attempt to escape and his shooting in her presence, together with the marks on her body, all definitely mark the use of most persuasive and cowing force toward the girl. Whether or not consent was given by the girl or force was used to compel her submission are questions of fact for the sole determination of the court and where supported, as here, by substantial evidence, their findings of guilty will not be disturbed by the Board of Review (CM ETO 503, Richmond).

Accused Cox admits and the evidence shows that he deliberately shot the stepfather (Karl Spath) of this girl while he was running to escape from Cox. There was no justification shown or excuse given. The assault as charged is fully established.

6. The charge sheets show that accused Cox is 24 years, seven months of age and was inducted 17 December 1942 at Sacramento, California; and accused Bowen is 25 years, one month of age and was inducted 25 July 1942 at Milwaukee, Wisconsin. Neither had any prior service.

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

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

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

28 JUN

CM ETO 11972

U N I T E D S T A T E S	) BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.	)
Private CHRISTOPHER K. ALLISON (16018034), 161st Reinforcement Company, 131st Reinforcement Battalion (AAF)	) Trial by GCM, convened at AAF Station 590 - APO 635 - U.S. Army, 10, 11, 12, and 13 April 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. 1
RITER, BURROW, and STEVENS, Judge Advocates

---

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

2. Accused was tried upon six charges and 57 specifications. One of the specifications alleges the offense of desertion in violation of Article of War 58 (Charge I and its Specification); three allege absence without leave upon different occasions (for periods of 11 days, 15 days and one day, respectively) in violation of Article of War 61 (Charge II and its three specifications); three allege separate escapes from confinement, all in violation of Article of War 69 (Charge III and its three specifications); 42 allege larcenies from military personnel (all of the specifications of Charge IV with the exceptions of Specifications 27, 28, and 29), one alleges robbery (Specification 27, Charge IV), and two allege assault with intent to commit murder (Specifications 28 and 29, Charge IV), all in violation of Article of War 93; two allege larcenies of government property furnished and intended for military service, in violation of Article of War 94 (Charge V and its two specifications); one alleges an attempt to escape from confinement (Specification 1, Charge VI), one alleges the wrongful taking and use of a government motor vehicle (Specification 2, Charge VI), and one alleges the wrongful and unlawful personation of a commissioned officer by wearing the uniform,

11972

and insignia of rank of a first lieutenant of the Army of the United States (Specification 3, Charge VI), all in violation of Article of War 96. Of the 42 specifications of Charge IV alleging larcenies, 16 (Specifications 6,8,9,12,15,17,18,20,21,22,23,30,31,34,39, and 43) allege the value of the property involved to have been more than $50, ten (Specifications 1,10,16,19,25,33,37,40,41, and 45) allege the value to have been more than $20, and 16 (Specifications 2,3,4,5,7,11,13,14, 24,26,32,35,36,38,42, and 44) allege the value to have been less than $20. Specification 1 of Charge V (AW 94 - theft of military property) alleges the value of the property involved to have been more than $50, while Specification 2 alleges the property involved to have been of a value of "about $50". The government motor vehicle which Specification 2 of Charge VI (AW 96) alleges accused wrongfully took and used is alleged to have been of a value of more than $50.

By exceptions and substitutions, accused pleaded not guilty to the offense of desertion alleged in Charge I and its Specification but guilty of absence without leave during the period of time alleged in the specification (14 January 1945 to 1 March 1945), in violation of Article of War 61 (R31). He pleaded guilty to Charge II (AW 61) and each of its three specifications (absence without leave) and to Charge III (AW 69) and each of its three specifications (escapes from confinement) and not guilty to all other charges and specifications (R31). The prosecution introduced no evidence in support of the allegations of Specifications 1,4,10,14,24,33,37 and 41 of Charge IV (each of which alleged the offense of larceny) and at the conclusion of its evidence moved the court to enter findings of not guilty of each of these specifications (R261-264). The enumerated specifications having been neither withdrawn nor nolle prossed (MCM, 1928, par.5a, p.4 and par.72, p.56), the court granted the prosecution's motions and entered findings of not guilty of these eight specifications (R261-264). Accused was found guilty of all other charges and specifications, exceptions and substitutions being resorted to in connection with some of the specifications of Charge IV (AW 93 - larceny) and Charge V (AW 94 - theft of military property) in order to make the findings comport with the proof as to items of property involved and their values (R269-271). The property involved in each of 14 of the larceny specifications of which accused was found guilty under Charge IV (Specifications 6,8,12,15,17,18,20,21,22,30,31,34,39, and 43) was found to be of a value in excess of $50; that involved in each of six of the specifications (Specifications 9, 16, 19, 23,40, and 45) was found to be of a value in excess of $20; and that involved in each of the remaining 14 larceny specifications of which accused was found guilty under Charge IV (Specifications 2,3,5,7,11,13,25,26,32,35,36,38,42 and 44) was found to be of a value less than $20. The value of the property involved in each of the two specifications of Charge V (AW 94 - theft of military property), of both of which accused was found guilty, was found to be more than $20 but not in excess of $50.

Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for life.

11972

The reviewing authority disapproved the finding of guilty of Specification 28 of Charge IV (assault with intent to murder), approved the sentence but reduced the period of confinement to 40 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. a. Accused pleaded guilty to Charge II (AW 61) and Charge III (AW 69) and to each of their respective specifications. His pleas were corroborated by testimony of witnesses cognizant of the facts, by morning reports of accused's organization and of the military prison inwhich he was confined, and by his voluntary confessions. The evidence was introduced without objection and was uncontroverted. No material procedural questions arose in connection with these particular charges and specifications, and the record is clearly sufficient to support the findings of guilty.

b. While accused pleaded not guilty to Charge I (AW 58) and to the allegations of the Specification thereof charging desertion, he pleaded guilty to absence without leave for the period of time alleged. Evidence was introduced without objection which clearly established his absence without leave for the period of time alleged in the Specification, i.e., from 14 January 1945 to 1 March 1945, a period of 47 days. The only question for discussion is whether or not the evidence is legally sufficient to show that at the time of so absenting himself, accused did so, or thereafter remained absent, with the requisite intent to remain away permanently. The undisputed evidence shows the following: Accused's absence had its inception in an escape from confinement, effected by the use of force on a prison guard, whomaccused at the time also robbed of his gun. Accused was in confinement awaiting trial for the three previous absences without leave (each of which had been terminated by apprehension), the two previous escapes from confinement, and the majority of the series of larcenies and other offenses of which he has been convicted herein. During his absence now under discussion, accused used an assumed name and supplied himself with money by perpetrating additional larcenies. In order to prevent apprehension on 14 January 1945, or to effect his escape from civilian police who had taken him into custody after his escape from confinement earlier the same day, accused made the assault upon officer Hurst which resulted in his being found guilty in the instant case of assault with intent to murder (Charge IV, Specification 29). His unauthorized absence in this instance, as in the three previous instances, was terminated by apprehension. These facts, together with accused's long continued absence, are amply sufficient to warrant the court in inferring that accused did not intend to return to his place of duty but intended to desert the service. The fact that he was probably in uniform throughout his unauthorized absence is without significance as it is common knowledge that at the present time in England an American of military age is safer from inquiry by the police if in uniform than he would be if in civilian clothes. (MCM, 1928, par.130a, p.142; CM ETO 1629, O'Donnell, III Bull JAG 232-233).

11972

c. The Board of Review is of the opinion that the evidence introduced in support of the remaining charges and specifications is legally sufficient to support the respective approved findings of guilty except as hereinafter indicated and qualified:

1. Larcenyof "41 English one-pound notes" is alleged in Specification 30, Charge IV, and larceny of "47 one-pound notes" is alleged in Specification 31, Charge IV. The proof under Specification 30 shows larceny of either four or five five-pound notes and of only 20 one-pound notes, while that under Specification 31 shows larceny of eight five-pound notes and of only seven one-pound notes. While one-pound notes and five-pound notes are both denominations of British currency, they are nevertheless distinctly different entities, and an allegation of larceny of five one-pound notes is not sustained by proof of larceny of a five-pound note. There is, in such instance, a fatal variance between the pleading and proof (2 Wharton's Criminal Evidence (11th Ed., 1935) secs. 1064, 1068, pp. 1868-1871, 1875-1877). The record of trial is therefore legally sufficient to support only so much of the findings of guilty of Specification 30, Charge IV, as involves a finding of guilty of larceny at the time and place and from the person alleged of "20 English one-pound notes, value about $80", and only so much of the finding of guilty of Specification 31, Charge IV, as involves a finding of guilty of larceny at the time and place and from the person alleged of "7 one-pound notes, value about $28."

2. The evidence of record fails to prove larceny of the "1 leather folder" as alleged in Specification 22, Charge IV, and of the insignia of rank and branch of service as alleged in Specification 23, Charge IV. While these items were not excepted by the court from its findings of guilty, accused was not thereby prejudiced in any substantial right, because the other property found under these specifications to have been stolen by him was in each instance clearly proven to be of a value as great as that found by the court.

3. Specification 40, Charge IV, as originally drawn and as it read when accused pleaded to it, charged larceny of, among other things, "11 English one-pound notes". The proof was that instead of 11 one-pound notes, two five-pound notes and one one-pound note were stolen. Defense counsel objected to the introduction of evidence showing theft of the two five-pound notes upon the ground that there was no pleading to support such evidence (R212). The trial judge advocate thereupon requested and was by the law member, with the acquiesence of the court, granted permission to amend the Specification, and did amend it, so as to make it charge larceny of "11 English pounds". When this had been done, defense counsel's objection to the proffered evidence was overruled and the evidence was received by the court.

The purpose of the amendment was not to correct any legal defect in the Specification. Its purpose was torender admissible evidence that was otherwise inadmissible and to avoid a variance between the pleading and proof such as occurred, and which have been hereinabove held to be fatal variances, under Specifications 30 and 31, Charge IV.

11972

It would seem to be a self-evident fact that an amendment to a specification alleging larceny which, as regards the subject matter of the alleged larceny, renders compatible the pleading and the proof where otherwise, and except for such amendment, a fatal variance would exist between the two must of necessity, to the extent of the change, allege an entirely different offense from the one originally alleged. The amendment under the circumstances was improper since required authority was not obtained (MCM, 1928, par.73,74,p.57; CM 129525 (1919), Dig.Op. JAG, 1912-1940, sec. 428(9), p.296; CM ETO 1991, Pierson, III Bull. JAG 286). The matter, however, was procedural, and it is patent on the face of the record that accused was not thereby injuriously affected in any substantial right. The finding of guilty will not, therefore, be disturbed (AW 37).

d. Various items of property, particularly the wallets, alleged in the specifications of Charge IV to have been stolen were described in detail as to color and material of composition. In only one or two instances was evidence descriptive of the wallets introduced. The general rule is that where goods which are alleged to have been stolen are described in an indictment with unnecessary particularity, the charge in this respect must be proved as laid unless the unnecessary part of the description can be regarded and rejected as surplusage (2 Wharton's Criminal Evidence (11th Ed. 1935) sec. 1064, p.1869). While, as indicated, proof of descriptive allegations was, in numerous instances, not made in the instant case, the particular descriptions as to color and material of composition were not essential to a proper charging of the offenses involved; and, since no descriptions inconsistent with those alleged were proved and accused does not appear to have been surprised or misled to his prejudice, the descriptive allegations referred to, under the facts of this case, may be regarded and rejected as surplusage, and the findings of guilty are not impaired by the absence of proof in the respects stated. (CM ETO 9288, Mills).

e. No proof was made by the direct evidence of any person affected that the property alleged in the specifications of Charge IV to have been stolen was taken without the owner's consent. The evidence, when considered as a whole, however, is legally sufficient to establish this want of consent in each instance.

f. Secondary evidence as to the specific dates between which accused occupied a room in the Grand Junction Hotel, Halifax, England, in which certain of the stolen property was found and recoveredwas improperly admitted over objection, no proper foundation for its introduction having been established (R224-225). The specific dates, however, between which accused occupied the room were not material to any issue in the case. The hotel proprietor, through whom the objectionable evidence was introduced, knew of his own knowledge and testified therefrom that accused had occupied the room. He also supplied from his own knowledge approximately the number of days and the time of month accused had occupied it, and the name under which accused was registered and by which he was known at the hotel, it being an assumed name. The specific dates of occupancy added nothing to the import of this admissible evidence. Furthermore, the same dates of occupancy supplied by the objectionable

evidence were also supplied in two pre-trial statements which were voluntarily made by accused and which were introduced in evidence without objection (R237,260; Pros.Exs. 20 and 29). Under the circumstances, it does not appear that accused was prejudiced in any substantial right by the improper admission of the mentioned evidence.

4. Without entering into a discussion of the extent to which the rule against unreasonable multiplication of charges growing out of the same or substantially the same transaction (MCM, 1928, par.27, p.17) was violated in the instant case by pleading the larceny of each individual's property as a separate offense, it may be conceded that, as the rule has been heretofore construed, both administratively and judicially (MCM, 1928, par. 27, p.17, par.149g., p.171; TM 27-255 (Military Justice Procedure), par.25i; Dig.Op.JAG, 1912-1940, sec.428(14), p.298), it was, at least to some extent, violated. A number of the alleged larcenies were committed upon the same occasion, in the same manner, and in the same hut or barracks. The only manner, however, in which this form of pleading could affect accused adversely would be for it to make applicable a greater maximum penalty than otherwise would be the case. That it did not do so is evident, because in time of war the offense of desertion may be punished by infliction of the death penalty and both desertion and absence without leave may be punished by confinement at hard labor for life. Under the circumstances, it does not appear that accused was injuriously affected in any substantial right by the manner of pleading.

5. The charge sheet shows that accused is 22 years five months of age and enlisted 3 March 1941 at Peoria, Illinois, to serve for the duration of the war plus six months.

6. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The maximum penalty for assault with intent to commit murder is 20 years, for robbery is ten years, and for larceny of property of a value in excess of $50 is five years. At a bare minimum (without holding there were not more), four such larcenies were involved. Confinement in a penitentiary for desertion is authorized by Article of War 42. Confinement in a penitentiary is also authorized upon conviction of larceny of property of a value exceeding $50 by Article of War 42 and section 287, Federal Criminal Code (18 USCA 466), upon conviction of assault with intent to commit murder by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455) 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).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(414)

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

BOARD OF REVIEW NO. 3

CM ETO 11978

2 JUN 1945

UNITED STATES	) XXI CORPS
v.	)
Private ELMER BROMLEY (35803027), Battery A, 278th Field Artillery Battalion	) Trial by GCM, convened at Dillingen, Germany, 30 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 7 years. Federal Reformatory, Chillicothe, Ohio.

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

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

2. Fraternization is not involved in a visit to a German home for the purpose of robbing or assaulting an occupant (CM ETO 10501, Liner; CM ETO 10967, Harris). However, the evidence in this case indicates that the original entry was not so motivated but that the intent was formed thereafter. Thus, there is no inconsistency in the findings of guilty of both charges and their specifications.

3. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper since the accused is less than 25 years of age and his sentence is not more than ten years (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a, as amended by Cir.25, WD, 22 Jan.1945).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

AGPD 2-45/19M/C504ABCD

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

BOARD OF REVIEW NO. 3

28 JUN 1945

CM ETO 11982

U N I T E D S T A T E S	)	SEVENTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Darmstadt, Germany, 13 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private HENRY JONES (34048633), 3252nd 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 and found legally sufficient to support the sentence.

2. Under Charge I and Specification, there was no evidence whatever that accused was drunk on his post as alleged. The corporal of the guard testified he found accused drunk "at the warehouse across the railroad track" about 30 to 50 yards from his post (R7-8). He was then inside the building apparently talking with several men (R26). This, under the circumstances shown, was not an immaterial distance from his post within the meaning of the Manual for Courts-Martial, 1928, paragraph 146c, page 161. The court's findings indicated that it did not believe accused's testimony that he was not drunk and was on his post when found by the corporal of the guard (R20,22). The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the court's findings of guilty of Charge I and Specification (Cf: CM ETO 4443, Dick), but legally sufficient to support its findings of guilty of Charge II and its specifications.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

11932

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

BOARD OF REVIEW NO. 1 20 JUL 1945

CM ETO 11987

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, 22 April 1945.
Private ARTHUR L. JOHNSTON)	Sentence: Dishonorable discharge
(16097726), Company B, 17th)	(suspended), total forfeitures
Tank Battalion)	and confinement at hard labor
)	for 25 years. Loire Disciplinary
)	Training Center, Le Mans, France.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Arthur L. Johnston, Company "B", 17th Tank Battalion, did, at APO #257, U. S. Army, on or about 11 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: go forward with his Company to engage the enemy, and did remain absent in desertion until he was apprehended at Stan De Tir (Transient Camp) Reims, France, on or about 30 January, 1945.

He pleaded guilty to the Specification, with the exception of the words "at APO 257, U. S. Army, on or about 11 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: go forward with his company to engage the enemy, and did remain absent in desertion until he was apprehended at Stan De Tir (Transient Camp) Reims, France", substituting therefor the words "absent himself from his orgahization and duties at APO #257, U. S. Army, from on or about 11 January 1945 to", not guilty of the excepted words, guilty of the substituted words, and not guilty of the Charge but guilty of a violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring, he was found guilty of the Specification in exact accordance with his plea, and not guilty of the Charge but guilty of a violation of the 61st Article of War. Evidence was introduced of two previous convictions by special court-martial, one for absence without leave for eight days, and the other for wrongfully taking and using without consent of proper authority a "one and 1/4 ton" command and reconnaisance car of the value and of more than $50.00 property of the United States furnished and intended for military service. 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 25 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 confinemeht, and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement. The proceedings were published in General Court Martial Orders

No. 32, Headquarters 7th Armored Division, 15 May 1945.

3. Competent morning reports were placed in evidence and established accused's absence without leave from 11 January 1945 to 30 January 1945 (R7; Pros.Ex.A). Oral testimony also showed his absence during this period and that such absence was without permission (R7,9).

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 accused in effect pleaded guilty to the following specification, and was found guilty thereof:

> "In that Private Arthur L. Johnston * * * did absent himself from his organization and duties at APO 257, U. S. Army, from on or about 11 January 1945 to on or about 30 January 1945".

The customary formal words "without proper leave" were omitted from plea and findings, and the words "and duties" were used in lieu thereof. Obviously, lack of authority to be absent is a necessary element of the offense (CM 107744, Dig.Op.JAG, 1912-40, sec.419(1), p.282), but certainly no stereotyped and invariable form need be used to state it. If the accused had leave or was evacuated through medical channels or assigned elsewhere, he would have no duties at the station alleged. The finding of absence "from his organization and duties" excludes the possibility of any other absence than one without leave, and was therefore the equivalent of the customary form. It was the same as a finding that

> "he was absent from his organization where it was his duty to be and where he had duties to perform"

viz., without leave. This is the case of an interpretation of a finding and not of a specification. The Board of Review should not be too technical in weighing the words used (Cf: CM 202027, McElvoy (1934), 5 B.R. 347,349).

It is not contemplated in the military judicial process that findings should become entangled in the sterile artificialities of common law verdicts. However, this liberal attitude does not excuse the carelessness here exhibited which is deplorable.

6. The charge sheet shows that accused is 21 years of age and enlisted 26 June 1942. He had no prior service.

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

8. The designation of the Loire Disciplinary Training Center, Le Mans, France as the place of confinement is proper (Ltr. Hq.European Theater of Operations, AG 252 Op.PM, 25 May 1945).

Judge Advocate

Judge Advocate

Judge Advocate

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