E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 10617
CM ETO 11987

VOLS. 23-24

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

Judge Advocate General's Department

Holdings and Opinions

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

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 23 B.R. (ETO)

including

CM ETO 10617 - CM ETO 11188

(1945)

Office of The Judge Advocate General

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

19 JUL 1945

CM ETO 10617

U N I T E D S T A T E S	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Gladbeck, Germany, 5 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROBERT C. DOMINGUEZ (39709598), Company C, 320th Infantry	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Robert C. Dominguez, Company C, 320th Infantry, did, without proper leave, absent himself from his organization at Rosieres, France from about 15 September 1944 to about 23 September 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his organization at Gremecy, France from about 11 November 1944 to about 14 November 1944.

Specification 3: In that * * * did, without proper leave, absent himself from his organization at Vallerange, France from about 20 November 1944, to about 26 November 1944.

Specification 4: In that * * * did, without proper leave, absent himself from his organization at Lutrabois, Belgium from about 11 January 1945 to about 4 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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, the Commanding General, 35th Infantry Division, 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. As evidence of the absences without leave charged in the four specifications, the prosecution introduced, without objection by the defense, twelve extract copies of the morning report of Company C, 320th Infantry, for various dates as hereinafter stated. Each of the copies was authenticated by Captain Gerard T. Armstrong, the Regimental Personnel Officer, who identified his signature at the trial, and each copy also indicates that this officer signed the original morning report, as follows:

"/s/ Gerard T. Armstrong
/t/ GERARD T. ARMSTRONG
Captain, 320th Infantry
Personnel Officer" (R7-8; Govt.Ex.A, pp. 1-11; Govt. Ex.B).

Specification 1 of the Charge: The extract copy of the morning report of Company C for 28 September 1944 shows accused "Dy to AWOL 15 Sept 44; AWOL to dy 23 Sept 44" (R7-8, Govt. Ex.A, p.1). An entry for 15 September 1944 shows that on that date Company C was at Rosieres (R-8, Govt.Ex.B).

Specification 2 of the Charge: The extract copy of the morning report of Company C for 16 November 1944 shows accused "dy to AWOL 11 Nov AWOL to dy 14 Nov 44" (R7-8, Govt.Ex.A, p.2). The first sergeant of Company C testified that on 11 November the company was in the vicinity of Gremecey, France. Accused was with the company while it was moving in column through some woods, but later in the afternoon when the company was assembled he was no longer present. He remained absent without permission from 11 November to 14 November, when he voluntarily returned (R9-10).

Specification 3 of the Charge: The extract copy of the morning report of Company C for 25 November 1944 shows accused "dy to AWOL 20 Nov 44" (R7-8, Govt.Ex.A, p.3). An entry from the morning report for 26 November 1944 shows accused "AWOL to arr in co area Held for trial Charge AWOL" (R7-8, Govt.Ex.A, p.4). Testimony of the first sergeant shows that on 20 November the company was in the vicinity of Vallerange, France. While it was moving through some woods, a lieutenant was hit, and accused assisted him back to the aid station, about a mile away. Accused did not return to the company as he was required to do, but remained absent without permission until 26 November (R10-11).

Specification 4 of the Charge: An entry of the morning report for 30 November 1944 shows that accused was on that date placed in arrest in the service company area, and an entry for 13 January 1945 shows that he was restored to duty to 11 January 1945 (R7-8, Govt.Ex.A, pp.5-6). The extract copy of the morning report of Company C for 16 January 1945 shows accused "Dy to AWOL 11 Jan 45" (R7-8, Govt.Ex.A, p.7). A correcting entry for 20 February 1945 shows him "AWOL to conf MP Hq Arlon, Belgium 4 Feb 45. Conf MP Hq Arlon, Belgium to abs conf Paris Detention Bks 8 Feb 45" (R7-8, Govt Ex.A, p.9). The first sergeant testified that on 11 January accused was released from arrest in the service company to return to his company which was then "on the line" in the vicinity of Lutrebois, Belgium. He never returned to the company, however, and failed to report back to the service company (R11). On 20 February he was returned to duty from the Paris Detention Barracks and on 22 February was placed in arrest in the service company area and held for trial (R7-8, Govt.Ex.A, pp.10-11).

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 (R11).

5. Each of the original morning report entries, of which duly certified extract copies were introduced in support of Specifications 1, 2 and 3, was dated prior to 12 December 1944, during a period when there was no authority in the European Theater of Operations for a personnel officer to sign an original morning report. Since the evidence affirmatively shows that the original entries were signed by the personnel officer, and hence themselves inadmissible as evidence, the extract copies thereof were not competent to prove the matters recited therein, regardless of the failure of the defense to object to their admission (CM ETO 6951, Rogers).. There being no evidence of the absence without leave alleged in Specification 1 other than the incompetent morning report entries, the record does not support the finding of guilty of that Specification.

The testimony of the company first sergeant is sufficient, however, without the incompetent morning report entries, to show that

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accused absented himself without leave from his organization at the times and places alleged in Specifications 2 and 3 of the Charge.

Since, on 12 December 1944, theater unit personnel officers were authorized to sign original morning reports (Cir. 119, ETOUSA, 12 Dec.1944, sec. IV), the entry for 16 January, in support of Specification 4, was competent evidence, in addition to the testimony of the first sergeant, to show absence without leave of accused on 11 January 1945. The entry showing termination of this absence by confinement in the military police headquarters at Arlon, Belgium, although hearsay, was beneficial to accused to the extent of showing termination of his wrongful absence, and therefore was competent in the absence of objection (CM 242082, Reid, 26 BR 391 (1943)).

6. The charge sheet shows that accused is 19 years of age, and was inducted 11 September 1943 at Los Angeles, California. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. Except as noted above, 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 finding of guilty of Specification 1 of the Charge, legally sufficient to support the findings of guilty of the Charge and of Specifications 2, 3 and 4 and the sentence.

8. A sentence of confinement for life is authorized for violation of Article of War 61. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is proper (AW 42; Cir. 210, WD, 14 Sept. 1943, sec. VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B H Levy Jr Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 10618

8 AUG 1945

UNITED STATES	)	35TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Gladbeck, Germany, 11 April 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CHARLIE O. MORROW (34517483) Company L, 320th Infantry	)	

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

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

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

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

Specification: In that Private CHARLIE O. MORROW, Company L, 320th Infantry, did, at or near Barbonville, France, on or about 19 September 1944 desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to-wit: combat service against the enemy, and did remain absent in desertion until about 31 December 1944.

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

Specification: In that * * * did, without proper leave, absent himself from his organization at Metz, France, from about 23 January 1945 to about 19 February 1945.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances

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due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

a. Generally.

Duly authenticated extract copies of Company L morning reports for 14 September 1944, 6 January 1945, 13 January 1945, 22 February 1945, and 6 March 1945 were introduced without objection. These extracts show the morning reports to have been signed by the personnel officer (R7;Pros.Ex.A). Accused's voluntary statement to the investigating officer was also introduced without objection (R13-14;Pros.Ex.B).

b. Charge I and Specification

A squad leader testified that on or about 13 September 1944, the company was on a hill at Barbonville, France, "pinned down" by the enemy. He went back about 500 yards with the weapons platoon to fetch their weapons. While there accused passed him "walking back slowly." Although he did not know whether accused returned to the company that day, he has not seen him in the company since then. Accused was not present the next morning when the company moved forward from the hill. He did not know whether accused, who came with the unit overseas, had permission to leave (R8-10).

In his extra-judicial statement accused stated that on or about 13 September the company was advancing against the enemy. Just before dark he stopped in a village, took shelter (it was raining) in a barn where he slept for the night. Arising the next morning he found the company had moved. For several days he searched for the company without success, eventually coming to Nancy on the outskirts of which he "messed around * * * for a pretty good while * * * /not/ doing much of anything." Finally on 27 December 1944 "I gave myself up to the M.P.'s" telling them "I was A.W.O.L." (Pros.Ex.B).

Morning report entry for 14 September 1944 shows accused from duty to absent without leave as of 13 September 1944; that for 6 January 1945, from absent without leave to duty as of 31 December 1944. (Pros.Ex.A).

c. Charge II and Specification

At Metz, France, 23 January 1945, accused was with the Service Company, more or less under guard. Most of the company had moved. He was told "to stay around the area." When the time came for the remainder to move, he could not be found. He had no permission to be absent (R11-13).

In this extra judicial statement accused stated he was with Service Company in arrest and under guard. He and two other prisoners found some beer and got to drinking. The unit pulled out that night unbeknown to him. He remained there until another unit came whereupon he surrendered to their military police (Pros.Ex.B).

Company L morning report entry for 6 March 1945 shows accused from 'Ar Sv Co area to AWOL 23 Jan 45'; that for 22 February 1945, from 'AWOL to Ar Sv Co 19 Feb 45' (Pros.Ex.A).

4. No evidence was presented by the defense. Defense counsel stated accused's rights as a witness had been explained to accused and 'accused states that in view of the fact that his statement has been made a matter of record and introduced into evidence, he elects to remain silent' (R5).

5a. 'Prior to 12 December 1944 there was no express authority in the ETO for a personnel officer,' as such, to sign a morning report. The morning report for 14 September 1944 was signed by the personnel officer rather than by 'the commanding officer of the reporting unit or 'the officer acting in command.'' It was incompetent (Cir ETO 6951, Sec.VI). However, its admission prejudiced no substantial rights of the accused. The testimony of the squad leader was complete as to hazardous duty and accused's absence and accused's extra-judicial statement is a full and complete admission of absence without leave while participating in hazardous duty. It was within the province of the court to disbelieve accused's explanation that he became separated through oversleeping. The record supports the findings as to Charge I and Specification.

b. As to Charge II and Specification, the morning report for 6 March 1945 was competent. Accused's extra-judicial statement is a full and complete admission of absence without leave. It was within the province of the court to disbelieve accused's explanation that he was left behind. Moreover, accused's initial absence without leave was not only corroborated, but also fully proved, by competent oral evidence; his return shown by competent morning report entry.

6. The charge sheet shows that accused is 27 years of age and that he was inducted without prior service 7 December 1942 at Spartanburg, South Carolina.

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

Benjamin R. Sleeper, Judge Advocate

[redacted] SHERMAN, Judge Advocate

E. H. DEWEY, Jr., Judge Advocate

(8)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 8 AUG 1945 TO: Commanding General, 35th Infantry Division, APO 35, U. S. Army.

1. In the case of Private CHARLIE O. MORROW (34517433), Company L, 320th 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 10618. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10618).

E. C. McNEIL

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

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

BOARD OF REVIEW NO. 1 — 24 AUG 1945

CM ETO 10629

U N I T E D S T A T E S	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private RAYMOND W. CONRAD (37562474), Battery A, 791st Anti-Aircraft Artillery Automatic Weapons Battalion	Trial by GCM, convened at Paris, France, 12 February 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. 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 I: Violation of the 58th Article of War.

Specification: In that Private Raymond W. Conrad, Battery A, 791st Anti air-craft Artillery Automatic Weapons Battalion, European Theater of Operations, United States Army, did, at his organization on or about 25 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 11 December 1944.

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

Specification 1: (Finding of guilty disapproved by Reviewing Authority).

Specification 2: (Finding of guilty disapproved by Reviewing Authority).

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of all the charges and specifications, with the substitution in Specification 1, Charge II of the words "Sainte Marie du Monte" and "3 October" for the words "Jars" and "30 October". Evidence was introduced of two previous convictions by special courts-martial for absences without leave for six and two days, and for 27 days, respectively, in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2 of Charge II, and of Charge II, 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. Sufficient evidence of the corpus delicti supports accused's extra-judicial confession (CM ETO 14040, McCreary), which confession, together with such evidence, establishes that accused absented himself without leave from 25 September 1944 until he was apprehended on 11 December 1944 in Paris, France. An unexplained absence of two and one-half months in an active theater of operations in wartime amply sustains a finding of desertion (CM ETO 1629, O'Donnell; CM ETO 12045, Friedman; CM ETO 14359, Hart). The Specification alleged that accused deserted the service "at his organization". The proof shows that his permanent organization was the 791st Anti-Aircraft Artillery Automatic Weapons Battalion, and that at the time he went absent without leave he was on detached service with the 6904th Provisional Truck Company. The variance, if any, was harmless since it could not change the nature or identity of the offense charged, nor could accused have been misled by it (CM NATO 1087, III Bull JAG p.9).

4. The charge sheet shows that accused is 30 years three months of age and was inducted 15 May 1943 at Fort Snelling, Minnesota, 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 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.

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).

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Donald R. Carroll Judge Advocate

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

BOARD OF REVIEW NO. 3

4 JUN 1945

CM ETO 10644

U N I T E D S T A T E S	)	2D INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Gottingen, Germany, 11 April 1945.
Technician 5th Grade LOUIE B. J. CLONTZ, (34256132), Medical Detachment, 9th Infantry	)	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 on the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 5th Grade Louie B. J. Clontz, Medical Detachment, 9th Infantry, did, at or near Gelliehausen, Germany, on or about 9 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Ruth Schweizer, by threatening to cut her with a knife.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Specification and Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the 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 prosecution's evidence was substantially as follows:

On 9 April 1945, Ruth Schweizer and various members of her family were living in Gelliehausen, Germany (R7). At about 1400 hours, she was downstairs with the children of Frau Weise, another member of the household when accused came to the gate asking for something to drink. Ruth opened the gate and he walked into the house. He had a bottle of cognac with him and after giving him a glass, she went outside but returned when he called her back and told her to have a drink. After having a drink with her, accused opened all the doors, looked into the rooms and then went down into the cellar, asking Ruth to accompany him which she refused to do. When he came out of the cellar, he went over to the window where she was standing and brandished a knife some eight or ten inches long in front of her face. Ruth tried to leave, saying "Mother, mother", but he held her back and kept threatening her with the knife. He then opened the door to a little food storage room and forced her to enter. By then, she was crying and implored him not to touch her (R8-11, 15-17). At this point, Frau Weise, attracted by Ruth's cries, came in. Ruth tried to signal to her for help, but accused turned around, said something to Frau Weise in English and raised his knife. Being frightened, she left and went upstairs to tell Ruth's father and mother what was happening (R11,20,22-24,26).

Shortly afterwards, Ruth heard her sister calling. She tried to answer but accused silenced her by putting his hand over her mouth. He then fingered her genitals and forced her to bend over, pulling down her panties. She tried to straighten up, but he held her in that position and had intercourse with her. Penetration was effected and an emission occurred. Next he made her turn around and threw her to the floor. He took her panties off completely and getting on top of her, had intercourse with her again. He remained there for about five minutes at the end of which the door was opened and Ruth's sister and several American soldiers entered. Ruth and accused stood up and she fled from the room, crying "Mother, mother". She resisted accused throughout as much as she could, and "if he wouldn't have had the knife, it wouldn't have been so easy" (R11-15,17-21).

Meanwhile, Frau Weise had told Ruth's sister and father what she had seen downstairs (R24-25,28). The sister called out to Ruth and, hearing no answer, went for help (R25,28). In the street she met an American lieutenant and two sergeants. The lieutenant understood a little German and she told him what had happened. They accompanied her to the house and all four entered the food storage room. They found Ruth lying on the floor with her legs apart and

accused on top of her (R29,33,36,38,42). Both got up and Ruth ran from the room in an agitated and hysterical condition. She cried and wailed and was very upset (R29-30; 34,38-39,42-43,56). Accused was fully clothed, but after Ruth left, appeared to be buttoning his trousers (R29,34,39,45,52). None of the witnesses saw a knife, although Ruth mentioned one to her sister (R30,31,34-35,39,43). Under the circumstances, however, accused could have concealed it in his clothes and he later had an opportunity to dispose of it (R35-36,40,44).

4. Accused after being warned of his rights by the law member, elected to testify under oath.

He stated that he had spent 26 months overseas and had been awarded the bronze star, a citation, and a good conduct ribbon (R47). On the morning of 9 April 1945, while on official business, he had seen Ruth at the gate to her home and she had smiled at him. After lunch he walked back to her house, knocked on the door and was admitted by her. He had some cognac and they had a drink together. She "seemed very happy about it" (R48). He indicated that he wanted her to go into another room with him, and she motioned to him to be quiet since there was another lady present. When the latter left, Ruth went into the room with him. They embraced and she took down her panties and stepped out of them. They then had sexual intercourse. While in the act, they were interrupted by the lieutenant. They got up and accused left the room followed by Ruth. She had consented to the intercourse and appeared to enjoy it. They had intercourse only once and then in the normal position. He had used no violence or threats, did not own a knife of the kind prosecution's witnesses had described and did not have such a weapon with him that day (R49-52, 54). On cross-examination, he admitted that he had told the investigating officer that he had never been to Ruth's house and had not had intercourse with her (R54-55).

5. All elements of rape have been proved in this instance by substantial competent evidence and the record of trial is accordingly legally sufficient to sustain the findings of guilty. Although accused's version of the various incidents out of which the charges arose is directly in conflict with the testimony of the witnesses for the prosecution in almost every aspect of the matter, he was impeached in his contention that his victim consented to intercourse by his prior inconsistent statements to the investigating officer. Under the circumstances, the determination by the court of the issues of fact thus raised cannot be disturbed by the Board of Review (CM ETO 6148, Dear and Douglas).

6. The charge sheet shows that accused is 32 years and six months of age and was inducted 17 March 1942. He had no prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction 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 Sleeper, Judge Advocate

Malcolm C. Sherman, Judge Advocate

_____, Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 10690

U N I T E D S T A T E S	SEVENTH UNITED STATES ARMY
v.	Trial by GCM, convened at Kaiserlautern, Germany, 5 April 1945.
Private BEECHER R. NOLAN (36788083), Company A, 827th Tank Destroyer 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. 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 Beecher R. Nolan, Company "A", 827th Tank Destroyer Battalion did, at WINDERSHEIM, France, on or about 2 February, 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with elements of the German Army, and did remain absent in desertion until he surrendered himself at PFAFFENHEIM, France, on or about 10 February 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court for absence without leave for 8 days and one by special court-martial for absence without leave for 19 days, both in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as

the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, Seventh United States Army, 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 to Article of War 50½.

3. The evidence for the prosecution shows that on 2 February 1945 accused was a member of the second platoon of Company A, 827th Tank Destroyer Battalion, which was, at that time, assigned to combat duty with the 12th Armored Division, and was bivouacked in the town of Wiwersheim, France, near the Rhine. At about noon, the second platoon received orders to move out at 1430 hours to join units of the 12th Armored Division for combat in the Colmar sector (R5-6). Sergeant Ray F. McAfee called together his section, including accused, and told them to pack their equipment and stand by for orders to move into combat. Accused said he would be ready and received permission from Sergeant McAfee to go into a barn to "shoot some crap" (R7). The 11 or 12 men who participated in the game talked about the second platoon "moving up on the line" (R10-11). When the platoon was ready to leave, Sergeant McAfee ran to the barn and told accused they were moving out (R8,11). Accused "said 'okey' and stood up on his feet", but made no motion to follow (R8). When other members of the company left, accused remained in the barn and continued to gamble (R10-11). The platoon moved out about 250 or 300 yards to a road and stayed there about 10 minutes. Accused had all his equipment on one of the vehicles, but he was not present (R8).

First Sergeant Joe Oliver, of Company A, saw accused gambling in the barn at 2200 hours that night and "asked him if he had got left and he said 'yes'". Sergeant Oliver then told him to catch a vehicle from one of the other two platoons which were moving out, or to ride on Oliver's vehicle, which was "short" a man. "He said 'alright sir'." However, he was not with any of the other vehicles when they moved out at midnight (R12-14) and was still gambling at 0030 or 0045 hours (R19-21).

At about 0130 hours he was brought to Second Lieutenant James W. Detwiler, of the third platoon of Company A, as an extra man, to whom he stated in explanation of his status that "he had been sleeping and hadn't been awakened" (R14-16). At about 0230 hours Lieutenant Detwiler turned him over to Technical Sergeant Jessie N. Simpson, in compliance with whose orders accused got into a jeep attached to Company A from a reconnaisance company. Before this jeep reached the company, the officer in charge decided to return to spend the remainder of the night at the battalion command post (R16-18).

A duly authenticated extract copy of the morning report of Company A for 17 February 1945, showing accused "Fr dy to Desertion 1430 hrs 2 Feb 45" and "Fr Desertion to Conf. Bn Stockade 10 Feb 45", was admitted into evidence but limited by the law member as proof of absence without leave only and not desertion (R21-22; Pros.Ex.A).

4. For the defense, Private First Class Joe Flowers testified that accused got in his jeep at 0300 or 0400 hours on 3 February 1945, on orders from a sergeant, and that they detoured on the wrong road at Colmar, returned to the battalion command post, and slept that night in the same building. Accused waited for Flowers the next morning while the latter went to Strasbourg, and after lunch they both set out for Company A in a vehicle driven by Flowers, but got lost enroute. Flowers stopped at a provost marshal station for information as to how to get to Colmar. When he came out about 15 minutes later, accused was gone (R22-25).

Accused, after his rights as a witness were explained to him, elected to testify under oath (R25). He did not quit gambling in the barn at 1400 or 1430 hours on 2 February because he was engaged in the game and did not notice the time. When Sergeant McAfee arrived, accused asked him if they were ready to move out. McAfee told him "no, not right now", and proceeded to engage in the game himself. Accused "figured there would be plenty of time" and did not see McAfee leave. He recalled the sergeant telling him at about 2200 hours to get in one of his vehicles, and he intended to do so, but was asleep in a corner of the barn after about 2230 hours. He got up about 0100 or 0130 and reported alone and of his own volition to Lieutenant Detwiler. Sergeant Simpson told him to get in a jeep driven by Joe Flowers. They later returned to the battalion command post. He stayed with Flowers all that day, but left him at about 2230 hours in Molesheim because Flowers was drunk and they were lost and could not find their way back to Wiwersheim. Moreover, Flowers had almost run into a road block and accused did not think he was capable of driving. Accused spent the night with some French soldiers; then, after looking for American soldiers all day, he spent the next night with the "FFI". The following day he saw some colored American soldiers and told them he was lost and was trying to get back to his outfit. They took him to a signal construction company and he reported to the commanding officer who tried without success to locate his organization by telephone and finally took him to Saverne where they reported to the military police. After he had been transferred to several military police stations and stockades, members of his outfit came and got him. At no time did he intend to run away to avoid hazardous duty. He had been in combat a week prior to 2 February, and he "figured", although he did not know, that his outfit would be used in combat again this time (R26-36).

5. In rebuttal, Sergeant McAfee denied gambling on the afternoon of 2 February and Flowers denied having anything to drink on 3 February

1945 (R37-39).

6. The evidence clearly shows that accused, a member of a tank destroyer platoon, was advised by his section sergeant at noon on 2 February 1945 to pack his equipment and stand by for orders to move into combat. With permission from the sergeant, he then went into a barn and commenced gambling with other soldiers. He was called by the section sergeant shortly before his platoon moved out, but, although he expressed a willingness to go and although other members of his company who were in the barn with him actually left, remained and continued to gamble while his platoon moved out without him. The morning report of his company shows him absent without leave as of 1430 hours on 2 February, which was the hour of his platoon's departure from the company area. The moment he failed to respond to the sergeant's summons to join them, he became absent without leave. His organization at that time, under the circumstances shown, was definitely his platoon, and his unauthorized absence from his platoon constituted absence without leave from his organization (CM ETO 5437, Rosenberg).

The evidence is convincing that accused knew that his platoon was moving up to engage the enemy in combat. The movement of his platoon "up on the line" was discussed during the "crap" game, after he had received the orders at noon to stand by to move into combat. He admits he had been in actual combat only a week before, and that he believed his outfit was going into combat this time. Under such circumstances the court was warranted in inferring that he deliberately absented himself with the intention of avoiding the hazardous duty alleged (CM ETO 6937, Craft). Such inference is strengthened by the fact that he again failed to avail himself of an excellent opportunity to join his company between 2200 hours and midnight on 2 February. Even if his actions were motivated by a desire to gamble rather than by fear, he necessarily intended to shirk the hazardous duty which his gambling prevented him from performing (CM ETO 6626, Lipscomb).

Proof of the duration of accused's absence is not essential to sustain a conviction of the offense charged (CM ETO 2473, Cantwell; CM ETO 9975, Athens, et al); and the absence of any proof showing that he surrendered himself at Pfaffenheim, France, on or about 10 February 1945, as charged in the Specification, is immaterial (CM NATO 2044, III Bull. JAG 232). The offense charged was committed at the moment he absented himself from his organization by remaining behind with the requisite intent (MCM 1928, par. 130a, p. 142). It therefore becomes unnecessary to decide whether he was temporarily returned to military control either by the orders of his first sergeant at 2200 hours 2 February or by the orders of Lieutenant Detwiler at 0130 hours 3 February, pursuant to which he rode in a jeep which was attached to his company.

7. The charge sheet shows that accused is 27 years of age and was inducted 22 October 1943 at Chicago, Illinois. 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). 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 K Sleeper Judge Advocate

Malcolm C Sherman Judge Advocate

S. H. Levy Judge Advocate

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 10699

U N I T E D S T A T E S	5TH ARMORED DIVISION
v.	Trial by GCM, convened at St. Tonis, Germany, 20 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade JOHN F. AUTREY (34745156), 3912 Quartermaster Truck Company	

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

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

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

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

Specification: In that Tec. 5th Gr. John F. Autry, did, at Kempen, Germany on or about 7 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Kaethe Noehsenes.

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

Specification: In that * * * did, at Kempen, Germany, on or about 7 March 1945, wrongfully fraternize with a German Civilian in violation of existing rules and regulations.

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

Frau Kaethe Noehsenes, age 22, a married woman, lives with her two children at 25 Um Street, Kempen, Germany. On 7 March 1945 at about 1115 hours she was walking in the direction of the home of her parents-in-law. At the railroad intersection in Kempen she encountered three negroes, two mulatto and one very dark. The latter, whom she identified in court as accused (R16), asked for her passport. She had none and kept on walking. A half an hour later this dark negro, driving a truck, overtook her, stopped the vehicle and got out with his rifle over his shoulder. He approached her, pointed the weapon toward her and said, "Fuck, fuck", at the same time making a sign with his fingers (R6-8, 12-13,15). Her testimony described his subsequent conduct as follows:

> "He led me to the truck and then he clapsed a hand over my mouth and fired a shot. He was standing behind me. He pushed me into the truck with one hand and he held me with the other and then closed the door. He threw me on the seat. He jumped on top of me. He pulled my legs over to the side and threw himself on top of me. He pushed my skirt to the side and he pushed my bloomers over to one side and he forced his mouth on top of my mouth. I had one hand behind me and the other holding underneath the steering wheel. He opened his trousers and removed his sexual organ. With force he jumped on top of me and let everything run into me. Then he got up. I attempted to kick him with my foot. He got up and buttoned-up his trousers. He opened the door and he grabbed hold of my right hand and pulled me out. I fell and he remained standing, and then he got in the truck and drove away" (R9).

She ran across a field and hid, and then continued on to the home of her parents-in-law. Immediately thereafter she went to the "Commandant" and reported the incident. Two days later in a line-up of negroes she recognized accused as the dark negro who attacked her (R9). She did not consent to the intercourse and "always fought him off" (R10). At the time of the attack she "felt powerless because I was so scared. My hands were shaking and my whole body was shaking" (R16) and ever since she "has had the runs" or uncontrollable bowel movement and pains in her stomach (R11,15). She sustained blue marks on one arm which she displayed to the members of the court (R10).

On 9 March 1945, Major Alexander T. Nelson, Provost Marshal, Fifth Armored Division, talked with accused, explained to him the 24th Article of War and informed him that anything he said might be used against him. Accused then made a statement whichhe signed, describing therein his duty on outpost with two other men of his company when "this lady happened to come along". One of the men asked that she show him a pass card, but she did not produce any. About 15 minutes later, accused drove after her in a truck and the manner in which she subsequently assented to sexual intercourse with him was set forth as follows:

> "I catches up with her and drives about fifteen (15) yards ahead of her and stops the truck and I tells her that I'm going to take her to the Captain. I takes her bag; then I takes my thumb between my two (2) fingers in my fist which means intercourse in German. Then I takes her bag and takes one arm and shoves her up on the fender and she crawls up on the cap of the truck. I give a little push up to the fender. Then I fastened the door, then I goes on the other side of the door, and turns on the ignition at the drivers side. Then I get behind the steering wheel. Then I takes the rifle and put it in my left hand. Turn the ignition on and put the gear in second gear; then I makes a motion at her with the thumb in between my fingers. She slightly bows her head to me, which means intercourse in German. Then I gets out the truck; I comes around and unfastens the door and slightly pushes her back. Then I goes to get on top of her and she pulls her dress up with both hands. Takes her right and left hands and pulls it up. Then I takes my prick out and she pulls her step-ins to one side. I was laying on her; I was kissing her. I had my prick probing for the hole and I laid on down, it slipped in. After I put it in I"

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made the first twist, she made the second one, I made the third and she made the last one, and I blowed my nuts. I gets up and comes around to the drivers side of the truck and gets in and goes to turn on the ignition, and in the meantime she has gone; but where she went I do not know" (R20-21; Pros.Ex.C).

4. For the defense, First Sergeant William Williams, of accused's company testified that he had known him since March 1943. Accused served as a truck driver, his conduct as a soldier and the performance of his duty were both very good, he never disobeyed any orders given him by witness and "his truth that I know of is very good. I don't believe he ever lied to me" (R24-25).

5. After his rights were explained, accused elected to remain silent (R25-26).

6. The court's findings of guilty under Charge I and Specification are supported by substantial competent evidence of every element of the offense of rape, as alleged, and are final and binding upon appellate review (CM ETO 4661, Ducote; CM ETO 3709, Martin, and cases therein cited).

7. The court's findings of guilty under Charge II and Specification negative the contention of accused as contained in his statement (R20-21; Pros.Ex.C) that his association with Frau Noehsenes was in the line of duty and friendly and that his sexual intercourse with her was with her consent. The evidence admits of no other conclusion than that he pursued her with the intent to commit rape which he hastily accomplished in a most brutal and savage manner. Such conduct is not fraternizing under holdings of the Board of Review and the evidence is therefore legally insufficient to support the court's findings of guilty under Charge II and Specification (CM ETO 10967, Harris; CM ETO 10501, Liner).

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

9. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty under Charge I and Specification, legally insufficient to support the findings of guilty under Charge II and Specification, and legally sufficient to support the sentence.

10. 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 Jun 1944, sec.II, pars.1b(4),3b).

B R S Cooper Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 3

17 SEP 1945

CM ETO 10700

U N I T E D S T A T E S	)	5TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Neersen,
	)	Germany, 18 March 1945. Sentence:
Technician Fifth Grade	)	Dishonorable discharge, total for-
THOMAS J. SMALLS (32869118)	)	feitures and confinement at hard
3907th Quartermaster Truck	)	labor. United States Penitentiary,
Company	)	Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Technician Fifth Grade Thomas J. Smalls, 3907th Quartermaster Truck Company, did, at Kempen, Germany, on or about 2300 5 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anne Schmitz.

Specification 2: In that * * * did, at Kempen, Germany, on or about 0330 6 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Anne Schmitz.

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

Specification: In that * * * did, at Kempen,

Germany, on or about 5 March 1945, wrongfully and unlawfully fraternize with German civilians in biolation of existing rules and regulations.

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

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

On 4 March 1945 the town of Kempen, Germany, was occupied by American troops (R19,22). Frau Elizabeth Holt, a resident of that town, testified that at about 2130 hours on 5 March two drunken American soldiers, one of whom was the accused, came to her house and indicated that they were looking for women. She told them "no girls here" but despite this statement they walked through the house to the kitchen where they discovered the presence of three refugees. Accused's companion went over to one of the women refugees and "touched" her but Frau Holt pulled him away and informed him "That does not come in question here" (R23). Upon being told this, they asked Frau Holt if she had any liquor, schnapps or beer. When given tea instead, accused's companion drank some of it and thereafter again approached the same woman refugee. Frau Holt armed herself with a stove poker, again told him she would have no untoward conduct in her house and again pulled him back. Then, after threatening to report him to his commanding officer and telling him that there were plenty of women on the street, she pulled him toward the door and pushed him out of the house. She then took hold of accused and also pushed him from the house (R22-29).

Having thus been denied access to the home of Frau Holt, the men went to the house next door. This house contained two apartments, one occupied by Herr and Frau Mueller and their three children and the other by Herr Treboeck, his daughter, Frau Anne Schmitz (the prosecutrix) and her child (R7,13-15,20,22). They knocked at the door and, when Herr Mueller opened it, "a white soldier approached me and pushed me inside and the colored soldier /accused/ followed him" (R15). After entering, accused asked Mueller, in broken German, "Where is woman, where is girl" (R15). Despite

Mueller's reply that there were no girls in the house, only women and children, accused and his companion searched the downstairs rooms with the aid of flashlights (R15). With reference to their behaviour toward him at this time, Mueller testified,

> "They didn't treat me rough exactly, I had to go with them * * * Somebody pushed his weapon into my back, I thought, but I cannot be sure. I just felt something. It could have been done unintentionally. It is rather narrow. I don't want to say that he threatened me" (R16).

After searching the downstairs rooms, the two men went upstairs and entered the bedroom of Frau Mueller who in the meantime had partially clothed herself. She was approximately eight and one half months advanced in pregnancy and the men did not molest her (R15,17). They then apparently directed Mueller to take them to the other apartment (R19). Upon reaching the adjoining apartment, he shouted for Herr Treboeck and Frau Schmitz responded. Mueller accompanied the men up the stairs and, when Frau Schmitz opened her bedroom door, the men entered. His testimony indicates that he did not enter with the men but only accompanied them as far as the hallway outside the bedroom (R16,18).

The prosecutrix testified that at about 2145 hours she was in bed with her child when she heard Mueller call her father and that shortly thereafter her door "was opened" whereupon Mueller, as well as the two soldiers, entered her bedroom (R7). When asked by the trial judge advocate whether the soldiers made any threatening gestures at this time, she replied, "Yes. They pointed the weapons at me" (R8). However, she then modified her prior statement to this extent:

> "Q. Was the colored soldier [accused] one of the men who pointed his weapon at you?
> A. I don't know for sure. It was dark and they had only a flash light.
>
> Q. How many guns did you see pointing at you?
> A. I saw only one." (R8).

While the exact sequence of events next occurring is not entirely clear from the record, the prosecutrix testified that she "first screamed" when the men entered her room and also "kept saying 'No, no' as loud as I could" (R11). It also appears that she called for her father "very loud" and that when he appeared on the scene in response to her cries he was pushed from the room by the companion of the accused (R22). Her father then returned downstairs, accompanied by accused, who thereafter went out into the yard to relieve himself (R20,21). Apparently at or about the time accused and Treboeck left, or almost immediately thereafter, the white soldier approached Frau Schmitz' bed and jumped in on top of her. She started to scream

and her child was crying at the time (R7,8). Her testimony as to the events next occuring is as follows:

> "He [accused's companion] jumped on me and made use of me. * * * He forced me. He was not able to do it, so he forced me to take it in my mouth. I did not want to. Then he tried it the other way again" (R8).

She resisted the white soldier's advances by trying to push him away and by saying, "No, No". She also stated that she did not have a chance to fight him off, because "I was afraid I might be killed" (R8). She assumed that he was finally successful in "having intercourse" because "suddenly he left". It was then about 2200 or 2215 hours (R8,9).

Immediately after the white soldier left, accused entered the room and jumped in bed beside Frau Schmitz. He then got up again, got undressed, and returned to the bed (R8). She

> "tried to push him away and said 'No, No!', but he said, 'Yes, I want to have intercourse with you.' I tried my best to force him away, but I couldn't. He had actual intercourse with me then" (R8).

When asked by the trial judge advocate to explain her resistance in detail, she testified:

> "I kept pushing him away and said, 'please don't do it! I am sick', I was too frightened to do any more because I was afraid he might kill me. We were always told if we resisted we would be killed. That is why I thought I couldn't do any more" (R9).

Later in her testimony, when asked specifically by the trial judge advocate whether her government had told them what the American soldiers would do when they entered the town, she answered that the civil population had been told that

> "It was best not to resist them [the Americans]; otherwise we would be killed. Everybody talked about that" (R11).

She stated that during the act of intercourse accused's carbine was in a corner of the room (R9).

When accused finished, he did not leave but indicated that he wanted to stay with her for the remainder of the night and have intercourse again in the morning before his departure (R9). Her child was

restless and, after "quite a while", she asked him if she might take the child downstairs, thinking thus to avoid the necessity of remaining in bed with him (R9). He permitted her to do so and joined her in the kitchen some ten minutes later, clad only in his underwear (R10). He told her at this time that if she would have intercourse with him again he would leave. Hoping that he would leave and in an attempt to distract him, she tried to be friendly with him, conversed with him and gave him coffee. He talked with her in a friendly manner and drank some of the coffee but kept recurring to his demand that she again have intercourse with him (R10). During this time, because she "resisted him so much", he asked her if there were any other women in the house (R10,11). She told him that there were only children but he directed her to show him where they were. She complied by leading him to the entrance of the Mueller apartment where Herr Mueller, seeing him enter, joined him and followed him upstairs to the room where his children were sleeping. Frau Schmitz joined them there and both urged accused not to molest the children, the oldest of whom was twelve years of age (R11,17). Accused then left the Mueller apartment and returned to the kitchen of Frau Schmitz' apartment and told her he was going to "use" her again. Frau Schmitz testified that at this time (about 0300 hours),

> "He wanted to go upstairs with me again. I said 'No', he said, 'Where shall we do it again?' I said, 'No, No'. He said 'Yes, yes'. There was a mattress lying on the sofa. He wanted me to place it on the floor. I had to place the mattress on the floor and he did it again. It was useless for me to struggle. I had to." (R10).

Then, after promising to return with chocolate for her child, he left (R10). At 1100 hours on the following morning, the hour at which the German civilians were first permitted to go out on the streets, she reported the occurrences of the previous evening to the military authorities (R12).

Mueller testified that when he left the two men outside Frau Schmitz' bedroom to return to his apartment, he heard "somebody crying and screaming, but just for a moment." He stated that this was "all I heard". (R16). Treboeck testified that his daughter called to him very "very loud" when the men first entered her room and that thereafter he "always heard her talk, but not screaming" (R21,22). Frau Holt stated that at about 2145 hours, shortly after she ejected the men from her home, she heard "a cry from Mrs. Schmitz" and that at about 2230 hours she "heard it again" (R24). She heard the child crying and "also the mother did" (R25). Mueller testified that Frau Schmitz was an "honorable woman * * * as far as men are concerned" and Frau Holt testified that Frau Schmitz' reputation was good and that to the best of her knowledge she had never conducted herself in an improper manner with men (R17,25). Neither Mueller nor Treboeck attempted to prevent the two soldiers from molesting Frau Schmitz or

went to seek aid because they were afraid and because they were not permitted on the streets at night (R19-22). Treboeck testified that the townspeople had been told by their officials that when the Americans came the Germans would be herded together and killed (R22). Both soldiers were drunk on the evening in question (R11,17,25). While accused's companion, who was extremely drunk, was the more intoxicated of the two, accused was sufficiently drunk that even after he drank three cups of coffee he kept "weaving his head from one side to the other" (R11).

On or about 7 March 1945, accused voluntarily made a statement to the Provost Marshal of the 5th Armored Division. The recitals set forth therein are, in main outline, in substantial accord with the testimony of the witnesses for the prosecution. Accused admitted that on the night alleged he and his companion, both of whom were drunk, went to various houses in Kempen in search of liquor and women. Upon reaching the Mueller-Treboeck house, they were admitted by Mueller and went to his wife's bedroom. While accused was in this room his companion went into another room and, when accused also went there and looked in, he saw his companion on top of a woman. He was told to wait, and, when he again opened the door five or ten minutes later, "the woman was sucking the soldier off". When he told his companion that he too wanted to have intercourse with her, he was told to find a woman of his own. After his companion left, he entered the room, got into bed and asked the woman to have intercourse with him. She indicated that she would rather commit sodomy per os but he stated his objection to this and had normal intercourse with her. The remainder of his statement is almost exactly parallel with the testimony of Frau Schmitz. He expressly admitted that he had intercourse with the woman on two occasions (R28-30).

4. For the defense, accused's acting company commander and first sergeant testified that accused had been a "model soldier" and that his character was good (R31,32). On cross-examination, the company commander stated that he was certain that the men in his unit were aware of the orders forbidding fraternization with German civilians (R31).

After his rights were explained to him, accused elected to be sworn as a witness in his own behalf. His testimony is largely repetitious of the recitals contained in his pretrial statement and need not be summarized here. On cross-examination, he admitted that he had "been told" of the orders prohibiting fraternization with German civilians. He could not state whether Frau Schmitz seemed to enjoy the first act of intercourse because of his extreme drunkenness and because it was very dark in the room at the time (R39). However, the fact that she was willing to commit sodomy per os with him led him to believe she would not seriously object to sexual intercourse (R37). On the second occasion he was less drunk and this time she

appeared cooperative because "all the time I was on her, she kept asking me 'is it good? is it good?' and she helped me along" (R37). She did not threaten to report him to his commanding officer (R38).

5. a. The evidence in this case clearly shows that accused had sexual intercourse with the prosecutrix at the times and place alleged. However, in view of the unusual circumstances shown, some question arises whether such sexual intercourse constituted rape.

The crime of rape quite commonly follows one of two more or less typical factual patterns. The first is found in cases where an accused has carnal knowledge of a prosecutrix despite her vigorous physical resistance, which he overcomes by the application of superior physical force. Under these circumstances, lack of consent on the part of the prosecutrix is demonstrated by her resistance and that accused employed force is manifest from the very nature of his acts. A second more or less typical factual pattern is found in cases where there is little or no resistance on the part of the prosecutrix but she submits because of conduct on the part of the accused calculated to put her in fear of death or great bodily harm. Here again, the act of intercourse will be rape. Resistance by the woman is only one method by which lack of consent is manifested and, if she submits through fear of death or great bodily harm the mere fact that she failed to resist does not necessarily mean that she consented to the act of intercourse. And, whether regarded as constructive force or as one form of actual force, the threatening conduct of the accused and the act of intercourse effected by means of it without prosecutrix' consent is sufficient to constitute rape.

While the instant case presents, in general, the pattern of conduct usually found in the second class of cases mentioned above, a rather novel feature is introduced by the fact that an analysis of the prosecutrix's testimony makes it clear that the chief basis for her submission was fear engendered by false German propaganda, not fear produced by the specific acts of the accused and his companion. Further, while evidence of the dissemination and effect of such propaganda was relevant as serving to explain the relatively feeble quality of the prosecutrix' resistance, there is nothing in the record from which it can be inferred that accused had knowledge of its dissemination and potential effect. Thus, knowledge of the fear produced thereby cannot be attributed to him and it cannot be said that he adopted and utilized the specific fear produced by the German propaganda in forcing the prosecutrix to have sexual intercourse with him. This being true, had the prosecutrix capitulated by reason of this fear alone and without any threatening conduct on the part of the accused, with the result that acting on the circumstances as they appeared to him he had been unaware that he was committing a crime known to the law, his act would not have been rape (CM ETO 9301, Flackman; 1 Wharton's Criminal Law (12th Ed., 1932), sec.701,pp.942,943; 44 Am.Jur.,sec.12,p.909.).

b. However, entirely aside from the effect of the fear entertained by the prosecutrix as the result of German propaganda, it cannot be said that there is not substantial evidence to support the court's finding that the first act of intercourse constituted rape. It seems clear that, despite her comparatively weak resistance, she did not consent to this act of carnal knowledge. She so testified and her testimony to this effect is inherently credible; she had never before seen the accused and there is no reason to suppose that she would have consented to his advances under the conditions shown. She continually said, "No, no." Any inference which might otherwise have arisen from her subsequent more or less friendly conduct toward him is plausibly dispelled by her explanation that she conversed with the accused amiably in an attempt to distract him and in the hope that he would leave. Thus, there is nothing to impeach her testimony that she did not consent but submitted only through fear. And, while her fear was produced chiefly by German propaganda, there was evidence from which the court could find that it also stemmed in part from the acts of accused and his companion. There is evidence that a carbine was pointed at her at the time they entered her bedroom. Accused's companion not only refused to let her father enter the room but pushed him from the door and there is testimony that accused was present at the time. The very presence of two armed enemy soldiers in her room late at night, one day after the town was first occupied by American troops, was productive of fear. And, while specific knowledge of German propaganda cannot be attributed to the accused, he must have known that his status as an armed member of the conquering forces might produce at least some degree of apprehension in the prosecutrix. Further, her fear was expressly manifested to him when she screamed at the time he and his companion first entered her room and when she called loudly to her father for aid. There is evidence that her scream was sufficiently loud to be heard by an occupant of the house next door and that she cried out at least once again with similar loudness. When accused returned a short time later and after first apparently placing his carbine in a corner of the room, got into bed with the prosecutrix, she made verbal protestations against intercourse and attempted to push him from her, thus manifesting her lack of consent to intercourse. While her resistance was comparatively weak and while, under some circumstances, feeble resistance may with justice be interpreted by the male as reluctant consent, under the circumstances here shown there was no reason for accused to suppose that he was accomplishing a seduction. In the light of all the facts shown, it must be concluded that there is substantial evidence to support the court's conclusion that accused had carnal knowledge of the prosecutrix by force and without her consent. It follows that the court's findings under Specification 1 of Charge I cannot be disturbed by the Board of Review (Cf: CM ETO 8837, Wilson).

c. It is probable that the prosecutrix also did not consent to the second act of intercourse but again submitted because she thought resistance was not only useless but might result in her death at the hands of the accused. However, since accused was not shown to have had

any knowledge of the misconceptions entertained by the prosecutrix as the result of German propaganda, her friendly behavior toward him in the interval between the two acts of intercourse and the virtual absence of any resistance on her part when he ultimately insisted that she again have intercourse might easily have led him to the conclusion that she was reluctantly consenting to his demands, a conclusion for which there was no legitimate basis at the time for the first intercourse. The record fails to show that his conduct was especially threatening on this occasion. As suggested above, his act in having intercourse with the prosecutrix under these circumstances cannot be said to constitute rape. The finding of guilty of Specification 2, Charge I, is accordingly not sustained. (Cf: CM ETO 9301, Flackman, supra; Mills v. U. S., 164 U.S. 644, 41 L.Ed.584; 44 Am.Jur.,sec.12,p.909).

d. The record of trial clearly supports the court's finding that accused was guilty of fraternizing with German civilians as alleged in the Specification, Charge II.

e. It will be noted that certain character evidence was introduced by the prosecution. Herr Mueller, who had lived for eight or nine years in the same apartment building as that occupied by Frau Schmitz, when asked to describe Frau Schmitz' reputation "as far as men are concerned", stated, "In so far as I know she has always been a very honorable woman". Frau Holt, who had known Frau Schmitz since infancy, testified that as far as she knew Frau Schmitz' reputation was good and that to the best of her knowledge Frau Schmitz had never conducted herself in an improper manner with men. As developed, and read in context, this testimony went to Frau Schmitz' reputation for chastity, not to her reputation for truth and veracity.

> "Since absence of consent on the part of the prosecutrix is an essential element of the crime of common-law rape, evidence of previous want of chastity on her part is always admissible as tending to show that the act of which the defendant is charged, if committed at all, was with the consent of the prosecutrix. Without exception, the cases hold that previous want of chastity may be shown by proof of reputation" (140 ALR p.380, sec.IIIa).

Regardless of its admissibility as part of the prosecution's evidence in chief, the testimony of the good reputation of the prosecutrix for chastity does not appear, in view of the evidence of consent thereafter introduced by the defense, to have injuriously affected the substantial rights of the accused in this case.

6. The charge sheet shows that accused is 22 years five months of age and was inducted on 20 March 1943. He had no prior service.

(38)

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted herein, 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 of Specification 1, Charge I, and Charge I, of Charge II and its Specification, and the sentence, but legally insufficient to support the finding of guilty of Specification 2, Charge I.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW42). 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, par.1b(4),3b).

B R Sleeper Judge Advocate

(DISSENT) Judge Advocate

B. L. Lewis Judge Advocate

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

BOARD OF REVIEW NO. 3

17 SEP 1945

CM ETO 10700

U N I T E D S T A T E S	)	5TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Neersen, Germany, 18 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Technician Fifth Grade THOMAS J. SMALLS (32869118), 3907th Quartermaster Truck Company	)	

DISSENTING OPINION by SHERMAN, Judge Advocate

1. The evidence is substantially in accordance with its summary as contained in the majority opinion. However, for the purpose of this dissent, evidence not mentioned therein will be quoted and discussed. I concur with the majority opinion only as regards the legal insufficiency to support the findings of guilty under Specification 2 of Charge I. As hereinafter shown, the record of trial is also legally insufficient, in my opinion, to support the remaining findings of guilty and the sentence. The reasons therefor, as regards the findings of guilty under Specification 1 of Charge I and Charge I, are as follows:

a. It is not apparent from the record of trial whether accused was found guilty by the court of rape because he aided and abetted the white soldier who may have had carnal knowledge of Frau Schmitz by force and without her consent at the time and place alleged or because accused himself had such carnal knowledge of her about 15 or 20 minutes thereafter. Since the prosecution's evidence tended to show that the white soldier first had sexual intercourse with her by force and without her consent at which time accused acted as an aider and abetter and also that accused shortly thereafter had sexual intercourse with her, the court's findings of guilty depend, since only one act of rape was alleged, upon the evidence relevant to and surrounding the first act of intercourse.

It has been held by the Board of Review that where accused was found guilty of rape and the prosecution's evidence showed that at the time and place alleged these separate and distinct acts of intercourse

occured between accused and his victim, rather than one as alleged, the findings of guilty "will depend upon the evidence relevant to and surrounding the first act of intercourse." (CM ETO 7078, Jones; CM ETO 492, Lewis; CM ETO 8837, Wilson; CM ETO 8511, Smith).

In accordance with the cases above cited, it is stated with reference to an indictment for rape,

> " * * * it is generally held that where the indictment charges but a single act and two or more are disclosed by the evidence, the prosecution should be compelled, on motion of defendant, to elect on which one it will rely. * * * Where different acts of intercourse are introduced in evidence and no motion for election is made, the trial court should, of its own motion, require the prosecution to elect which act it seeks to rely on, or the court should treat the first act as to which the state introduces evidence as the act it elects to rely on, and should instruct the jury to confine itself to such evidence, and to consider the evidence of the other acts merely as corroboration. Too, where no motion is made to compel the prosecution to elect, defendant cannot complain on appeal because no election was made, it being presumed in such a case that the prosecution elected to stand by the offense first shown by the evidence and that the evidence of the other acts was introduced to corroborate and explain the evidence of the act charged." (52 CJ sec.138,pp.1106-1107 and authorities therein cited).

We find that the law thus set forth in the Board of Review cases above cited are particularly applicable to the present case.

Frau Schmitz testified that when the white soldier, accused and Herr Mueller entered her room, the white soldier "jumped on top of me" and "made use of me. I didn't have a chance to fight him off. I was afraid I might be killed" (R7,8). Describing the white soldier's further conduct she testified,

> "He forced me. He was not able to do it, so he forced me to put it in my mouth. I did not want to. Then he tried it the other way again." (R8).

The prosecution inquired, "Was the white soldier successful finally in having intercourse?" She answered, "I take it that he was because suddenly he left." Her expression "made use of me," as interpreted from her original words in German, leaves it uncertain whether she was describing the act of sodomy, sexual intercourse or attempted sexual intercourse. Her statement that after committing sodomy, the white soldier "tried it the other way again" implies that he had not been successful at sexual intercourse the first time he "tried it." The prosecution evidently so understood for prosecution then asked if the white soldier was successful

finally in having intercourse. Her answer to that question was, enigmatic. She took it that he was "because suddenly he left." The court could not know any more than the witness and certainly could not properly consider that the act of the white soldier in suddenly departing in and of itself was substantial evidence that he had had carnal knowledge of her. Yet it does not appear from the record of trial whether the court did find accused guilty of rape as an aider and abetter of the white soldier or of personally raping Frau Schmitz. Under the authorities above cited, however, the findings of guilty must "depend upon the evidence relevant to and surrounding the first act of intercourse" (CM ETO 7078, Jones). Since, as above indicated, there is not substantial evidence that rape was then committed to support such finding, the record of trial is therefore legally insufficient as regards Specification 1 of Charge I.

Under the law as expressed in the above cited authorities, such an ambiguous finding of guilty as reached by the court in this instance is prevented, wherein the prosecution presented evidence tending to show accused guilty of two rapes, one being alleged, and the court's findings of guilty do not indicate to which act its findings apply.

b. However, considering hereinafter only the evidence as regards accused's sexual intercourse with Frau Schmitz, which was not in dispute, there was no substantial evidence of force used by him. Apart from the answer elicited from her by a leading question of the prosecution, in which she said, "They pointed the weapons at me" (R8), there is no evidence whatever in the record that accused, prior to, during or after their initial sexual intercourse ever threatened her with words or with a weapon or otherwise. There was no evidence of that force described in the first pattern of cases mentioned in the majority opinion in which "accused has carnal knowledge of a prosecutrix despite her vigorous physical resistance, which he overcomes by the application of superior force". The manner in which she quickly qualified the six words "they pointed the weapons at me" deprived them of their initial sinister import and rendered them vague, obscure and unsubstantial. Taken in conjunction with the rest of her testimony, it was not evidence "which cogently reveals that the woman had been reduced to a state of submission by accused's threatening and menacing use of firearms" as was said by the Board of Review in CM ETO 3933, Ferguson et al and was not substantial evidence that accused accomplished his admitted sexual intercourse by force. His conduct before and after their intercourse is consistent only with his own voluntary statement and his testimony which showed he first asked her for intercourse, which her testimony confirmed, and was then insistent. The evidence is therefore legally insufficient to support the findings of guilty of rape, since there is no substantial evidence that he used either force or violence.

c. The prosecution's evidence regarding her resistance rests solely on her testimony as follows:

When Herr Mueller and the two soldiers entered her room she screamed and called to her father. She pushed the white soldier away when he got in bed with her and said, "No, no." After the white soldier

left accused "jumped in my bed and placed himself along side of me. He got up again and got undressed" (R8). She was then asked, "What were you doing at this time?" She testified,

> "I tried to calm my child. It was crying. He came back into bed with me. I tried to push him away and said 'No, no,' but he said, 'Yes, I want to have intercourse with you.' I tried my best to force him away, but I couldn't. He had actual intercourse with me then. When he was finished, he told me to go to sleep" (R8).

The prosecution's next question did not indicate that it had yet heard any evidence of resistance by her, for she was then asked, "Will you explain in detail whether you resisted when the colored soldier wanted to have intercourse with you, how you did it?" She replied,

> "I kept pushing him away and said, 'Please don't do it, I am sick.' I was too frightened to do any more because I was afraid he might kill me. We were always told if we resisted we would be killed. That is why I thought I couldn't do any more" (R9). (Underscoring supplied).

In cross examination she was asked, "Where to the best of your knowledge, were the nearest American soldiers stationed?" She answered, "Across the street, in the barracks" (R13).

> "To constitute carnal knowledge of a female rape, the law requires something more than mere absence of consent; there must be actual resistance, or excuse, incompatible with consent, for its absence. Thus, generally, resistance by a female is a necessary element of the crime. In fact, the essential element of nonconsent, or that the act be against the woman's will, signifies, and is indicated by, resistance by the female."
>
> "Too, it has been stated that the requirement that the act be without the female's consent or against her will signifies that it be committed against the utmost reluctance and against the utmost resistance which she is capable of making, and that the female's opposition of the man to the utmost limit of her power is the test of resistance. Thus, the prevailing rule is that there must be the most vehement exercise of every physical means or faculty within the female's power to resist penetration, and a persistence in such resistance until the offense is consummated. The female need not resist as long as either strength endures or consciousness continues. Rather the resistance must be proportioned to the outrage; and the amount of resistance required necessarily depends on the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested."

> "Stated in another way, the resistance of the female to support a charge of rape need only be such as to make nonconsent and actual resistance reasonably manifest" (52 CJ sec.29,pp.1019-1020 and authorities therein cited).

The resistance of Frau Schmidt consisted only of pushing accused away and saying, "No, no." Her statement to him, "Please don't do it, I am sick" carried with it the implication that if she were not sick her attitude might not be negative. When accused got out of her bed to undress, her mind was directed to quieting her child rather than to avoiding the intercourse under consideration by accused.

In the recent case of CM ETO 11621, Trujillo et al, the incriminating evidence as to rape rested entirely on the testimony of enemy nationals. It showed that the victim was raped in succession by two soldiers, one of whom kept his carbine over his shoulder during the act after first escorting her to the place of the attacks at revolver point. Each soldier testified she made no resistance, protest or outcry and cooperated in intercourse with him. The Board of Review said:

> "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."

It may be noted that the foregoing language is especially applicable to the evidence in that case, in which there was direct conflict in the testimony of an enemy alien and accused. However, such language does not mean that the Board of Review may not hold, in admitting as true all the prosecution's evidence, that such evidence is not substantial and the record of trial, therefore, legally insufficient as in the instant case. The conduct of Frau Schmitz, as described in her testimony, was not such as to make her nonconsent and actual resistance reasonably manifest to accused. In my opinion, there was no substantial evidence, therefore, that indicated to accused any more than that she reluctantly consented to sexual intercourse. There was no evidence that accused knew her lack of resistance resulted from what had been told her by German officials.

d. Frau Schmitz' testimony, above quoted, showed that her fear was induced by German propaganda not by conduct of accused. The majority opinion states, "And, while her fear was produced chiefly by German propaganda * * * it also stemmed in part from the acts of accused and his companion". In my opinion, under all the evidence in the record, it cannot be said that there is substantial evidence that accused's conduct

put her in fear of either death or great bodily harm. She did not so testify, but attributed her fear to what "we were always told" (R9). Her description of their two acts of intercourse was not inconsistent with accused's pretrial statement which was significantly in substance the same as his testimony.

> "Under some statutory provisions, rape by fraud consists of consummating the act after administering to the female some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance. Administration of the substance without the woman's knowledge or consent is essential to constitute the offense under such a statute; and where the female voluntarily drank the substance alleged to have excited or stupefied her, this element of the offense is lacking, and the act is not rape" (52 C.J.,sec.33,p.1025; Winthrop's Military Law and Precedents (Reprint 1920),p.678).

Similarly, accused may not properly be found guilty of rape, since Frau Schmitz was stupefied by fear engendered not by him, but by her voluntary acceptance of the persuasions of her own people.

e. The majority opinion, it may be noted, in holding the court's findings of guilty legally sufficient evidences some reluctance in doing so by stating that "it cannot be said that there is not substantial evidence" to support the court's finding that "the first act of intercourse" constituted rape. It then refers to this evidence that cannot be said to be not substantial:—"While her fear was produced chiefly by German propaganda * * * it also stemmed in part from the acts of accused and his companion". This reference can only be to her six words that "they pointed the weapons at me." It is considered that her qualifications of this sentence, her testimony of the subsequent actions of accused, her amicable conversation with him over coffee in her kitchen while he was clothed in his underwear, her subsequent voluntary intercourse with him and all the other surrounding circumstances disclose no substantial evidence to support the court's findings of guilty. "All the surrounding circumstances" include that weapons were part of the equipment of soldiers in newly captured German towns, that under such conditions liquor and sexual intercourse are not infrequently obtainable without force or violence and that no greater censure attaches to the colored soldier than to the white for such conduct. The majority holding makes it apparent that the words "they pointed the weapon at me" were considered to come within the language found at page 216, Manual for Court-Martial, 1928, wherein it is said,

> " * * * if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though

there be uncontradicted evidence of such facts.
C.M. 152797" .

The quoted six words with reference to weapons in the record should not be considered standing alone as the "any evidence" in the record of trial referred in the above passage of the Manual, except as they were further qualified by the witness who uttered them. When taken with the rest of the witness' testimony, showing no threatening words or use of any weapon by accused, the Board of Review cannot be said to be "weighing the evidence", within this prohibition of the Manual, in stating there is no substantial evidence of the use of force or violence by accused and no substantial evidence that he put her in fear. It should be noted that Frau Schmitz' father was under the same misapprehension as his daughter as to American soldiers, having been told by their military authorities: "They would kill us. They would herd us together" and that when he was pushed from her room by the white soldier who said "Heraus" to him (R22) it does not appear accused was then present or had any part in such pushing.

For the reasons hereinabove stated, the record of trial is legally insufficient, in my opinion, to support the findings of guilty under Specification 1 of Charge I and Charge I.

2. In addition to and in the light of the foregoing considerations, the legal sufficiency of the record of trial as a whole should be judged as a result of certain character testimony received in evidence. The findings of guilty rested entirely upon the credence given by the court to the testimony of Frau Schmitz as against that of accused, which differed only in the matter of her resistance and the amount of force used by him. Two prosecution witnesses, without any objection by the defense, testified regarding her good reputation in response to questions of the prosecution.

Herr Johann Mueller testified that he had known Frau Schmitz for eight or nine years and had lived in the same apartment with her. Asked regarding her "reputation as far as men are concerned", he replied, "insofar as I know, she has always been a very honorable woman" (R17).

Frau Elizabeth Holt testified she had known Frau Schmitz since she was a small child. The prosecution asked, "To the best of your knowledge what is Frau Schmitz' reputation?"

She answered, "As far as I know, it is good."

Questioned further the witness indicated she had never seen or heard that Frau Schmitz had ever conducted herself in an improper manner with men (R25).

The question is thus presented, whether, under all of the circumstances in which accused stood in peril of a sentence either to

death or life imprisonment based upon the credence to be given by the court to her testimony and that of accused, this evidence regarding her good character, her reputation as "a very honorable woman" injuriously affected his substantial rights within the meaning of Article of War 37.

As stated by the Board of Review in the case of CM ETO 1069, Bell in which accused was charged with rape and evidence was received regarding the good character of the victim:

> "Under certain circumstances * * * the introduction of character testimony to support the character of an unimpeached witness is reversible error, even in the absence of an objection by the defense."

In holding the record of trial legally insufficient where such evidence was received in CM 195687, Stansbury, 2 B.R. 263, the Board of Review said:

> "It is well settled that the introduction of character testimony to support the character of an unimpeached witness is reversible error. Ford v. U.S. (CCA) 3F. (2d)104; Harris v. U.S. (CCA) 16 F. (2d)117; Bolling v.U.S. (CCA) 18 F.(2d) 863. In the case last cited the court while recognizing the rule, held that upon the whole record the rights of the accused were not materially adversely affected. In the instant case, it is clear that serious error was committed by the court in receiving the testimony of witnesses in support of the character of certain witnesses for the prosecution, and the paragraphs 75, 111, and 124, Manual for Courts-Martial, were thereby infringed. The events of the trial as stated briefly above establish that this error in the admission of evidence injuriously affected the substantial rights of the accused."

This rule has been repeatedly applied by the Board of Review (CM 196371, 2 B.R. 349,357; CM 201710, 5 B.R. 291,293, and authorities therein cited; CM 196371, Dig.Op.JAG, 1912-1940, sec.395 (8), p.203) and is particularly applicable to the instant case in view of all the evidence and the considerations affecting the record of trial hereinbefore discussed. As also stated in 52 C.J.,sec.114,p.1084, citing cases from many jurisdictions:

"In all cases when the reputation of the female is attacked, proof of her good character is admissible on behalf of the state, but not before it is attacked". (Underscoring supplied).

It is considered that the accused's substantial rights were thus injuriously affected.

3. For the reason above stated, the record of trial is legally insufficient, in my opinion, to support the findings of guilty and the sentence and I dissent accordingly with the majority holding.

Malcolm C. Sherman Judge Advocate

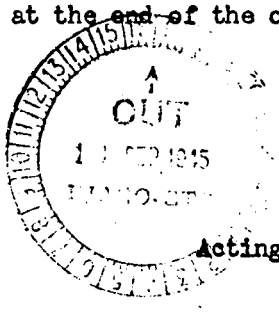
(48)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 17 SEP 1945 TO: Commanding General, 5th Armored Division, APO 255, U. S. Army.

1. In the case of Technician Fifth Grade THOMAS J. SMALLS (32869118), 3907th 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 of Specification 1, Charge I, and Charge I, of Charge II and its Specification, and the sentence, but legally insufficient to support the finding of guilty of Specification 2, Charge I, 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 10700. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10700).



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

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

BOARD OF REVIEW NO. 1 28 MAY 1945

CM ETO 10713

U N I T E D S T A T E S	)	4TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM convened at Hagenau,
	)	France, 23 March 1945. Sentence:
Private LUTHER C. CLARK (34571210), Company C, 12th Infantry.	)	Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern
	)	Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Luther C. Clark, Company "C", 12th Infantry, did, at or near Waimes, Belgium, on or about 14 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Paris, France, on or about 23 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and the Specification. Evidence was introduced of one previous conviction by special court-martial for absence with leave for nine days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and be confined at hard labor, at such place as the reviewing authority may direct, for the

(50)

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 is clear, positive and uncontradicted that on 14 September 1944, while accused's company was in the attack upon the Siegfried Line at or near Waimes, Belgium, accused without authority absented himself from his organization. He remained absent from military control until 23 December 1944 when he was arrested at Paris, France, and was confined at the Paris Detention Barracks on the following day. He did not testify and offered no explanation for his conduct although his absence of 100 days was during the period when his company was engaged, except for brief intervals, in combat with the enemy and suffered heavy casualties.

4. A soldier's prolonged, unexplained absence from his organization in time of war in a foreign country is substantial evidence to support the inference that he intended to absent himself permanently from the military service (CM ETO 10741, De Witt Smith and authorities therein cited).

5. The charge sheet shows that accused is 26 years four months of age and that he was inducted 2 November 1942 at Fort McPherson, Georgia, to serve for the duration of the war plus six months. No prior service is shown.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

CM ETO 10714

U N I T E D S T A T E S v. Private First Class JAMES H. TURNER (33527815), 528th Port Company, 514th Port Battalion	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Granville, Manche, France, 21, 22 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. 1
BURROW, STEVENS and CARROLL, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James H. Turner, 528th Port Company, 514th Port Battalion, did, at or near Vire, Calvados, France, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Rene Hamel, a human being, by shooting her with a gun, on or about 10 December 1944, thereby inflicting a mortal wound as a result of which the said Rene Hamel died, at or near the place aforesaid, on or about 22 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and 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. On 10 December 1944 about half-past one or two o'clock in the afternoon, accused, armed with a carbine, entered the house of Henry Hamel in Neuville, France, and asked his wife, Rene Hamel, the deceased, to do some washing for him. He remained there for about an hour and then made improper advances to Madame Hamel, who left the house (R7-8). Accused kept Hamel in the house and apparently when he made preparations to shoot Hamel, the latter jumped out a window and joined his wife in a nearby shed (R8-9). Accused shot a bullet through the door of the house, then went out to the shed and pointed his gun into it. The Hamels then came out of the shed and accused shot again but the bullet landed at their feet. Hamel ran to a neighbor's house. Madame Hamel was held for a short time by accused but apparently managed to break away (R11). Hamel was looking out the neighbor's window when he saw his wife being chased by accused (R23). Both were running and had covered about half the distance from the shed to the neighbor's house - about 50 meters - when accused, at a distance of 6 or 7 meters from the woman, shot her (R24). Madame Hamel continued on into the neighbor's house and accused followed her. Hamel then went for assistance (R11,12). The occupant of the house, Madame Charenton, managed to disarm accused and then she too went for assistance (R48). On the arrival of the police, Madame Hamel was seated in a chair and accused was seated on her "thighs" or "lap" facing her (R52).

Madame Hamel was taken to a hospital and found to be suffering from two gunshot wounds, one of which "entered by the back of the right thigh and came out on the front a little lower than the groin" (R31). The second penetrated both of the buttocks (R32). According to Dr. Frederick Darnis, she died on 22 December 1944 from a hemorrhage of the femoral artery caused by the bullet wound in the thigh (R33-34).

4. Major Mather Pellen, Medical Corps, testified for the defense in answer to a hypothetical question that in his

opinion it was very improbable that Madame Hamel died from a rupture of the femoral artery. He admitted that this was a possibility, but thought that there were other causes leading to her death (R42).

5. There was evidence as to accused's sobriety as follows:

a. Prosecution:

Hamel stated that before the shooting accused was drunk "but not sufficiently to fall down"(R18). He was walking, but "had difficult to walk". He could stand up but sometimes he had to hold on to the table (R27). When he was taken from the neighbor's house where he had followed Madame Hamel "he had been carried away. He could not walk easily" (R20).

Auguste LeBachelet testified that he was in the Hamel home before the shooting for about 15 or 20 minutes and that accused did not appear to be drunk (R91,95). His eyes, however, were "starry" and he was nervous (R97).

Madame Chareton, the neighbor testified that he was "drunk" and that "he was not walking straight". She took particular notice of his condition when he was following deceased (R50).

A French policeman testified that he removed accused from Madame Charenton's house assisted by Monsieur Gehenne. Each of them had accused by the arm and at least at times they had difficulty in walking with him. When they had walked about 300 or 400 meters, accused fell in the middle of the road and lay there although it was raining. While lying on the road he vomited (R53).

Gehenne testified that when accused was being taken from the house he fell down. Several times thereafter he fell down and cried, and his captors were obliged to pick him up. The last time he fell he lay on the road for one hour (R55-56).

b. Defense:

Louis Auvray, a gendarme, who came along while accused was lying on the road, testified that accused "appeared to be" "completely drunk" when he saw him lying on the road but that when the military police came accused was able to get into the truck himself (R58-59).

Private Charles Off, Corps of Military Police, testified that he picked up a soldier (a man the court could find was accused) lying on a road. "He was paralyzed, he couldn't speak, he couldn't get up" and it took two men to load him

in the truck. He never saw a soldier quite as drunk as accused (R61,62).

Captain James B. Lynn stated that when accused was brought to Military Police headquarters he was "paralyzed drunk". It was necessary to carry him in (R64,65).

Accused, after being advised of his rights, elected to be sworn and testify (R65-66). He stated that about noon on the day in question he bought a bottle of calvados and in a period of an hour to two hours drank two-thirds of it. He remembered going into the Hamel house, asking about laundry, and remaining there for 45 minutes. After that he remembered nothing (R67-70). He had never drunk calvados before (R71) and did not have any lunch that day (R72).

6. Murder is the unlawful 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,p.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 (40CJS,sec.44,p.905,sec. 79b,pp.943-944). The evidence shows that accused, after making improper advances to Madame Hamel, chased her when she sought to escape and, apparently unable to catch her, stopped and fired his carbine at her twice at a distance of about 6 or 7 meters. He was chargeable with knowledge that such an act might cause death or grievous bodily harm and when, as here, death results a finding of murder is justified (CM ETO 559, Monsalve; CM ETO 4292, Hendricks; CM ETO 4497, De Keyser; CM ETO 7815, Gutierrez).

Although there was testimony from a United States Army Medical Officer in answer to a hypothetical question that it was improbable that death had resulted from a rupture of the femoral artery, there was contrary testimony from the attending physician, a French doctor, and, since the credibility of the witnesses and the weight to be given to their testimony was for the court, we have not the power to disturb their findings, even if so inclined, present substantial evidence in the record to support them (CM ETO 895, Davis et al).

The suggestion, implicit in the cross-examination of the French physician, and perhaps inferable from Major Mellen's testimony, that Madame Hamel's death would not have

occurred if she had received different treatment, cannot avail accused. The rule to be applied in such cases is stated by Wharton (1 Wharton,Criminal Law (12 Ed.,1932), sec.199,p.257):

> "We have next to consider cases of homicide in which, after the deceased receives the wound, he is placed under the charge of a medical man, who, in probing the wound or otherwise operating on the patient immediately causes his death. If the medical man acts negligently or maliciously, and so introduces a new responsible cause between the wound and the death, this, on the principle just stated, breaks the causal connection between the wound and the death * * *. It is no defense, in cases in which the deceased's death is not shown to have been produced by his own negligence or that of his medical attendant, that he might have recovered had a higher degree of professional skill been employed. The law does not exact from physicians the highest degree of professional skill, but only such skill as men of their profession are, under the circumstances, accustomed to apply; and if we should convict only in cases where it is possible to conceive of recovery under another mode of treatment, we would convict in few cases in which death did not immediately follow the wound. The true test is, whether the deceased's death followed as an ordinary and natural result from the misconduct of the defendant. If so it is no defense that the deceased, under another form of treatment, might have recovered".

There was no evidence that Doctor Darnis was negligent and under the rule above stated accused must be held responsible for Madame Hamel's death.

7. There was a considerable amount of evidence in the record as to accused's intoxication, although such evidence chiefly concerned his condition after the shooting. There was competent evidence, however, from which the court could infer that his drunkenness had not reached such an extreme advanced state as to preclude his entertaining malice. He was able, once he conceived the idea of having sexual relations with Madame Hamel, to follow her and persist in his advances toward her. He was capable of realizing that she was escaping from him and of aiming and shooting his carbine in what, the court could find, was an attempt to prevent her from eluding him. He was able to hit his intended victim. There was a substantial body of evidence in the record from which the court could, in the exercise of its fact-finding powers, conclude that accussed possessed the requisite malice.

(CM ETO 6229, Creech; CM ETO 6265, Thurman et al; CM ETO 6380, Himmelmann; CM ETO 16581, Atencio). Specific intent is, of course, not involved.

8. The charge sheet shows that accused is 28 years 11 months of age and was inducted 16 December 1942 at Roanoke, Virginia, to serve for the duration of the war plus six months. He had no prior service.

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

10. The penalty for murder is death or life imprisonment as the court-martial may direct (Article of War 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. Gunnar Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Daniel X. Carroll Judge Advocate

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

28 MAY 1945

CM ETO 10715

U N I T E D S T A T E S	)	NINTH UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at Rheydt, Germany, 7 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class SAMMIE L. GOYNES (38669573), 2705th Engineer Dump Truck Company	)	

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

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

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

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

Specification: In that Private First Class Sammie L. Goynes, 2705 Engineer Dump Truck Company, did, at Bochet, Germany, on or about 7 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Gertrud Niessen.

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

Specification: In that * * * did, at Bochet, Germany, on or about 7 March 1945 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Arnold Billens 5 Marks, value about 50 cents, the property of Arnold Billens.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

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

Specification: (Finding of not guilty)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Charge III and the Additional Charge and their specifications and guilty of all other 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 evidence presented by the prosecution was substantially as follows:

Charge I and Specification: On the afternoon of 7 March 1945 accused entered the home of Joseph and Gertrud Niessen in Bochet, Germany. He had his rifle in his hand and after about five minutes he returned to the street (R7). He made about seven such visits into and out of the house, always playing around with his rifle (R8,9). On one of these occasions, he took a small brooch from Mrs. Niessen (R8). She was alone in the kitchen at this time as her husband was outside working in the garden (R8,9,22). When accused entered the house about the seventh time, he put his hand on her shoulder and "pointed" that she should accompany him into another room. Accused was still armed and she went outside to her husband; she thought she knew what he wanted (R9). The Niessens came back into their kitchen and in about ten minutes accused entered and pointed his rifle at Mr. Niessen, pushed Mrs. Niessen on the arm and "showed" her that she should come into the next room (R9,10,23). They indicated by gestures that he should leave them alone, but accused always "motioned" that he was going to shoot (R10).

By saying "Kommandant" they indicated they would report him to his company commander (R10,11,24). He stood outside, right in front of the door, blocking the way with his rifle (R11), and pointing it at Mr. Niessen (R28). Here accused took out his penis and, getting down on their knees, the Niessens begged accused to leave them alone (R12,28). He pointed the rifle at Mr. Niessen, got down on his knees and lowered Mrs. Niessen's pants to her knees (R12,28). Mr. Niessen attempted to force accused away from his wife, but again accused pointed his rifle at him (R28). He then attempted to have sexual relations with her on the last stair out in the courtyard (R12,13). Not succeeding in this attempt, accused took the woman by the arm and forced her into another room (R13,29). She begged her husband to come with her which he did (R29). Accused threw her on a mattress on the floor (R13,29) and, despite her struggles, removed her pants, forced her legs apart twice and penetrated her vagina with his penis (R13,14,29,30). She could not oppose him any further because she was about seven months pregnant at the time (R13). After accused "had it in about five minutes" the orgasm came and "after he was finished, he took his sexual part out" (R14). Accused left the house right after completing the intercourse (R14,31). Mrs. Niessen did not consent to these sexual relations, acquiescing only because "he would have shot me" (R17). Throughout the intercourse accused always had his rifle in his right hand (R18), with the barrel of the weapon lying diagonally across her breast (R20). Mr. Niessen did not interfere while accused was having intercourse with his wife because he was afraid "He would kill me" (R38) and further he feared for his wife's safety (R39). Mr. and Mrs. Niessen left the house immediately and told a man they met in the street to report the incident to the proper authorities (R14,15,31).

Charge II and Specification: Between 1600 and 1700 hours on 7 March 1945, one Arnold Billens saw the accused standing right at the door of his house in Bochet, Germany (R45,46). Accused placed his rifle on Mr. Billens' chest and by pointing his finger at Mr. Billens' visible billfold, asked him for money (R46). He took his billfold out of his pocket and gave accused one paper German mark. He gave it to him "because I was afraid" (R47,48). The accused returned the paper mark to Mr. Billens and seeing a five mark silver piece in his billfold, he snatched it and left the scene. Accused held the rifle against Mr. Billens' chest until he was given the money (R48).

4. Accused, after his rights as a witness were fully explained to him (R60), was sworn and testified in substance as follows:

On the afternoon of 7 March 1945, he was in Bochet, Germany, and he saw Mrs. Niessen standing out in front of her farm. He followed her into the yard, "touched her on the shoulder and begged

her to come where I was then". He then grabbed by the arm and she followed him into another room. There she lay down on the bed, unfastened her pants and opened her legs. "I took my hand and opened her legs and then I took my penis out and laid over her for about five minutes". He then got up, fastened his pants, Mrs. Niessen arose and he left. During all of this, his carbine was on his right shoulder (R61). She did not offer resistance at any time during the intercourse and for this reason, he did not feel he was raping her (R61). He never stole a silver piece from anyone (R62).

On cross-examination, accused placed the time of his encounter with Mrs. Niessen at about 1100 hours (R63). He admitted intercourse with her and stated that he removed her pants (R64,65, 66). He admitted he told an untruth to the investigating officer when he denied that he had intercourse with Mrs. Niessen (R65). He denied that he ever took his rifle from his shoulder, or that Mrs. Niessen acted frightened, but rather that she was pleased and liked the experience (R69,70). He testified that she cooperated with him and that Mr. Niessen watched the entire proceedings and made no effort to interfere with him (R70).

5. The first element of the crime of rape, namely, carnal knowledge of Mrs. Niessen by the accused at the time and place alleged, is clearly established by the uncontradicted evidence of the prosecution and the admission of the accused. The only issue presented to the court was whether she willingly consented to the act, as contended by accused in his testimony, or whether she acquiesced therein because she feared for her life as a result of accused's menacing actions with his rifle as related by her. On this point, she testified with clarity and conviction, and her husband corroborated her version of the incident. This issue, being one of fact, was for the exclusive determination of the court and inasmuch as there is competent, substantial evidence to support its findings, they will not be disturbed on appellate review (CM ETO 3933, Ferguson, et al; CM ETO 6042, Dalton).

Concerning Charge II, the evidence as related by the victim of the robbery is clear and persuasive. Opposed thereto is accused's categorical denial that he robbed anyone. Robbery is defined as follows:

> "the taking with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (MCM, 1928, par.149f, p.170).

There is substantial evidence in the record to support the court's findings as to all the elements of the crime of robbery.

6. The charge sheet shows that accused is 19 years of age and was inducted 6 June 1944 at Camp Robinson, Arkansas. He had no prior service.

7. The court was legally constituted and hurisdiction 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 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

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

BOARD OF REVIEW NO. 3

16 AUG 1945

CM ETO 10716

U N I T E D S T A T E S	IX ENGINEER COMMAND
v.	Trial by GCM, convened at APO 126, U. S. Army, 23,24 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CLEO ROBERTS (38219014), Headquarters and Service Company, 859th Engineer Aviation Battalion, 923rd Engineer Aviation Regiment	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Cleo Roberts, Headquarters and Service Company, 859th Engineer Aviation Battalion, did, at Haughley Park, Suffolk, England, on or about 4 November 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, to wit: service in the combat area in France, and did remain absent in desertion until he was apprehended at Eye, Suffolk, England on or about 29 December, 1944.

He pleaded not guilty and, 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 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:

At a battalion formation held on or about 1 November 1944, the officers and men of the 859th Engineer Aviation Battalion, then stationed at Haughley Park, Suffolk, England, were informed that all personnel were restricted to the camp area and, according to one witness, that "their departure overseas was imminent" (R7), or, according to another witness, that "we probably were due to go on an overseas movement * * * very shortly" (R4). The battalion commander pointed out the necessity for compliance with security measures and told the men that the mission about to be undertaken was an important one and possibly dangerous as well. Article of War 28 was read and explained and each man present was directed to append his signature to a document acknowledging this fact (R4,5,7). Accused, as a member of Headquarters and Service Company, 859th Engineer Aviation Battalion, was present at this formation and signed the document above mentioned (R4,7; Pros.Ex.1). At about this same time, the company vehicles were "lined up" in convoy formation along the road some 400 yards from and within view of the camp site and the packing and loading of equipment was begun (R8).

On the evening of 3 November, orders were received in the company that its personnel would move to the marshalling area--"where they gather the convoys together in preparation to getting on boats for an overseas movement"--on 5 November (R7). Accused was present at reveille formation held at 0600 hours on 4 November (R11,12). The company commander testified that he informed the company at this time that they were leaving for the marshalling area the following morning (R10). However, the first sergeant testified that this information was not imparted until a subsequent formation held at 1900 hours that evening (R12). Accused was absent from the formation held at 1900 hours and, as a result, a search of the area and of his quarters was made. His clothing and equipment were found in his tent, unpacked, despite the

fact that "the entire company was packed ready to move out", but accused was missing. He had no permission to be absent and was marked "from duty to AWOL at 1900 hours" on the morning report for 4 November (R4-6; Pros.Ex.2). The company left Haughley Park on 5 November and proceeded to Camp Hursley, near Southampton, where it remained for two or three days. It then left Camp Hursley and arrived in Rouen, France, on 12 November (R4,9). Thereafter, the company, the mission of which was "to construct, maintain and defend the construction of airfields", worked on various fields at Bougneville, Toul, Contrexeville and Luxeuil. During this time, the unit was usually from 50 to 100 miles from the front (R10). Accused was not with the organization during this period (R5).

On 29 December 1944, accused was taken into custody at the home of a British civilian at Eye, Suffolk, England, some 15 miles from Haughley Park. He was in uniform at the time but had no pass or identification tags. He had told the woman with whom he was staying that he was absent from his unit but she "just didn't have the heart to turn him out" (R14). He admitted to the soldier who effected his arrest that his company was "overseas" (R13-15).

4. After being advised of his rights as a witness, accused elected to make an unsworn statement through his counsel as follows:

> "I, Pvt. Cleo Roberts, left my station on the afternoon of 4 November 1944 to see a friend and then return about 6 November 1944. I returned to my station at Haughley Park, Suffolk, England, to rejoin my unit the 859th Engineer Headquarters and Service Company. I learned that my unit had departed. I located an M. P. not far from the station and explained what had happened and that I was supposed to go with the unit. The M. P. advised me that this was a good way to get out of the unit and that I should go to London to prevent being picked up. I wanted to return to the unit, so went to a small town, Eye, Suffolk, England, instead. Here I remained till picked up on 29 December 1944." (R17).

5. Despite accused's assertion that he intended to return to his unit before its departure, there was ample evidence from which the court could find that he absented himself with the intent to avoid hazardous duty and to shirk important service. All of the elements of the offense alleged were shown by substantial, competent evidence.

The court wastherefore warranted in finding accused guilty as charged (CM ETO 2473, Cantwell; CM ETO 2638, Lybrand).

6. The charge sheet shows that accused is 25 years four months of age and was inducted 6 August 1942 at Dallas, Texas. He had no prior service.

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

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

B R Keeper Judge Advocate

(ON LEAVE) Judge Advocate

B. [illegible] Judge Advocate

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

27 JUL 1945

CM ETO 10718

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, 9 February 1945. Sentence: Dismissal and total forfeitures.
	)	
Captain BENNIE H. CABBELL (O-560733) Air Corps, 432nd Bombardment Squadron (Medium), 17th Bombardment Group (Medium)	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Bennie H. Cabbell, 432nd Bombardment Squadron (M), 17th Bombardment Group (M) having been appointed Summary Court Officer (when a Second Lieutenant) at Telergma Air Base, Algeria, North Africa, on or about 25 February 1943, to collect and dispose of

the effects of Technical Sergeant William D. Hibbs, Jr (then reported missing in action), the said Captain Bennie H. Cabbell (then First Lieutenant) did, at Djedeida Air Base, Tunisia, North Africa, on or about 22 October 1943, with intent to deceive the Mother of Technical Sergeant William D. Hibbs, Jr., Mrs. W. D. Hibbs, Sr., of Louisville, Kentucky, willfully and wrongfully write in a letter to said Mrs. W. D. Hibbs, Sr., which letter was mailed to and received by the said Mrs. W. D. Hibbs, Sr., the following statement: 'As to the contents of Sgt Hibb's wallet - - - instead of holding the money I sent it to my bank with instructions to hold it until they were advised by me as to what disposition', which statement was then known by said Captain Bennie H. Cabbell (then First Lieutenant) to be untrue, in that he had not sent any of said money or any instructions to his bank.

Specification 2: In that * * * did, at Telergma Air Base, Algeria, North Africa, on or about 5 March 1943, willfully and wrongfully officially certify on War Department, Adjutant General's Office Form Number 54 ("Inventory of Effects" form) that the inventory of effects of the said Technical Sergeant William D. Hibbs, Jr., including only $11.00 in money, as listed on the aforesaid form, comprised all of the effects of said Technical Sergeant William D. Hibbs, Jr., which certification was then known by said Captain Bennie H. Cabbell (then Second Lieutenant) to be untrue in that he had received from Technical Sergeant Glenn M. Wilson, over and above the $11.00 listed on the aforesaid form, 20,000 francs of the value of about $400.00, the property of said Technical Sergeant William D. Hibbs, Jr.

Specification 3: In that * * * and having received from Technical Sergeant Glenn M. Wilson 20,000 francs of the value of about $400.00, the property of said Technical Sergeant William D. Hibbs, Jr., did, at Telergma Air Base, Algeria, North Africa, on or about 5 March 1943, wrongfully and in violation of Article of War 112, and Paragraphs 29 and 35, Army Regulations 600-550, fail to deposit the 20,000 francs with a disbursing officer of the United States Army.

ADDITIONAL CHARGE: Violation of the 93rd Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

He pleaded guilty to both charges and all specifications except Specification 2 of the Charge to which he pleaded; guilty except the words "willfully and wrongfully", substituting therefor the word "negligently", of the excepted words not guilty, of the substituted word guilty. He was found guilty of the Charge and its specifications and not guilty of the Additional Charge and its Specification. 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 "though wholly inadequate punishment for an officer guilty of such grave offenses", and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Accused was a member of 37th Bomb Squadron, 17 Bomb Group, stationed at Telergma Air Base, Algeria, North Africa on 24 February 1943 and on 22 October 1943 was stationed with this same organization at Djedeida Air Base, Tunisia (R7). The squadron battle casualty report for 24 February 1943 listed Technical Sergeant William D. Hibbs, Jr. as missing in action (R9) and accused was appointed summary court officer to take charge of his personal effects (R8) under the provisions of Army Regulation 600-550 and Article of War 112, requiring among other things that any cash belonging to the estate of the decedent will be deposited with an army disbursing officer and a report thereof made to the Chief of Finance (Pros.Ex.5; R11). After Sergeant Hibbs had been listed as missing in action, his tentmate gathered Hibbs' personal effects together and turned same over on 26 February 1943 to accused as the officer designated to receive

them, including the sum of $411.00, being $11.00 in American money and 20,000 French francs of a value of $400.00.

The former tentmate was returned to the United States in July 1943 and, on 14 September 1943, visited Mr. and Mrs. William D. Hibbs, Sr., parents of Sergeant Hibbs, at their home in Louisville, Kentucky, at which time he informed them among other things, of the $411.00 and learned all they had ever received was a billfold containing a small amount of money, less than $25.00. The parents then wrote direct to accused asking about the remainder of the $411.00 and accused answered by having sent to them a check drawn on his personal bank account (Pros.Ex.4; R11-12) in the amount of $350.00 and stating in a letter dated 22 October 1943 which he wrote to Mrs. Hibbs that that was the amount "which was what was turned over to me". Under date of 25 May 1944, accused wrote to Mr. Hibbs, Sr., enclosing a postal money order for $50.00 "which is the amount due you from the estate of your late son - - - When I made settlement of the aforementioned estate, I was in error of this amount. This has been called to my attention by higher authorities" (Pros.Ex. 8,9; R12). Only $11.00 in money was received by the army authorities as part of the effects of overseas casualties going to William D. Hibbs, father (Pros.Ex.10,12; R13). No money was deposited in accused's bank account in the joint name of himself and wife between February and November 1943, except only the monthly allotment checks of accused and $125.00, deposited 28 October by the wife (Pros.Ex. 11; R13).

In an investigation of accused's actions as a summary officer about 26 May 1944, accused made a signed sworn statement in detail of his handling of the effects of Technical Sergeant William D. Hibbs, Jr., in which he admitted signing the inventory of the effects of Sergeant Hibbs showing $11.00 as the only cash. He admitted there was an additional $350.00 turned over to him by Sergeant Hibbs' tentmate but before he was able to turn the money over to the finance officer, he lost his pocketbook and contents. Not having the money to make restitution he waited until he thought the parents were notified of his death, and then sent that amount direct. He was "pretty sure it was approximately the $350.00 mentioned before". He explained the discrepancy in his inventory by saying "the $11.00 was all that I had to put with Sergeant Hibbs' effects at that time". When told that the tentmate had informed the parents he had turned over $411.00 to accused, his only answer was, "I seem to have made a mistake of $50.00 in my check to Mr. Hibbs". Accused admitted he knew that he had to turn over any moneys of deceased soldier to the finance officer and also that he had written Mr. Hibbs he had sent the money to his (accused's) bank to hold until advised of disposition, but that such statement was not true as he never sent any such money to his bank.

He did not want to show he had lost the money. The $350.00 was sent by the bank when he directed his wife to have them do so. He stated "I can see where I did wrong in the case of - - - Hibbs and want to make full restitution to his parents of the money due them". He never reported the loss of the money but repeated "that the letter I wrote Mr. Hibbs in October 1943 did not disclose the true facts" (Pros.Ex.13; R15).

Accused also gave a signed statement on 19 June 1944 to the officer who investigated the charges herein (Pros.Ex.14; R21) and another to the same officer on 28 December 1944 (Pros.Ex.15; R21). In the first mentioned statement, accused stated that Hibbs' tentmate gave him $400.00 belonging to Hibbs and while boxing his things he found a wallet in a pants pocket containing $11.00, which latter amount he turned over to a finance officer. He had put the $400.00 in his own wallet until he could turn it over to a finance officer as it was too late that day. Later that day or early next morning, before visiting the finance officer, he drove from Telergma to Oned Athmenia to take a bath in the hot springs and when he started to dress after his bath, he found his wallet and contents had been stolen from his clothes. He was worried for he was not able to make restitution at that time. He wrote his wife to conserve expenses as he knew later on he would have to repay the money. He received the letter from Mr. Hibbs in October 1943 and answered it on 22 October "erroneously" stating the amount at $350.00 and also "erroneously" stating the money was held by his bank being "reluctant to admit my carelessness in losing the money". He wrote his wife on the same day to have a cashier's check for $350.00 sent to Mr. Hibbs, Sr., being "under the wrong impression of the amount due". He has since been informed of the error and sent the additional $50.00 to Mr. Hibbs 25 May 1944. He denied intending to deceive Mr. Hibbs (Pros.Ex.14). The statement of 28 December 1944 made some small corrections to the former statement (R15).

4. Accused was sworn as a defense witness and testified that he was 28 years old, married and had a three year old daughter. He enlisted in the Air Corps in November 1938. He related the facts in connection with the effects of Sergeant Hibbs substantially as in his statement (R31-46). He put the $400.00 into a "souvenir" wallet when it was given him as the size of the bills did not fit in his regular wallet. It was late in the evening. The next morning he put the wallet into his coveralls pocket as he did not want to leave it in the tent and drove alone about 12 to 15 miles to the hot springs to take a bath (R33). He left his own wallet with a small amount of money in it back in his tent (R40). There was no supervision and they left their clothes in one room and bathed in another. When he had put on his clothes he reached in his pocket

for his watch and it was gone as was the wallet from the other pocket. There were a lot of Arabs around and soldiers coming and going. When he returned he discussed the loss with a couple of officers with whom he was living (R34-35). He did not report the loss officially and subsequently made out a report of Hibbs' effects, listing only the money he turned in (R35,46). He excused himself by saying that "I did not have the money right then to repay it and the fact that I was adverse to reporting my own negligence and carelessness in the loss and theft of the money" (R38). He insisted he was concerned about this money until he had paid it back although some eight months elapsed and he paid nothing until after receiving Mr. Hibbs' letter (R42). He admitted making false entries on the official inventory "in using poor judgment", that he failed to comply with the provisions of AR 600-550, had violated the 112th Article of War in performing his duties as summary officer and had made untrue statements in his letter to Mr. Hibbs. He admitted he had been instructed in his duties as summary officer immediately prior to his appointment and that he knew what they were (R44). Although he "did not act correctly" he did not think he did wrong in handling the money as he did (R46). In the opinion of other officers on the post, accused was honest, trustworthy and a good officer (R52-59).

5. The facts herein are not disputed. The acts with which he is charged were done by him. He simply denies any wrongful intent in so doing and pleads negligence and poor judgment. His own statements indicate his intent to deceive and mislead the parents of Sergeant Hibbs in his letter to them, written some eight months after their son's money had come into his hands and then only after he had received their letter showing they knew he had been given the money. Even then, he did not remit the entire amount but waited another eight months before sending them the balance. He admits signing the inventory of deceased's effects and intentionally listing $11.00 as the only money in the estate, knowing that it was not true. He claims the money was stolen from him and there is no evidence to the contrary, but he was not disturbed by the loss and claims to have forgotten the correct amount until unforeseen circumstances brought them to his attention and brought about an accounting that might not otherwise ever have occurred.

Article of War 96 takes cognizance of, though not otherwise mentioned in the Article of War, "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service". Accused's act in falsifying his inventory as a summary officer was clearly a neglect or disorder prejudicial to good order and military discipline, as was his deliberate misstatement to deceased's parents and his admitted neglect and failure to comply with the requirements of known Army

Regulations (Winthrop's Military Law and Precedents (Reprint, 1920), pp.713,722). The court extended to the accused the benefit of every doubt in finding him not guilty of the embezzlement charge and in not imposing confinement in addition to the punishment adjudged.

6. The charge sheet shows accused to be 27 years six months of age. He enlisted at Randolph Field, Texas, 7 November 1938 and was commissioned at Miami Beach, Florida, 5 August 1942.

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

8. Conviction of offenses under Article of War 96 are punished at the discretion of the court.

Judge Advocate

Judge Advocate

Judge Advocate

(74)

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 BENNIE H. CABBELL (O-560736), Air Corps, 432nd Bombardment Squadron (Medium), 17th Bombardment Group (Medium), 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 10718. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10718).

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

(Sentence ordered executed. GCMO 327, ETO, 12 Aug 1945).

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

BOARD OF REVIEW NO. 2 27 JUL 1945

CM ETO 10719

U N I T E D S T A T E S	14TH ARMORED DIVISION
v.	Trial by GCM, convened at APO 446, c/o Postmaster, New York, N.Y., 8 March 1945. Sentence: Dismissal.
Captain PERRY F. PATTON, JR., (O-379736), 48th Tank Battalion	

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

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

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

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

Specification: In that Captain Perry F. Patton, Jr, 48th Tank Battalion, then Captain, 25th Tank Battalion, was at Huttendorf, France on or about 23 January 1945 found drunk while on duty as a mortar platoon leader.

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

Specification: In that * * * did at Huttendorf, France on or about 23 January 1945 wrongfully drink intoxicating liquor in the presence of and with enlisted men.

He pleaded not guilty, and was found guilty of Charge I and its Specification, guilty of the Specification, Charge II, and not guilty of Charge II but guilty of violation of the 96th Article of War. No evidence was introduced of previous convictions. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 14th 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 "though wholly inadequate punishment for an officer guilty of such grave offenses", and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence shows that on 20 January 1945, accused was assigned as battalion S-3 and communications officer of the 25th Tank Battalion at Lupstein and was performing the duty of mortar platoon leader, which job usually calls for a first or second lieutenant. The battalion moved to Huttendorf beginning about 1800 hours and arrived at 2115 hours. Accused accompanied the battalion. At Huttendorf an experienced liaison officer was needed and accused was sent for and when he appeared, his commanding officer, Lieutenant Colonel Ernest C. Watson, saw from his walk, talk and general appearance that he was definitely drunk (R8,12,13-15,16-17,21-24), and informed him that he was unfit for official duty in his condition. The mortar platoon was then in Huttendorf and was the only platoon "not closed" and it was giving trouble as they had not completed refueling and the men had not bedded down for the night (R7-9), both being responsibilities of the platoon leader (R10,20). They had been on an alert status since leaving Lupstein and accused was "definitely on duty status" all during the times mentioned (R10).

The platoon sergeant of the mortar platoon customarily rode with accused in the command half-track and both did so except for a time on the move from Lupstein to Huttendorf (R23). Accused had a quart bottle of schnapps on the trip and took several drinks from it as did his sergeant who testified that accused took at least five or six drinks (R24). It was all done in the half-track which also carried the crew (R25). Accused offered drinks to other soldiers and a squad leader from another vehicle had a drink with accused (R26) in the presence of the men of the other half-track. Accused had also drunk from a pitcher of wine on a table from which all the men were drinking in Lupstein before they left. The court took judicial notice that schnapps is an intoxicating beverage (R27).

4. Accused, having been advised of his rights as a witness, was sworn and testified that orders were given to move on the afternoon of 23 January 1945. It was freezing weather and he was given a bottle of schnapps before he left, which bottle he put in his half-track.

During the march he took several drinks from the bottle and gave his platoon sergeant a drink also from the same bottle. At one of the halts, a sergeant of another squad came to the half-track in which accused was riding and accused gave him a drink also. After arriving at Huttendorf and while accused was attempting to get an assault gun moved to its proper area, he was summoned to battalion headquarters where he was asked if he had been drinking and he stated he had been drinking schnapps. Colonel Watson, Battalion Commander, informed him that he was unable to perform any military duty, that he was not himself and that he had better send someone else to accomplish the mission. Accused was directed to return to his platoon area and told that disciplinary action would be taken (R7,28). He insisted that he was at all times in full possession of all his faculties, that no drinks were taken outside the command half-track and that Colonel Watson was the only one who spoke to him about drinking liquor or being drunk (R29). Accused testified that he was "on duty" at the time he went to see Colonel Watson (R30). These drinks taken on the trip were just regular drinks taken from the bottle which was about half consumed prior to accused's going to headquarters. He had five or six drinks (R31) and two glasses of wine in Lupstein prior to the trip. This wine was drunk in the presence of a platoon sergeant and a squad leader, being the same ones to whom he gave the schnapps (R32).

5. Accused himself states he was "on duty" at Huttendorf, France, when called to the command post and all the evidence so indicates. He also admits consuming an appreciable quantity of intoxicating liquor just prior to talking with Colonel Watson.

> "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (AW 85; MCM, 1928, par.145, p.160).

The findings of guilty of Charge I and its Specification is supported by substantial evidence.

The evidence conclusively shows and accused admits that he drank with enlisted men prior to starting on the march as well as during the march. Drunking with enlisted men is not per se a violation of Article of War 95 but is a violation of Article of War 96 (II Bull.JAG 342,343).

6. The charge sheet shows accused to be 27 years of age. He was commissioned a second lieutenant, Officers' Reserve Corps, 10 February 1941.

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. Conviction of offenses under Article of War 96 are punishable at the discretion of the court, and dismissal is mandatory upon conviction under Article of War 85, if the offense be committed in time of war.

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

1st Ind.

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

1. In the case of Captain PERRY F. PATTON, JR. (O-379736), 48th Tank Battalion, 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 10719. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10719).

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

(Sentence ordered executed. GCMO 324, ETO, 11 Aug 1945).

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

BOARD OF REVIEW NO. 2

9 AUG 1945

CM ETO 10721

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, 31 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
First Lieutenant JOSEPH S. PETROSKI (O-814749), 443rd Bombardment Squadron, 320th Bombardment Group (M)	)	

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

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

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

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

Specification 1: In that First Lieutenant Joseph S. Petroski, 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 1944, 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 2100 hours, 4 November 1944.

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

Specification 1: In that * * * did, at Alto Air Base, Corsica, on or about 16 November 1944, wrongfully drink intoxicating liquor with an enlisted man, to wit, Private Kenneth (NMI) Eielson, 443rd Bombardment Squadron, 320th Bombardment Group (M) AAF, to the prejudice of good order and military discipline.

Specification 2: In that * * * was, at Alto Air Base, Corsica, on or about 15 November 1944, drunk and disorderly in camp.

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 1/4 ton 4x4 truck, property of the United States, of a value of more than $50.00.

He pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, 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, XII Tactical Air Command, approved only so much of the finding of guilty of Specification 5 of Charge I as involves a finding of guilty of absence without leave from about 2400 hours 3 November 1944 to about 1800 hours 4 November 1944, 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 wholly inadequate punishment for an officer guilty of such grave offenses", designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence showed that accused was on 4 November 1944 a first lieutenant with the 443rd Bomb Squadron (R7) then located at Alto, Corsica (R11). An extract copy of the morning report of that organization, dated 11 December 1944 (Pros.Ex.1) was admitted in evidence without objection. It shows accused as "Duty to AWOL as of 2400 hours 3 Nov.1944 (Omitted from previous M/R)" and "AWOL to Duty as of 1800 hours 4 Nov 1944 (Omitted from previous M/R)". The commanding officer of accused's squadron testified that accused did not have permission to be absent at that time. He also testified that his organization participated in two combat missions on 4 November 1944, one in the morning and one in the afternoon. The morning combat mission schedule for 4 November 1944 (R7-8) upon which accused's name appears (Pros.Ex.2) was admitted in evidence. It showed accused as scheduled to fly as first pilot on Ship 63, that briefing was at 0815 hours (R9) and the time of take-off was around nine forty-five or ten o'clock. The notices of scheduled duty for the men listed on the schedule were posted on three bulletin boards, one of which was located in the Orderly Room, another in front of the mess hall (R10), and the third in Operations.

Accused was also scheduled to fly on a combat mission on the afternoon of 4 November and an extract copy of the mission schedule for the afternoon (Pros.Ex.3) was admitted in evidence showing accused listed to fly as co-pilot in Ship 62. He also had the duty

to report for briefing at 1230 hours. At the last minute, accused could not be found and as they were short of pilots (R11) it was necessary to substitute for him a man who had just returned from the morning mission. Accused, who has participated in approximately 27 combat missions, was not present for the afternoon briefing (R12, 24) or take-off (R24), and was not excused from either (R13). It was not a regular occurrence to have two missions scheduled for one day (R14). The established procedure for an officer leaving the post intending not to return that evening is that if the operations officer tells him he will not fly the next day, he comes to the Orderly Room and gets permission from the commanding or executive officer, otherwise it is his duty to return in time to catch the transportation down to briefing if he is scheduled for a mission (R15).

The clerk in squadron operations on 3 November 1944, testified that the schedule of mission (Pros.Ex.2) for 4 November was posted on the bulletin boards all day 3 November, he having corrected the time of briefing and pre-briefing to an hour earlier than originally posted about nine o'clock on the night of 3 November 1944 (R17). Accused was not in his tent or around the area when the flying personnel for the morning mission of 4 November were awakened about seven o'clock that morning (R19), and he was not present at the briefing (R22) or take-off (R23). The combat mission schedule for the afternoon of 4 November was prepared on the morning of that day (R20) and one copy was posted on a bulletin board. It included the name of accused (R21) and was the first time in possibly three months that more than one mission had been scheduled for any one day (R22).

A stipulation between the trial judge advocate and the accused and his counsel was admitted in evidence to the effect that if the operations officer of the 443rd Bombardment Squadron, 320 Bombardment Group were present, he would testify that under the verbal order of the commanding officer it is and was on 3-4 November 1944 the responsibility of all flying officers in that unit to be present and available for duty, including participation in combat missions, at all times unless specifically excused by the commanding officer or the squadron operations officer. They are required to ascertain whether they had or might be scheduled for flying duty during the period of contemplated absence before leaving the post and to return by the time stated. It is their further responsibility to read the bulletin boards frequently and to be present for briefing and take-offs called for on schedules posted. The schedules of missions are prepared and posted each evening early enough so those on schedules can check them before retiring. Accused did not have permission from the operations officer to be absent from the post the night of 3 November and 4 November 1944 (R50).

Around midnight of 15 November 1944 (R24), Captain West, the commanding officer of accused (R7), was awakened by loud voices and the noise of a jeep (R24). He testified that on going outside he saw a jeep approaching and on stopping it found accused was one of its three occupants. He ordered accused to go to his quarters and the enlisted man driving to return the vehicle to the pool. He then went to accused's tent and talked to him, during which conversation accused said,

> "he was going to get drunk every day until he started flying again or something to that effect".

From his appearance and condition, witness estimated "he was intoxicated to a degree", and after telling him to remain in his quarters, witness returned to bed (R25). First Lieutenant William L. Mosby of 320th Bomb Group (R26) testified that he lived in the same tent with accused (R28), who came in the tent the night of 15 November 1944 about eight o'clock and talked with him for about a half-hour and then came in again a little after midnight that night. Accused had been drinking (R27). They talked a while and Mosby tried to keep him from going out again (R28). In Mosby's opinion, he was not sober (R29,32). A Captain Davis came to the tent asking the cause of the commotion and told them to go to bed (R29). The commotion and noise was caused by witness tussling with accused and another officer who also lived with them. Witness was trying to keep them from leaving the tent (R30) because it was late and there was a mission next morning (R31). Accused did leave the tent a few minutes later (R30). First Lieutenant William J. Murray, Jr., 320th Bomb Group (R32) who, with accused and Lieutenants Mosby and O'Hara occupied a tent together, testified that on the night of 15 November, he returned to the tent a little after ten o'clock and went to bed. Mosby was getting ready for bed and accused and O'Hara were in the tent. Sometime later an enlisted man, Private Eielson of their organization, entered the tent where the only light was one candle (R33, 35-36). "As far as I could make out from my position in the tent they had a few drinks together" (R33). There was the noise of glasses and bottle and finally the private wanted them to go out with him to get more to drink. As both accused and O'Hara had been restricted and were only getting into more trouble by leaving, Mosby tried to stop them, which led to a "rough and tumble wrestling match". The disturbance, lasting for about two hours, could be heard 75 yards away. At that time Captain West came in and ordered them to go to bed. A few minutes before, Captain Davis had come in and told them to stop the noise. From inside the tent the noise was loud. Accused did not behave in a normal manner, would not listen to reason and in Murray's opinion was not sober (R34).

Private Kenneth Eielson, 443rd Bomb Squadron, 320th Bomb Group, testified that on 15 November he had been uptown and was a "little bit drunk" (R37,39). He walked into accused's tent and sat down. Lieutenants O'Hara, Murray, Mosby and accused were present. He had a bottle of sweet wine and in the 10 to 15 minutes he stayed in the tent he "took a drink once in a while and passed it around" (R37). He passed it to accused "and we each had a drink out of it" (R38), but he later stated that he did not see accused drink out of the bottle (R39-40). Accused is an old friend and he just walked into the tent without invitation (R41).

Lieutenant Colonel Ashley E. Woolridge, 320th Bomb Group had a jeep (R42), property of the United States (R48), dispatched to him about nine o'clock on the night of 15 December (November) 1944 (R42,46-47) from the motor pool and went to the Chateau of the 443rd in Aiserey, France, staying there about an hour (R42), leaving the vehicle near the south entrance of the Chateau. It was gone when he came out. He had given no one permission to use it. On the same night, Private Eielson was with accused and they, with O'Hara, got into a jeep near the Chateau in Aiserey, France (R43). It belonged to 320th Bomb Group headquarters and they drove it around for a half hour, accused doing some of the driving (R44-45). No permission was asked of anyone to take the vehicle which they left at a gateway into the Chateau (R44). On a search for the vehicle next day, it was found behind some buildings in the village of Aiserey (R49).

4. Accused was sworn as the only defense witness (R52). He testified that he left the post with Lieutenant O'Hara around four o'clock in the afternoon of 3 November 1944. He had flown no missions for ten days, and no mission for 4 November had been scheduled when they left. He testified that he knew of nothing requiring them to return to the base at any specified time or that express permission was required to remain away after midnight. They went to a town (R53) about 20 miles distant and spent the night there. About eight o'clock the next morning, O'Hara called the 443rd Orderly Room and learned that the mission had been changed from 1015 briefing to 0815 and if they were on the schedule they could not make it back in time as the post was an hour's travel away. The policy was that if the first pilot did not attend the briefing he would not be permitted to take off (R54). So they remained in town, returning sometime after supper of that day, when they were restricted. On 15 November, when he had a friendly wrestling match with Mosby and O'Hara, they had been drinking in their tent every day since 4 November. He did not know at the time why they were wrestling, but later found out that Mosby was trying to keep them in the tent, which was dark. The next thing

that occurred was that they were sitting outside in a jeep of which Private Eielson was the driver (R55). The motor was running and the lights were on when Captain West came running out in his pajamas telling them to get out, which accused did, and was then ordered back to his tent, which order he obeyed (R56). He testified about his military service extending over a period in excess of five years including training and said that because of his troubles in the army and at home he had been drinking a lot. He admitted he did not check the bulletin boards of his organization before he left the area about 1600 hours 3 November (R59) and that he assumed he had the privilege of being away from his station at any time just so they got back in time for their scheduled mission (R60), the times for which varied. They hitch-hiked to the town of Bastia and expected to return in the same manner. While in town they were drinking all day and until one or one-thirty in the morning. O'Hara called the "443rd" about eight o'clock and when they found the mission scheduled for 0815 briefing, as it was impossible to return by that time, they remained in town (R62). He knew it was his duty to examine the bulletin board and that the notices are posted somewhere between ten o'clock and midnight (R64).

5. Article of War 61 provides that:

> "any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station or camp without proper leave, shall be punished as a court-martial may direct".

The record of trial shows without question that accused left his station and camp area around four o'clock on the afternoon of 3 November without proper leave, permission, or notice to anyone, in fact, without even checking the bulletin boards, and hitch-hiked to a town twenty miles distant where he spent most of that night and the next day drinking. The evidence clearly and substantially supports the findings of guilty of Charge I and its first four specifications and Specification 5 as amended.

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person" (MCM, 1928, par.27, p.17).

Here the first four specifications describe four distinct offenses which if not so charged, on proper objection might not have been shown in aggravation of the absence without leave. The duplication of the charges does not affect the legal propriety of the sentence and the findings of guilty of the specification need not be disturbed (CM 228838, Mitchell).

The evidence of his drinking with the enlisted man is not quite as direct and plainly the witnesses were reluctant to testify against accused. From the testimony of the sound of bottle and glasses and the fact that accused was a friend of the enlisted man and of the other incidents of the evening, the inference is compelling in the absence of any denial by accused, that he did drink intoxicating liquor with Private Eielson. While the reluctant witnesses would not say accused was drunk, they did say he was not sober. He himself states he drank in his tent every day from 4 November on and that he was going to get drunk every day until he started flying again. This and his statement that he did not know until later why they were wrestling and that Private Eielson was the jeep driver are all substantial evidence in support of the court's finding that accused was drunk at the time. The drinking, the loud talking, the wrestling rough and tumble, and the other incidents of disturbance which continued for a period of two hours and could be heard for some distance and quieted down only after it had awakened and attracted the attention of two different officers are all competent and substantial evidence that accused was disorderly in camp as well as drunk.

The evidence shows and accused admits that he was found in a jeep which the evidence shows had been taken wrongfully and without permission and Private Eielson testified that accused rode around in it with him, driving it some of the time. Accused does not explain what he was doing in the jeep or how he came there. As accused and the other occupants of the jeep had been together in his tent during the evening, the natural presumption is that they all, including accused, were equally guilty of the wrongful taking and use of the car. These are all questions of fact solely within the jurisdiction of the court to decide and where substantially supported by the evidence as here, their findings of guilty will not be disturbed by the Board of Review (CM ETO 503, Richmond).

6. The charge sheet shows accused to be 26 years nine months of age. Without prior service, he enlisted in the Regular Army 25 November 1940 and was appointed a second lieutenant 3 November 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 and the sentence.

8. Conviction of an offense under either Article of War 61 or 96 is punishable at the discretion of the court. Designation of the

Eastern Branch, United States Disciplinary Barracks as the place of confinement is proper (Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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

1. In the case of First Lieutenant JOSEPH S. PETROSKI (O-814749), 443rd Bombardment Squadron, 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 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 10721. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10721).

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

(Sentence ordered executed, GCMO 343, ETO, 25 Aug 1945).

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

BOARD OF REVIEW NO. 1

16 AUG 1945

CM ETO 10728

U N I T E D S T A T E S)	XIX CORPS
)	
v.)	Trial by GCM, convened at Korschenbroich
)	and Oschersleben (Bode), Germany, 2,22
Private CURLY O. KEENAN)	April 1945. Sentence: Dishonorable
(34640514), Battery A,)	discharge (suspended), total forfeitures
351st Field Artillery)	and confinement at hard labor for 15
Battalion)	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 and there found legally insufficient to support the findings and sentence in part. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Curley O. Keenan, Battery "A", 351st Field Artillery Battalion, did, at or near Neuss, Germany, on or about 11 March 1945, with intent to commit a felony, viz., rape, commit an assault upon Fraulein Leni Kaspar, by willfully and feloniously striking the said Fraulein Kaspar on the face with his hand, forcing her to lie down and lifting up her dress.

He pleaded not guilty and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 10, Headquarters XIX Corps, APO 270, 28 April 1945.

3. The following material and undisputed facts were established by the prosecution:

Shortly after 9 am on 11 March 1945, Frau Margaret Kerres and Fraulein Leni Kaspar, both of whom lived near Neuss, Germany, were on their way on foot to a hospital to visit their son and mother, respectively (R7,9,11,12; Pros.Ex.B). When they passed an artillery battery installation they were halted by a colored soldier armed with a carbine (R7,11; Pros.Ex.B), identified by both women, before and at the trial, as accused (R9,12-13). By motioning with his weapon, he indicated that they were not to continue in the direction in which they were walking, and directed them, against their will, to precede him along a path leading from the main road to a wooded area (R7-8, 11-12). After the three entered the woods, he pointed his carbine at the ground to indicate that Fraulein Kaspar should lie down. When she remonstrated, he repeated his direction. She screamed and he loaded his weapon, which he pointed at the women. He directed Frau Kerres to look the other way and Fraulein Kaspar to come toward him (R7,12). The two women dropped to their knees and pleaded for mercy, but accused insisted that Fraulein Kaspar lie down. She screamed again and he slapped her on the face with sufficient force to discolor it temporarily. He directed Frau Kerres to turn around and look away from them or he would shoot her. He placed his hands on Fraulein Kaspar's shoulders, pushed her over on her back and while she was in that position raised her dress to a point above her knees. During the last mentioned act she screamed a third time, "fiercely at the top of her voice". Accused fired his carbine andboth women stood up and endeavored to explain that they wished to go to the hospital. He motioned that they might depart whereupon he went in one direction and the two women in another, after which they complained of the assault to a white soldier about 100 or 200 meters from the scene (R7,10,12-13; Pros.Ex.B). The victim testified that accused at no time loosened any of his clothing (R13). Both women were very nervous during the episode (R7,12).

A soldier of accused's battery, from a distance of about 150 feet, saw him following two women down the lane and several minutes thereafter heard what sounded like a woman's scream (Pros.Ex.A). An officer of the 751st Field Artillery Battalion, from a distance of about 300 yards, saw accused stop the women and accompany them to the woods, saw the women fall to their knees and saw accused strike one of them on the face. He heard screams. Accused, whom he found near the scene buttoning his trousers and buckling his belt, stated he had just defecated but the officer found no evidence to corroborate him (Pros.Ex.B).

4. The defense stated that accused's rights were explained to him and that he elected to remain silent, and offered no evidence (R15).

5. The evidence establishes an assault and battery by accused upon Fraulein Leni Kaspar at the time and place alleged. The only question for determination is whether the evidence is sufficient to establish that accused's acts constituted assault with intent to commit rape. The vital elements of that offense are:

> "'(1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female. Dorsey v. State, 108 Ga. 477, 34 S.E.135' (Hammond v. United States (App.D.C. 1942), 127 F(2nd) 752,753)" (CM ETO 10097, Rosas).

In approving the foregoing language the Board of Review stated in CM ETO 10097, Rosas, supra:

> "The Board of Review is of the opinion that the above requirements must be rigorously applied and that no soldier should be convicted of the offense unless all elements are proved by compelling evidence in the record of trial".

The Hammond case continues with the following language:

> "The assault must be such as to show a purpose to have sexual intercourse despite resistance, and the consent of the female must be wanting. * * * there must be some overt act in addition to the intent, * * * which, in connection with

> the intent, constitutes the attempt. * * * There must be an intent to use such force and violence as may be necessary to overcome resistance * * *. Wharton's Criminal Law, Vol. 1, 12th Ed., sec.748.
>
> * * * Except that he /appellant/ used his hand to touch the body /private parts/ of the girl, he did nothing to carry out a carnal purpose. * * * That he had a lustful desire is not enough. There must have been the intent to ravish if the desire were denied * * * to warrant conviction the evidence must show beyond a reasonable doubt that intercourse was the immediate design and that force was intended to its accomplishment. In the instant case, it can just as well be assumed that appellant's purpose was to look or to fondle or to have intercourse if consent were forthcoming, rather than to ravish" (Hammond v. United States, supra, at p.753).

With regard to proof of the requisite intent, Winthrop's language is relevant:

> "The intent will be demonstrated by the character and degree of the violence employed, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, etc." (Winthrop's Military Law and Precedents (Reprint, 1920), p.608).

Under the Manual for Courts-Martial, 1928,

> "Indecent advances, importunities however earnest; mere threats * * * do not amount to this offense. * * * the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice.
>
> Once an assault with intent to rape is made, it is no defense that the man voluntarily desisted" (MCM, 1928, par.149l, p.179).

Accused, a complete stranger to both, forced the victim and her companion at the point of a gun and against their will to apoint in a

wood within hearing distance of soldiers some 100 - 200 meters distant, where with his carbine he directed the victim to lie down. When the girl screamed, he loaded the weapon, pointed it at both women, and directed the older to look away and the younger to come to him. On their knees, they pleaded for mercy, but accused persisted and repeated his direction to the girl to lie down. She screamed again, he slapped her face violently, again ordered her companion to turn away on pain of being shot, pushed the girl onto her back, and raised her dress above her knees, when she screamed once more, this time at the top of her voice. Accused fired his gun and the victim and her companion took advantage of the opportunity to arise and renew their plea for release, whereupon accused desisted and permitted them to leave.

The court was justified in inferring from accused's directions to the victim's companion to turn away and to the victim to lie down and from his pushing her onto her back and raising her dress that he was motivated by a desire to have sexual intercourse with the girl. No other purpose is reasonably attributable to him. These and other circumstances further indicate, beyond reasonable doubt, that accused, at the time he struck the girl in the face, pushed her onto her back and raised her dress, intended to effectuate his design to have intercourse with her despite her resistance and to overcome any such resistance with such force or terrorization or both as might prove necessary. From the start he threatened and obviously terrorized the girl and her companion with his carbine. He committed a series of violent acts calculated progressively to force his victim to submit to intercourse and did not desist in his attempt to gain his ends until the girl screamed so vociferously that he must have been well aware of the likelihood of soldiersin the vicinity hearing her and coming to her aid, to his embarrassment. In his anger or fear he fired his rifle and then, more apprehensive than ever of the approach of outsiders, desisted in his lustful enterprise to avoid detection and punishment. Actually the screams were heard by military personnel. The court could well conclude that at this point the assault with intent to commit rape was complete; that up to this point "intercourse was his immediate design and * * * force was intended to its accomplishment". The fact that he desisted, the reason for which was so clear, is no defense under the circumstances. Had the girl not continued her screaming and increased it to the point of jeopardizing the success of accused's lustful venture, the only reasonable conclusion under the circumstances is that he would have persisted in its accomplishment, which very clearly would have constituted rape (CM ETO 14256, Barkley, and

authorities therein cited). The attempt was interrupted by circumstances independent of his will (MCM, 1928, par.149l, p.179, par. 152c, p.190). The testimony of the German women, corroborated by depositions of an American soldier and an American officer, stands unimpeached. The Board of Review is of the opinion that all elements of the offense were proved by compelling evidence and that the required standards of proof were met (CM ETO 4386, Green and Phillips; CM ETO 10097, Rosas; and authorities cited in those cases).

6. The record shows (R2) that the charges were served on accused only four days before the trial, but that the defense specifically consented to trial at such time (R6). Under such circumstances, no prejudice to accused's substantial rights is disclosed and the irregularity may be disregarded (CM ETO 8083, Cubley, and authorities therein cited).

7. The charge sheet shows that accused is 23 years eight months of age and was inducted 27 December 1942 at Fort Jackson, South Carolina, to serve for the duration of the war and six months. He had no prior service.

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

9. The 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

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

BOARD OF REVIEW NO. 1 18 MAY 1945

CM ETO 10740

U N I T E D S T A T E S	OISE SECTION, COMMUNICATIONS ZONE EUROPEAN THEATER OF OPERATIONS
v.	
Private First Class ALVIN R. ROLLINS (34716953), 306th Quartermaster Railhead Company	Trial by GCM, convened at Reims, France, 13 March 1945. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Alvin R. Rollins, 306th Quartermaster Railhead Company, did, at Troyes, France, on or about 23 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class John H. Hoogewind, a human being by shooting him with a pistol.

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Specification 2: In that * * * did, at Troyes, France, on or about 23 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Royce A. Judd, Jr., 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 both specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Cise Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Prosecution's evidence showed substantially the following:

On 23 February 1945, accused, a colored soldier, was a member of the 306th Quartermaster Railhead Company, then stationed near Troyes, France (R9,29,41). On that day he was restricted because of the failure of his squad room to pass an inspection (R42-43,48). Nevertheless, in the evening, he went to Cafe "Number 27" which was off limits, in Troyes, where he met Private E. C. Williams of his company (R7-8,9,29-30; Pros.Ex.A). While they were there, a jeep arrived outside and someone in the cafe cried "M.P.'s". Accused thereupon proceeded toward a door at the rear of the room as Sergeant Royce A. Judd, Jr., a military policeman of the Guard Platoon, Headquarters Company, European Civil Affairs Division, entered the cafe and said "Just a minute" (R7-8,19,25-26,30). Accused stopped and Judd said "I got to take you down. Don't you know it is off limits?". Accused replied that he did not because he saw no sign on the entrance door and pleaded with Judd to "give him a break". Judd stated he could not do that and would have to take accused to the desk sergeant who might grant his request (R8,20,21,30). Accused inquired if this were because of his color and the sergeant replied "No, he would take anybody in that he found in this place" (R9,20). Thereupon Corporal Victor H. Paul, another military policeman of the Guard Platoon, who was standing just inside the door, placed his hand upon his holster and accused assured him he did not need to "go for" his gun (R7,9,17,30,34). Judd said "Let's go", took accused by the arm and conducted him outside to the jeep in which was sitting the driver, Private First Class John H. Hoogewind, also of the Guard Platoon. They were followed by Williams and Paul who placed Williams in custody (R7,9,26,30).

They all entered the jeep and the five occupants sat in the following order: On the front seat Hoogewind, the driver, was behind the wheel. Williams, unarmed, was on his right, and Paul sat on the right of Williams. On the rear seat Judd sat on the left and accused (who by his own testimony was armed with a German pistol (R54-55; Pros.Ex.P)), sat on the right (R9-10,31, 35,36,38; Pros.Ex.B). When the jeep had moved a short distance, a shot was fired from behind the front seat at very close range. Paul immediately started to throw himself from the jeep when another shot came from behind and passed by his head. As he fell out of the jeep his foot was caught under the dashboard and he was dragged along the street for from 20 to 30 feet by the jeep which stopped when it struck a wall. During this time a number of other shots were fired from the jeep (R10-11,18-19,32,35). When the jeep stopped, Williams and accused left it and ran down the street in the direction opposite from that in which the jeep faced. Williams asked accused "What did you kill those M.P.'s for" to which he replied "he was restricted and he would not get ninety more days restriction". After they rounded a corner they were halted by two military policemen and accused fired two shots. Williams ran back to camp but Rollins turned off before arriving there. The following morning accused warned Williams "Don't say nothing about what happened last night" (R11,32-33).

Paul testified that after extricating his foot from the jeep (at about 2210 hours) he discovered Hoogewind, who was slumped back from the wheel, bleeding from the head and from the left jaw, and Judd, who was also slumped down, bleeding from the neck. Paul stopped a passing jeep which took him with the two victims to a hospital (R12-13). At 2230 hours, Judd was dead and Hoogewind was dying as a result of the wounds (R26). Autopsies made on 25 February disclosed the following: Judd's death resulted from a wound caused by a bullet which entered the right side of the neck from close range, as indicted by powder burns, completely destroyed the jugular vein, causing a large hemorrhage, and emerged from the left side of the neck (R23). Hoogewind's death was caused by a bullet which entered the right side of the head at the rear on a line with the ear, turned over in its course, badly fracturing the boney casing of the head and causing hemorrhage, and emerged on the left side of the head about on the level of the hairline. Powder burns at the point of entry indicated that this bullet also was fired at close range. Hoogewind was further wounded by another bullet which entered his shoulder at the right side of the back and emerged just beneath the clavicle (R24). His helmet liner was found by Paul, on the night of the shooting, in the street to the left of the jeep even with the driver's seat. There was a bullet hole of entry in the rear of the liner and a hole of exit in the front (R15-16; Pros. Ex.G).

The following exhibits and testimony were introduced with respect to the identity of accused as the slayer of the two military police:

> Pros.Exs. C-F, inclusive, four empty cartridges marked "42 hla St / 7", (except D, marked "42 aux S 34"), found by Paul on the floor in the back of the jeep between 2300 and 2330 hours on the night of the shooting (R13-14,21).
> Pros.Ex.K, freshly fired bullet, .35 to .38 caliber, found by commanding officer of victims' Guard Platoon about 0900 hours, 24 February, across the street from a pool of blood found near Cafe Number 27. There was blood on the bullet when found (R26-27).
> Pros.Exs.M and N, two live rounds of "P 38" (German) ammunition, found in overcoat, admitted by accused to be his, during investigation 24 February (R43-46),(admitted by accused in his testimony to be for his pistol (R57,61)).
> (Examination of each of the foregoing exhibits disclosed that they are the same caliber, to wit: .35 to .38).
> Pros.Ex.P, Pistol, Automatic, Luger, 1940 model (R62), (identified by accused in his testimony as his, which he carried with him to town on the night in question (R54-55)).

Accused was positively identified as the soldier in the rear of the jeep on the night in question, by both Paul (R17) and Williams (R38).

4. The following evidence, in substance, was introduced for the defense:

During the year accused was a member of the 306th Quartermaster Railhead Company he was rated excellent by his company commander (R47)and his reputation in the company was good (R49). He was entitled to wear a battle star (R48).

After a full explanation of his rights (R46-47), accused elected to take the stand as a witness in his own behalf (R49). He testified in pertinent summary as follows: He was restricted on the day in question (R49) and went to town for the purpose of securing sexual intercourse. He met and drank with Williams in a cafe and they decided to return to camp (R50). He did not remember how much he drank (R51). When they started out they heard a jeep, the proprietress said "M.P.'s" and pointed to the back, and the military

police entered and asked them what they were doing - "Didn't we know the place was off limits". Accused replied he saw no sign on the entrance door. One of the military police pulled a gun and accused told him "No need for the gun because I wasn't running", whereupon he put it down and said "Let's go". One of them caught accused by the arm, "rushed" him out of the cafe and pushed him into the jeep (R50). They did not tell him he was under arrest (R58-59). The next thing he remembered was leaving the jeep and running away with Williams. He did not remember saying anything to Williams at this time. On the corner two men halted them and when Williams moved on, one of them threatened to shoot him if he did not stop, whereupon Williams fired at him (R50-51), with a revolver (R60). They returned to camp. He denied saying anything to Williams the following morning about what occurred on the night in question. On that day Paul twice picked accused out of a lineup as "the man".

Upon cross-examination, he admitted carrying his pistol (Pros.Ex.P) when he went to town and remembered telling someone that he fired one or two shots on the night in question, but did not remember actually firing his weapon or whether he had it after running down the street (R54-55,62). Although he acquired the pistol in July, he never fired it (R60-61,62). He did not remember seeing it in the hands of his company commander or of the Criminal Investigation Division agent or making a statement to the latter about firing it (R55). He stated, however, that he answered questions about the gun voluntarily and that no duress or promises were used (R56). He merely opened up the gun a little and looked at it, but did not "field strip" it (R57,61-62). He admitted having the two live rounds, Pros.Exs.M and H, and that they were for his pistol, but he did not know whether it was loaded (R57,61). The purpose for which he left camp on the night in question was to sell the pistol to a man with whom he had made an agreement (R58-59). He did not remember Williams getting into the jeep, or who sat with him (accused), but remembered sitting in the back (R58). He heard no shots before he left the jeep (R60), but when he ran away he heard shots fired (R58). The time he did not remember clearly was when he was moving from the cafe and shoved into the jeep. He had similar "blackouts" after 23 February but not before.

5. In rebuttal, the prosecution introduced testimony of accused's company commander that accused disassembled and then reassembled Pros.Ex.P while in custody in the presence of witness and an agent of the Criminal Investigation Division who complimented him on his speed (R63). The agent then asked him "Is that the gun" and accused stated "That is the gun" (R64).

6. Murder is the killing of a human being with malice afore-

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

> "an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, * * * provided the offender has notice that the person killed is such officer or other person so employed" (MCM, 1928, par.148a, p.164; CM ETO 4949, Robbins, Jr.).

The circumstances surrounding the killing of the two military police, Private First Class Hoogewind and Sergeant Judd, leave no reasonable doubt that accused was guilty of the murder of each as charged. His identity as the soldier involved is fully established by the third military policeman, Corporal Paul, by accused's companion, Williams, and by his own testimony. The evidence shows that he endeavored to evade the military police when they entered the cafe and had an altercation with them concerning his knowledge that the cafe was off limits. He requested lenient treatment but Judd told him that such request should be addressed to the desk sergeant, forcibly ejected him from the cafe and placed him in the jeep for the purpose of taking him to the sergeant. Accused's testimony substantially accorded with the foregoing, but he claimed that he could remember nothing after entering the jeep until he left it. No sooner had the jeep started than a shot was fired, followed shortly thereafter by another toward the front and then by several more. The proof that Judd was shot at close range in the right side of the head and that Hoogewind, the driver, was shot by one bullet, also fired at close range, in the right rear of his head and by another in the rear of his shoulder, indicates that the shots must have come from approximately where accused was sitting at the right rear. The four empty cartridges found in the rear of the jeep, the freshly fired bullet found near the scene and the two live rounds found in accused's overcoat all of which were suitable for use in the German pistol with which he was armed, identify him as the killer. It is apparent that he was motivated by anger and a continuous desire to resist arrest and to escape the custody of his victims. He chose a summary and brutal method of

effectuating his motive, thereby causing their deaths. No issue of intoxication was raised by the evidence and the court was warranted in believing, notwithstanding his testimony to the contrary, that he was fully conscious and aware of what he was doing at the time of his acts. In the opinion of the Board of Review, the record contains convincing evidence of his guilt of each of the murders alleged (CM ETO 3200, Price; CM ETO 4949, Robbins, Jr.; CM ETO 5764, Lilly, et al;and authorities cited in those cases).

7. The charge sheet shows that accused is 20 years three months of age and was inducted 15 June 1943 at Camp Forrest, Tennessee, to serve for the duration of the war plus six months. He had no prior service.

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

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

B. Franklin Pete Judge Advocate

Wm. F. Burrows Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(104)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class ALVIN R. ROLLINS (34716953), 306th Quartermaster Railhead Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 10740. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10740).

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

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

(Sentence ordered executed. GCMO 180, ETO, 26 May 1945).

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

BOARD OF REVIEW NO. 1

19 MAY 1945

CM ETO 10741

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Chaudfontaine, Belgium, 17 March 1945.
Private DE WITT SMITH (36798512), 3168th Quartermaster Service Company	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private De Witt Smith, thirty-One Hundred Sixty-Eight Quartermaster Service Company, did, in the vicinity of Marolles, France, on or about 8 September 1944, desert the Service of the United States and did remain absent in desertion until he was apprehended in Cherbourg, France on or about 27 January 1945.

(106)

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 introduce of one previous conviction by summary court for changing the date of his pass stated to be in violation of Article of War 94. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, First United States Army, approved the sentence, forwarded the record of trial for action under Article of War 48, and, stating that because of the low mentality of the accused the imposition of the extreme penalty was not considered necessary in this case, recommended that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor in a Federal penitentiary for a period of 25 years. 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 reviewing authority, commuted the sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Clear, competent evidence for the prosecution established that on 8 September 1944, the 3168th Quartermaster Service Company, of which accused was a member, was located in the vicinity of Marolles, France, that accused was absent from his organization from that date until his apprehension at Cherbourg, France, on 27 January 1945, and that he had no permission to be absent during that period (R7-10).

4. No evidence was introduced in behalf of accused. After his rights were explained to him, he elected to make the following unsworn statement through counsel:

> "He left his organization without leave on the 8th of September intending to be gone for some time and return. He made various attempts to locate his organization unsuccessfully and eventually arrived on the Cherbourg Peninsula. He went to Cherbourg knowing it was the main supply base, intending there to catch the train or obtain from there transportation to bring him back to the area where he believed his company to be; that while attempting to board a train he was apprehended by a transportation officer, a captain, and then turned over to the military police" (R11).

5. The Manual for Courts-Martial states:

> "If the condition of absence without leave is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent" (MCM, 1928, par.130a, p.143).

Here the undisputed evidence shows that accused was absent for 141 days from his organization in an active theater of operations in a foreign country and that his absence was terminated by apprehension by military authorities. Under these circumstances the court was justified in finding accused guilty of desertion as charged (CM ETO 1629, O'Donnell, III Bull. JAG 232; CM ETO 1726, Green; CM ETO 7663, Williams).

6. The charge sheet shows that accused is 21 years and three months of age and was inducted 13 April 1943 at Chicago, Illinois, to serve for the duration of the war plus six months. No prior service is shown.

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

8. The penalty for desertion 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. Franklin Riter — Judge Advocate

Wm. T. Burrow — Judge Advocate

Edward L. Stevens, Jr. — Judge Advocate

(108)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private DE WITT SMITH (36798512), 3168th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10741. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10741).

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

(Sentence as commuted ordered executed. GCMO 187, ETO, 28 May 1945).

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

18 AUG 1945

BOARD OF REVIEW NO. 2

CM ETO 10742

U N I T E D S T A T E S	LOIRE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private LOUIS BYRD (34528201), 3117th Quartermaster Service Company	Trial by GCM, convened at Le Mans, France, 13 October 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Louis Byrd, 3117th Quartermaster Service Company did at or near a spot on National Highway 157 about 15 Kilometers toward Bouleire from Le Mans, France, on or about 28 September 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Eliane Sealvine.

CONFIDENTIAL

The accused pleaded not guilty and all of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present when the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48, recommending that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Evidence for the Prosecution:

Late in the afternoon on 28 September 1944, accused, together with two other soldiers in the 811?th Quartermaster Service Company, Private Lenard Bryant and Private Calvin L. Preston, were walking on Highway N-157 about fourteen kilometers from Bouloire, France, where they had drunk considerable wine and cognac (R9,18,58,61,64; Pros.Ex.2). They were drunk (R21). They met a French woman, Madame Eliane Sealvino, a resident of Bouloire (R9a). The accused spoke to her in English which she did not understand, and to indicate that she did not wish to talk to him she showed him her wedding ring. He left and walked ahead with the other two soldiers. When the four reached a deserted part of the road, bordered by pine trees, accused came back to Madame Sealvino and tried to kiss her. She resisted and when he continued in his efforts she cried "help" several times. The other two soldiers then joined the accused and the three forced her to keep quiet by placing their hands over her mouth and pressing on her cheeks. She was thrown into a ditch and in the struggle lost an earring and ripped the seam of her skirt. She also sustained bruises on her left side which were later observed in a medical examination. The three soldiers then forced her to get up and with one on each side and one behind her they took her into the woods some distance from the road where they stopped and two of the soldiers, not the accused, made her understand that she was to lie down. She lay down. The accused was within arm's length. One of the soldiers took out his pocket knife saying, "Ne comprie" (R9b; Pros.Ex.1). The soldier (Bryant) who had the knife then ordered the accused to do "what he wanted to do". The accused opened his trousers, raised her clothes and had sexual intercourse with her (R12) for about 15 minutes (R13, 22). She did not resist because of her fear of the soldier who held

the unopened knife in his hand always close to her (R13,21, 22). The accused then got up and lay down nearby and went to sleep. Preston then lay on top of her and tried to have intercourse with her. Due to his inebriated condition he was not successful. Bryant remained close by. When Preston gave up Bryant had intercourse with her. Preston then made a second attempt during which she indicated that she had to get up to urinate. All four then stood up including the accused. She had her shoes in her hand prepared to run when the opportunity presented itself. She also had the knife. She had gotten it from Bryant as he was on his knees in front of her and about to penetrate her by yelling "no, no" and taking the knife (R15,16,25). She edged her way over toward the road and then ran screaming to the road where she found a French civilian and a military policeman who had stopped near there. She turned the knife over to the police and tried to explain to him that she had been attacked by colored men (R15,16). Shortly thereafter Bryant was captured in the woods (R27, 29). She identified the accused the following day at a military camp (R16). Altogether she was in the woods with the men for one and one half hours (R21). She stayed there because of her fear of the one who had the knife and threatened her. She did not cry out while in the woods for the same reason and because she did not believe anyone could hear her (R21,26). The military policeman described her as "crying for help, pleading and begging for something. She was in a nervous, hysterical condition" (R27). Another witness who observed her almost immediately thereafter described her as "about to faint • • • hysterical, the side of her face was scratched and her skirt torn • • • crying • • • " (R30). A medical officer examined her about two hours later and found her nervous and tearful. There were scratches on her right cheek, bruises on both hips and scratches on her thighs. Her genitalia revealed no evidence of injury nor of spermatozoa. She had a "marital vagina" so that it was impossible to tell whether she had had recent intercourse (R32).

On 30 September 1944 the accused was questioned by two CID agents. The two agents testified that he was not promised any immunity, extended any hope of reward, nor threatened in any manner. He was told that he was accused of having raped a French civilian, that he had the right to remain silent, and that if he did say anything it may be used for or against him in the event the investigation resulted in a trial. The accused signed a statement that he understood his rights and also a typewritten statement prepared as the result of information supplied the agents by the accused in which he related that he, Bryant and Preston, were walking back toward camp on Highway N-157 after considerable drinking and noticed a French girl walking in the same direction. He greeted her and she said something in French and pointed to her wedding ring. Shortly thereafter Bryant

approached her and spoke to her and then grabbed her by the arm with one hand and placed his other over his mouth and made her go into the woods. He and Preston followed for quite a distance in the woods. When he caught up to Bryant the girl was lying on her back with her skirts above her hips and Bryant was about to, and then did, have intercourse with her. Preston followed. The accused then had intercourse with her. Bryant then repeated the act. The accused and Preston then walked back to camp leaving Bryant with the girl (R33-38,48-49; Pros.Ex.2).

The statement was admitted in evidence over the objection of defense counsel after the accused testified that he was intimidated and told to tell the truth. He claimed that the agent had typed the statement and that half of it was wrong. He was forced to sign it (R42-44,52).

4. Evidence for the Defense:

Private Calvin L. Preston testified that he saw the accused on the afternoon of 28 September 1944 consume considerable wine and cognac, enough to get drunk and to make him sick (R57,58). He started to go back to camp. When the witness was asked if the accused at any time thereafter was in the company of a French female civilian the law member, who previously had warned the witness of his rights under Article of War 24, instructed the witness not to answer the question on the ground that it might incriminate him. A five minute recess was then had at the request of defense counsel who also represented the witness. After the recess, defense counsel announced that he would not proceed any further with that witness "in view of the peculiar circumstances in the case" (R59,60).

The accused, after his rights as a witness were fully explained to him, elected to testify in his own behalf. He stated that he and Bryant and Preston went to a cafe and drank considerable wine and cognac. On the way back to camp they saw a lady on the road. Bryant went over to her and grabbed her and went into the woods (R65). He and Preston followed right behind them (R66). He saw the lady lying down with her dress up and Bryant standing over her with his pants unbuttoned (R66). He himself lay down, was sick and fell off to sleep. He was later awakened by Preston and the two returned to camp (R61-62). The "lady" was Madame Scalvino (R62). He did not see any knife nor see Bryant have intercourse with her (R66). Instead of returning directly to the road that led to the camp they walked a considerable distance through the wood (R68). He did not see any military police nor know about Bryant's arrest (R69).

5. Discussion:

Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration of a woman's genitals is

sufficient carnal knowledge, whether emission occurs or not. The force involved in the act of penetration is alone sufficient where there is in fact no consent.

> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par.148b, p.165).

There was substantial competent evidence of record that clearly showed that the accused did at the time and place alleged have carnal knowledge of Madame Eliane Scalvino by penetrating her genitals with his male organ and that he used force to effect the penetration. The only debatable element of the offense was that of lack of consent. The victim contended that she did not consent but that she was attacked by three colored soldiers on a public highway and forcibly dragged or carried to a point in the nearby woods where her screams, if made, would not be heard and there, because three men were pitted against her and one held an unopened knife in his hand in a menacing and threatening manner, she submitted without further struggle to their desires. Her lack of, or cessation of resistance was attributable to her fear of death or great bodily harm. If such were the facts rape was committed (1 Wharton's Criminal Law (12th Ed.,1932), sec. 701,pp.942,944; CM ETO 1069, Bell). Her contentions were supported by the signed statement of the accused and her general appearance and physical condition after the attack as shown by several witnesses. Opposed to this was the accused's testimony of being present but not participating in the sexual acts of his companions with the victim. There was therefore presented an issue of fact to be determined by the court. By its findings thecourt has resolved this issue against the accused and the Board of Review is of the opinion that there is competent substantial evidence to support the court's findings. Inasmuch as it was within the exclusive province of the court to determine this issue of fact, it will not be disturbed by the Board upon appellate review (CM ETO 4194, Scott; CM ETO 9461, Bryant).

6. The charge sheet shows that accused is 20 years, ten months of age and was inducted 6 April 1943 at Camp Shelby, Mississippi. No prior service is shown.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Penitentiary confinement 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 (AW 42; cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

CHARLES M. VAN DENSCHOTEN
Judge Advocate

JOHN WARREN HILL
Judge Advocate

ANTHONY JULIAN
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 Louis Byrd (34628201), 3117th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10742. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10742).

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

(Sentence as commuted ordered executed, GCMO 357, ETO, 29 Aug 1945).

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

BOARD OF REVIEW NO. 3 — 23 JUN 1945

CM ETO 10743

U N I T E D S T A T E S	)	III CORPS
	)	
v.	)	Trial by GCM, convened at APO 303, U. S. Army, 29 March 1945.
Private JOHN J. MARTIN (32779133), Company B, 299th Engineer Combat Battalion	)	Sentence: Dishonorable discharge, total forfeiture, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John J. Martin, Company "B", 299th Engineer Combat Battalion, did, at Pleuth, Germany, on or about 21 February 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: participate in an assault crossing of the Roer River, and did remain absent in desertion until he was apprehended at St. Trond, Belgium, on or about 2 March 1945.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specifi-

cation. Evidence was introduced of four previous convictions, one by summary court and three by special courts-martial for absences without leave of seven, seven, 24 and 170 days respectively, in violation of Article of War 61. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, III Corps, approved the sentence, recommended it be commuted to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for twenty years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but due to unusual circumstances in the case and the recommendation for clemency by the convening authority, 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, 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. Summary of evidence for prosecution:

On 21 February 1945, accused's company was "stationed in the Hurtgen Forest near Pleuth, Germany". It "had been alerted to be prepared to cross an infantry battalion across the Roer River. The company was to be split down into eleven assault-boat teams, with one platoon being used to construct a treadway bridge across the Roer" (R7).

Accused joined the company on 17 February 1945 (R7,10). On that and the next day he talked with his assistant squad leader, Corporal John LaMantia, who told him they were expecting to make a crossing of the Roer River and it would probably be against the enemy. Corporal LaMantia further testified:

"I told him what was going to be done.
* * *
I told him we were expected to build a bridge across the Roer River and what we were going to do and how it would be. and I told him everything in detail, what we would do, what we could expect.
* * *
I gave him a hint about it on the day he came in, but on February 18, I told him what he could expect, how we were going to do it.
* * *
Yes, sir, he said he understood alright. He didn't like it, the idea, very much.
* * *

He said if the shells ever start to come over, he wouldn't be around.

* * *

Well, he said he was going AWOL, because, well, he had four of them; I don't know how many he had, but he said one more wouldn't hurt.

* * *

I told him I figured it would be dangerous and how it would come off, because I had seen a little combat and I wanted to tell him all the points I knew" (R10-11).

Accused was found to be missing on the morning of 21 February 1945 when his squad was loading a truck to go out to work (R10-11). Search was made for him without success (R8). His company commander entered him on the company morning report of 21 February 1945 as "Fr dy to AWOL 0800". The morning report was introduced without objection and an extract copy substituted therefor (R7, Pros.Ex.1).

Accused's squad participated in the assault crossing (R11) about 25 February (R8,11).

Accused was apprehended at St. Trond, Belgium, 2 March 1945 (R12, Pros.Ex.2).

4. No evidence was presented for the defense. Accused, after having been advised of his rights, elected to remain silent (R12).

5. a. The corporal's testimony that accused had previously been absent without leave was improper. However, the evidence of accused's guilt was sufficiently convincing as to render its admission harmless under Article of War 37 (CM ETO 2644, Pointer). Accused did, in fact, have four "AWOLS" as shown by certificate of previous convictions properly introduced.

b. It was for the prosecution to show that accused (1) knowing (2) his unit was under orders or anticipated orders involving hazardous duty (3) absented himself without leave (4) to avoid that duty (CM ETO 4138, Urban; CM ETO 1921, King; CM ETO 2473, Cantwell). The prosecution sustained its burden and the record supports the findings. Accused, when told the anticipated crossing of the Roer would probably be against the enemy and was "figured" to be dangerous, voiced disapproval of the idea and stated when the shells started to come he would not be around - that he was going AWOL because one more would not hurt him. Three days later he absented himself without leave. At that time his unit was in the Hurtgen Forest near Pleuth, Germany. The Hurtgen Forest extends from Pleuth eastwardly for about six miles to within about three miles of the Roer. Of this the court could take judicial notice (CM ETO 6934, Carlson). Thus it appears that at the time and place accused absented himself without leave he and his unit

were three to nine miles from the Roer. Four days later his unit made the crossing. It was not necessary to show that the assault crossing, normally a hazardous operation, was, in fact, as hazardous as anticipated. The inference is compelling that accused absented himself to avoid the crossing: - He declared his intention. The material intent was his intent at the time he absented himself without leave (CM ETO 5958, Perry et al).

6. The charge sheet shows that accused is 20 years two months of age and that he was inducted 29 March 1943, at Elizabeth, New Jersey. He had no prior service.

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

S K Alway Jr Judge Advocate

1st Ind.

War Department, Branch Office the The Judge Advocate General with the European Theater of Operations. 23 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S.Army.

1. In the case of Private JOHN J. MARTIN (32779133), Company B, 299th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 10743. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 10743).

E. C. McNEIL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 258, ETO, 10 July 1945).

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

BOARD OF REVIEW NO. 2

23 AUG 1945

CM ETO 10751

U N I T E D S T A T E S	78TH INFANTRY DIVISION
v.	Trial by GCM, convened at Gummersbach, Germany, 18 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private First Class HENRY WEBB (34922290), Company D, 309th Infantry	

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

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

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

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

Specification: In that Private First Class Henry Webb, Company D, 309th Infantry, did, at Hennef, Germany, on or about 30 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Wlodarczyk.

CHARGE II: Violation of the 93rd Article of War.
(Finding of not guilty)
Specification: (Finding of not guilty).

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. Evidence was introduced of one previous conviction

for being drunk in uniform in a public place in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 testimony of the prosecution substantially shows that Maria Wlodarczyk (R6) an unmarried (R14) 24 year old Polish girl (R20), who identified accused as her assailant (R6) saw him at her home, Mittelstrasse 14, on 30 March (1945) on three occasions. The last time at 11:30 at night (R7) while she was in bed (R10-11), he came in with a carbine and "hollered" for her. She testified, that she "hid behind the bed and he wanted to shoot" (R19,33-34) and struck one man who was in his way. He ordered her to "come to bed", grabbed her (R7,12) and took her into the cellar (R7) dressed only in her pajamas (R12) and in spite of her struggles had intercourse there with her twice (R7,15). She finally escaped by hiding under the bed (R8). There was penetration (R16). She was positive in her identification of accused (R8,18) and he was identified as Maria's assailant by two other occupants of the house that night (R29-31,32-34). Accused was examined by an army medical officer on the afternoon of the following day (R22) "for evidence of rape" (R21), who found what in his opinion were seminal stains on accused's underclothing and physical evidence caused possibly by recent intercourse or uncleanliness (R22-24). Accused denied his guilt to the officer (R21). To an investigating officer, he stated that he was at another house in town before 11 pm but he failed to account for his whereabouts on the night in question between 11 and 1 o'clock (R26).

4. Accused was sworn as the only defense witness. He denied seeing Maria Wlodarczyk on the night of 30 March or of being in her house (R35) or of having intercourse with her (R38) but stated, that he went to bed in a barn about 11 o'clock that night (R35,37) and nobody saw him between 11 and 12 o'clock. He denied possessing a pistol but admitted he was "pretty high" that night (R36).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). The story of the victim shows all of the essential elements of the offense present and except for the proof of penetration is corroborated by other occupants of the premises at the time. The physical condition of accused the following day furnished circumstantial evidence also against him. He denied even being at the house but failed to account

for his whereabouts satisfactorily covering the time of the claimed offense. The court observed the witnesses and passed on their creditability. There is substantial evidence to support their findings of guilty and in such circumstances it will not be disturbed upon review (CM ETO 503, Richmond; CM ETO 11971, Cox et al; CM ETO 13178, O'Neil et al).

6. The charge sheet shows the accused to be 19 years six months of age and that without prior service he was inducted 9 December 1943 at Kingsport, Tennessee.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

25 AUG 1945

CM ETO 10757

U N I T E D S T A T E S	)	83rd INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Argenteau, Belgium, 13 February 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private MELVIN D. GRENOBLE (33017917), Company E, 331st 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, 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 Melvin D. Grenoble, Company E, 331st Infantry, did, at or near Bihain, Belgium, on or about 12 January 1945, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by 1st Lt. JOSEPH W. SLOAN, to engage with the German Army, which forces, the said command was then opposing.

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

to be shot to death with musketry. The reviewing authority, the Commanding General, 83rd Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the convening authority commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Accused was a private in the third squad, first platoon, Company E, 331st Infantry on 11 January 1945 when that organization was engaged in an attack upon the enemy in Belgium. He was present when his company received an order from 1st Lt. Joseph W. Sloan to move out in the attack and was with his squad when it reached a barn in or near the town of Bihain about 0200 of 12 January (R7-8,11-12,15-17). There the company reorganized and then proceeded in the dark in single column to seize a clearing in the woods south of the town. The accused's squad was last in line and before it reached the cover of the woods it was subjected to heavy enemy artillery fire forcing the squad to take cover in another nearby barn. When the barrage lifted 10 or 15 minutes later the platoon guide called for the men to come out and continue the movement. It was so dark it was impossible to check all of the men who responded. He led them on to join the remainder of the company (R21). Their objective was reached about 0500 and a check made at 0730 disclosed the accused to be absent (R9,13,17). Because of casualties received from the shelling, only four members of the squad reached the objective (R17). Accused rejoined the company on 21 January 1945 when it was in a rest area (R13,18,23). He had no authority to be absent (R9,22,23).

4. The accused after his rights as a witness were fully explained to him, elected to make an unsworn statement through counsel substantially as follows: He was present with his organization during the attack on the night of 11 January 1945 and early morning of the day following and participated in it. Shortly after commencing the latter attack his squad was heavily shelled and they took cover in a building in the immediate vicinity. He was not aware of the fact that the rest of his squad left the building. When he came out he found the rest of his squad had moved on. He endeavored to locate them and after walking in the direction in which he thought they were he arrived at a regimental command post of the 75th Division that afternoon. He identified himself and was told to wait there. He waited for 3 days and no one came for him so he left and found an artillery battalion and then finally the Service Company of the 331st Infantry Regiment. In July 1944 he was evacuated with combat exhaustion

because of constant shell fire and ever since he has had a feeling of intense fear of artillery fire. He returned to his company of his own volition (R27).

5. The accused has been found guilty of misbehavior before the enemy by failing to advance with his command when ordered to do so to engage with the enemy. Failure to advance in attack when ordered or properly called upon to do so constitutes an act of misbehavior before the enemy in violation of Article of War 75 (CM ETO 6177, Transeau).

The evidence for the prosecution clearly establishes that the accused did at the time and place alleged in the Specification fail to advance in an attack upon the enemy forces, although called upon to do so. Accused in his unsworn statement establishes the fact that he was in the second barn, the one in which the men took cover after leaving Bihain, and that when the men moved on from there he did not accompany them because he was not aware of their departure. His unsworn contention that he was left behind in this building when all of the other members of the squad left when called out by the squad leader is unconvincing. He merely says that he did not know of the departure of the others. They were there only about 15 minutes. The prosecution's evidence showed that the shelling ceased and the squad leader went into the barn and called out for the men to come out and continue the movement. After all of the men were presumably outside of the building, he called again for any others. No others came out. It was a fair and reasonable inference to draw from the foregoing facts that the accused was in the barn at the time the two calls were made. All of the others responded. He must have sought shelter in the barn from the artillery fire like the others. When it ceased it was his duty to continue the advance. It was a fair and reasonable inference that he heard the calls for them to continue the advance and saw the others leave and that he consciously remained in the barn, while his comrades continued on. He admitted his intense fear of artillery fire. Thereafter he was gone for nine days and did not return to the company until after it had returned to a rest area. The factual issue thus raised was within the sole province of the court to determine. Its findings should not be disturbed (CM ETO 1663, Ison; CM ETO 1685, Dixon).

6. The charge sheet shows the accused to be 29 years and four months of age. He was inducted on 15 May 1941 at Altoona, Pennsylvania.

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

8. The penalty for misbehavior before the enemy in violation of Article of War 75 is death or such other punishment as the court-martial may direct (AW 75). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement upon commutation of a death sentence is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

(131)

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 MELVIN D. GRENOBLE (33017917), Company E, 331st 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 the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10757. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10757).

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

(Sentence as commuted ordered executed. GCMO 379, USFET, 4 Sept 1945).

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

BOARD OF REVIEW NO. 3

- 7 AUG 1945

CM ETO 10758

U N I T E D S T A T E S	83RD INFANTRY DIVISION
v.	Trial by GCM, convened at Argenteau, Belgium, 13 February 1945.
Private JAMES M. BEDWELL (18037830), Company G, 330th Infantry	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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James M. Bedwell, Company G, 330th Infantry, did, at or near Carentan, France, on or about 4 July 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until on or about 24 January 1945.

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He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 83rd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of the Specification of the Charge as involves a finding that accused did at the time and place alleged 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 on or about 12 August 1944, 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that about 1 July 1944 accused was a member of the first platoon of Company G, 330th Infantry, when the company was sent into combat about two or three miles north of Carentan, France, in relief of an airborne division. Between 1 and 4 July the company was in a holding position under small arms, mortar and artillery fire. On the night of 3 July, the company commander oriented his platoon leaders and platoon sergeants as to an attack scheduled for the morning of 4 July. Accused's platoon sergeant oriented his squad leaders and issued to them extra small arms ammunition, hand grenades, anti-tank rockets, "bazooka" ammunition and a day's K rations, which were then distributed by the squad leaders to the men. Square pieces of cheesecloth were also issued to be pinned on the backs of the men so that their tanks could identify them. On the morning of 4 July, the men stacked rolls, packs and extra equipment for handling by the service company. Accused, a Browning Automatic Rifleman, assembled with

his squad prior to 0445 hours, at which time he "jumped off" on the attack. After an advance of 300 or 400 yards the platoon was pinned down in an apple orchard by mortar and artillery fire and was ordered to withdraw to the outpost line. Accused was not seen by his platoon sergeant on withdrawing nor during the ensuing half hour in which the platoon reorganized and prepared to move out again. After moving about 150 yards on the second "jump-off", the platoon was pinned down by machine gun fire, and in another five minutes was subjected to a heavy artillery barrage. When the barrage lifted, the accused, a lieutenant, the platoon sergeant and one other man, all of whom were standing, returned to the outpost line. When the platoon sergeant checked his platoon at the outpost line he had about nine men left, but accused was missing. Accused had no authority to be absent and his place of duty was on the line. He had no duties which would have taken him away from his squad or platoon. His platoon sergeant testified that accused was not thereafter present up until the night of 5 July, when the witness was hit, nor from 1 September 1944 to 24 January 1945, when he was returned by the military police to the company in Belgium (R6-11).

The mess sergeant of Company G testified that accused was not present for duty with the company between 4 July 1944 and 25 January 1945 (R11-12). The company commander testified accused was not present for duty on 7 January 1945, when the witness joined the company, or at any time prior to 24 January 1945 (R12).

A duly authenticated extract copy of the morning report of accused's organization for 7 July 1944 shows him missing in action as of 4 July 1944 (R13; Pros.Ex.1). Entries for 22 August 1944 show him from "MIA 4 July 44 to AWOL 4 July 44" and from "AWOL 4 Jul 44 to abs Conf Straggler Collecting Point 83d Inf Div APO 83 U S Army 12 Aug 44" (R13; Pros.Ex.2). An entry for 24 January 1945 shows him "Fr abs conf place unknown" to "arrest in qrs" (R13; Pros.Ex.3).

4. After his rights had been explained to him by the law member, accused elected to make through his counsel the following unsworn statement:

"On the early morning of the 4th of July he made one attack with his company and returned to the original line of departure of the attack with his company. Later he made a second attack with his company and again returned to the line of departure of this attack, at which time one of his friends, a soldier of the company, was wounded. The accused accompanied him back to the aid station -- assisted him to return to the aid station. After this the accused endeavored to return to his company in the line and became lost. He wandered from unit to unit on that day and finally spent the night with an artillery unit in the vicinity. The next morning, on the 5th of July, the accused again endeavored to locate his company and was unable to find it. He made many inquiries from enlisted personnel and officers as to the location, but in the state of confusion, no one knew where his company was. He spent several days with another artillery organization in that vicinity. Shortly thereafter he joined with an armored unit in the same vicinity. Having been unable to locate his company, the armored unit returned the accused to the M.P.'s in Carentan. The accused does not know the designation of this M.P. establishment. At the M.P. headquarters in Carentan there was considerable misunderstanding with a replacement company in that vicinity and the accused was sent to it on several occasions. On the first two times, the accused was returned to the M.P. establishment. Finally the replacement company accepted the accused and he travelled from their location in the vicinity of Carentan to the vicinity of Rennes. The date on which the accused first came to the M.P.'s was on or about the 12th of August, 1944. Since that time there has been considerable time spent in replacement channels and M.P. companies. The accused was finally brought through M.P. channels back to his original organization on or about 24 January 1945" (R13-14).

5. Competent testimony shows that shortly after accused had participated in two attacks with his organization on 4 July 1944 in heavy fighting near Carentan, France,

he absented himself without authority and was not returned to his organization until 24 January 1945. The testimony cures any possible objection that the morning report entry of 22 August 1944, showing accused's absence without leave as of 4 July 1944, was not within the personal knowledge of the person making it (CM ETO 8631, Hamilton). The court evidently gave little credence to accused's unsworn statemeht, and under the circumstances shown the court was clearly warranted in inferring that accused left his organization with the intention of avoiding combat with the enemy as charged (CM ETO 7413, Gogol; CM ETO 5953, Myers; CM ETO 10443, Mays). The confirming authority very properly modified the findings of guilty to accord with the undisputed evidence showing accused's return to military control on 12 August 1944. Since the offense was complete on 4 July, at the moment accused absented himself with the requisite intent, it was not necessary that the Specification allege or the proof show the method or place of termination of the desertion (See CM ETO 9975, Athens, et al; CM NATO 2044, III Bull. JAG 232).

6. Although accused was tried only one day after the charges were served upon him it appears that both he and his defense counsel expressly consented to trial without objection (R2,3). In the absence of objection, or a showing of prejudice to accused as a result of trial on such short notice, the findings of guilty cannot be disturbed (CM ETO 3475, Blackwell; CM ETO 5255, Duncan).

7. The charge sheet shows that accused is 26 years of age, and enlisted 5 November 1940 at Forth Worth, Texas. No prior service is shown.

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

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).

B R Cooper Judge Advocate

Malcolm C Sherman Judge Advocate

B L Levy Jr. Judge Advocate

1st Ind.

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

1. In the case of Private JAMES L. BEDWELL (18037830), Company G, 330th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 10758. For convenience of reference please place that number in brackets at the end of the order (CM ETO 10758).

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

(Sentence as commuted ordered executed. GCMO 341, ETO, 24 Aug 1945).

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

BOARD OF REVIEW NO. 1

CM ETO 10759

14 JUL 1945

U N I T E D S T A T E S)	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.)	
First Lieutenant PAUL E. HOULE (O-2055472), Corps of Military Police, 6832nd Prisoner of War Administrative Company)	Trial by GCM, convened at Marseille, France, 11, 12 February 1945: Sentence: Dismissal and total forfeitures

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

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

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

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

Specification: In that First Lieutenant Paul E. Houle, 6832 Prisoner of War Administrative Company, did, at Marseille, France, on or about 5 January 1945, with intent to do him bodily harm, commit an assault upon Lieutenant

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(jg) L. E. Jacobsen, USNR, by willfully and feloniously drawing and pointing a pistol at the said Lieutenant (jg) L. E. Jacobsen, USNR.

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

Specification: In that * * * was, at Marseille, France, on or about 5 January 1945, in a public place, to wit, at and near the Embassy Bar, Rue Vacon, disorderly while in uniform.

He pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Delta Base Section, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, although deemed wholly inadequate punishment for an officer guilty of such grave offense, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. On 5 January 1945 at about 2330 hours Lieutenant (jg) Leonard E. Jacobsen, United States Naval Reserve, and Ensign Matthew J. Wojcicki, United States Navy, were leaving the Embassy Bar, Rue Vacon, Marseille. The bar was crowded, the aisle leading to the door was somewhat narrow and as a consequence the two officers had difficulty in making their exit. Accused, who was leaving at the same time with two women guests, pushed his way through the crowd, shoving people to one side with his elbows. The two naval officers' comments to the affect that he had his nerve and that he had no right to use such tactics were apparently overheard by accused. He inquired of Lieutenant Jacobsen whether he wanted to do something about it and when the latter still insisted that accused had no right to act the way he did, accused raised his hand as if to strike Lieutenant Jacobsen. The latter grabbed accused's right hand, bent it back, and thus forced accused to leave the bar with him (R6,7,12-15, 23-25,31). Lieutenant Norman A. Smith, United States Naval Reserve, Senior Shore Patrol Officer, who observed the two

officers as they came out the door into the street, ordered Lieutenant Jacobsen to release accused. As soon as Lieutenant Jacobsen complied accused pulled a pistol, pushed it into the former's stomach and said in a vicious and threatening manner, "I am going to kill you, you son-of-a-bitch" (R7,8,26,38). At the same time, those present heard two "clicks" as though the pistol was being cocked (R10,17,26,27,32,46). Lieutenant Jacobsen, thoroughly frightened, raised his hand and turned his back to accused, thinking that accused would be less likely to shoot him in the back. The former, however, jabbed the pistol into his back and repeated his profane threat (R10,17,23,27,38,39). At this juncture Lieutenant Smith intervened and pushed the gun aside, at the same time ordering Lieutenant Jacobsen to leave (R11,18,39). Lieutenant Smith asked accused to surrender the gun and produce his identification papers. He declined to do the former and would not identify himself until Lieutenant Smith did. In the meantime, an officer and some enlisted men of the Military Police arrived. While Lieutenant Smith was discussing the affair with them, accused re-entered the bar (R28,33, 40,53). The military police searched the bar for about five minutes and finally detected accused as he was about to leave. He was taken to the military police station where he was searched in vain for a gun (R29, 34,40-43,49,53-55). Later that night the Embassy Bar was searched somewhat cursorily for the same purpose without success (R57).

4. Evidence for the defense:

a. Accused, after being warned of his rights elected to be sworn and testify. He stated that he escorted two ladies to the Embassy Bar on the night in question. In attempting to leave, it was necessary to push people to get through the crowd although he did not use much force. When he was near the door he was accosted by a naval officer who charged him with "pushing people around" and who grabbed the middle finger of accused's right hand, bent it back, and forced accused to leave with him. As soon as they were outside the door Lieutenant Smith intervened and he was released. He denied that he had a pistol in his possession, much more that he pointed one at Lieutenant Jacobsen. He admitted that he had not produced his "AGO" card immediately when asked for it by Lieutenant Smith, but

stated that he did this because he wanted to make sure that Lieutenant Smith was actually a member of the Shore Patrol before he complied with his demands. He returned to the bar to see about his two guests who had not followed him outside (R83-86).

5. a. Charge I and Specification:

This Specification alleged, in substance, that accused committed an assault with intent to do bodily harm on Lieutenant (jg) L. E. Jacobsen by pointing a pistol at him. An assault with intent to do bodily harm

> "is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed" (MCM, 1928, par.149n, p.180).

Although there was a direct conflict in the evidence as to whether accused pointed a pistol at Lieutenant Jacobsen and stated that he was going to kill him, the resolution of the conflict was for the court (CM ETO 895, Davis, et al). Having resolved it adversely to the accused it was fully warranted in its conclusion that he was guilty as charged. The case in this aspect is governed by CM ETO 7585, Manning, and CM ETO 7000, Skinner.

b. Charge II and Specification:

This Specification alleged that accused was guilty of disorderly conduct in a public place in violation of Article of War 95. It states an offense in violation of that article (CM ETO 10362, Hindmarch). Accused's conduct in assaulting a naval officer with intent to do bodily harm in the manner already described clearly stamps him as morally unworthy to remain an officer (CM ETO 7585, Manning, supra). It was not improper to charge the same offense under two Articles of War when one is based on its civil aspect and the other on its military aspect (CM ETO 4606, Geckler). The record of trial is legally sufficient to support the findings of guilty.

6. The following occurred at the outset of accused's cross-examination:

"Q. Are you an agnostic?
A. I am a Roman Catholic.

10759

Q. I ask you if this is your signature (Accused shown Form 66-1).
A. Yes

Q. What was put down as your religion in 1942?
A. Agnostic.

Q. Do you know the meaning of the oath you took a moment ago?
A. I certainly do.

Q. Do you wish to strike that part about 'So help you God'?
A. I do not; I am a firm believer - a Roman Catholic.

Q. As of what date?
A. As of birth! I would like to ask the courts' permission if this line of questioning is authorized. Religion is a private issue I think" (R89).

The President then intervened and stated that this line of questioning was improper. The Defense agreed with this observation but stated "the answer as the witness has given, (sic) stands and I believe it should be incorporated in the record". Generally it is held that inquiry into the religious belief of a witness for the purpose of testing his credibility is improper (95 A.L.R. 711; 3 Wharton's Criminal Evidence (11th Ed., 1935), sec.1307, p.2180). However, in view of the Defense's request that the objectionable matter remain in the record no prejudicial error resulted.

7. The charge sheet shows that accused is 27 years seven months of age. He was appointed a first lieutenant on 30 August 1943. He has had prior service in the Regular Army since 1935.

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.

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9. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 93 and is mandatory upon conviction of an offense in violation of Article of War 95.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

10759

1st Ind.

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

1. In the case of First Lieutenant PAUL E. HOULE (O-2055472), Corps of Military Police, 6832nd Prisoner of War Administrative 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 10759. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 10759).

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

(Sentence ordered executed. GCMO 275, ETO, 20 July 1945).

10759

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

BOARD OF REVIEW NO. 2

27 JUL 1945

CM ETO 10760

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, 8 March 1945. Sentence: To be dismissed from the service and to forfeit all pay and allowances due or to become due.
	)	
Second Lieutenant WILLIAM E. ROBERSON (O-1016985), Company H, 41st Armored Infantry Regiment	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant WILLIAM E. ROBERSON, Company H, 41st Armored Infantry Regiment, attached to Headquarters Second Armored Division Trains, did, en route from Belle Roche, Belgium, to Vaals, Holland, on or about 3 February 1945, wrongfully drink intoxicating liquors in company with enlisted men.

Specification 2: In that * * * having received a lawful order from Captain WILLIAM A. CARMICHEAL, Company H, 41st Armored Infantry Regiment, not to drink intoxicating liquor while on duty, the said Captain WILLIAM A. CARMICHEAL being in the execution of his office, did en route from Belle Roche, Belgium, to Vaals, Holland, on or about 3 February 1945, fail to obey the same.

Specification 3: In that * * * was at or near Vaals, Holland, on or about 8 February 1945, drunk in camp in his bivouac area.

He pleaded not guilty to, and was found guilty of, the Charge and specifications. Evidence was introduced of one previous conviction by general court-martial for failing to restrain an enlisted man from brandishing a loaded weapon in a private home of a French civilian and for wrongfully drinking intoxicating liquor in company with an enlisted man, each in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 2nd Armored Division, approved the sentence 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, stated that it was wholly inadequate for an officer guilty of such grave offenses and that the court in imposing such meager punishment had reflected no credit upon its conception of its own responsibility, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 3 February 1945, accused was a second lieutenant and leader of the second platoon, Company H, 41st Armored Infantry Regiment, which organization was located near Belle Roche, Belgium (R5,6,8,14). During the evening of this date the organization moved by convoy from Belle Roche to Vaals, Holland (R6,8). Accused was in charge of his platoon during the move and rode in a command half-track with his platoon sergeant and the platoon. While enroute they stopped at Verviers, Belgium, where the men in the half-track purchased four or five bottles of cognac. The accused drank some of this brandy with these men (R6,7). His platoon sergeant saw accused take more than one drink of cognac, although he would not say how much he consumed. The 12 men in the vehicle, including accused, drank all the cognac purchased on the journey (R7,8).

Captain William A. Carmicheal, the company commander of accused's company, testified that between the first and 15th day of November 1944, he gave orders "pertaining to drinking" to the members of his company and that he "told" accused "that there would be no drinking while on duty" (R9). Although accused appeared to have been drinking at the time this order was given to him, he was not so intoxicated as to prevent him from understanding instructions and from carrying out other orders given him at that time (R9,10). At about 2400 hours 3 February 1945, Captain Carmicheal saw accused in the billet designated as the company command post in Vaals, Holland. He was under the influence of intoxicants at this time. The captain formed an opinion that accused had been drinking from the odor of alcohol on his breath and from his manner of speech (R9,10).

On 7 February 1945 accused visited Hasselt, Belgium, on pass, and on the evening of the 8th, he was brought to the second platoon command post by members of the military police. He could hardly stand up at this time (R13,14). His eyes were watery and glassy and his speech was very thick. His clothes hung on him loosely and his appearance was that of a "very drunk" man (R14,15). He was ordered by Captain Carmicheal to go to his room. Accused started up the stairs but after ascending five or six steps fell down. He got up and started again but fell down a second time after which another officer assisted him up the stairs and into his bedroom (R14,15).

4. Accused, after his rights as a witness were explained to him, elected to remain silent (R16).

Captain George H. Cushman, Train Headquarters, 2nd Armored Division, the only witness for the defense, testified that accused had been a member of his company for approximately a month and a half during which time he had served as company reconnaissance officer, whose duties included checking outposts, investigating disturbances in the area and directing the work of the reconnaissance platoon. He also served as instructor at the reinforcement school, giving instruction in the operation of small arms, map reading, march discipline and other subjects. Captain Cushman indicated that accused is a very able instructor, rated him as superior in the performance of his duties and stated that he desired very much to have him as a member of his organization (R15-16).

5. Competent uncontradicted evidence establishes that accused drank intoxicating liquor with the men of his platoon while in command en route from Belle Roche, Belgium, to Vaals, Holland.

Four or five bottles of cognac were consumed during the journey. The company commander, who saw accused at the command post immediately following their arrival, testified that he was under the influence of liquor. The drinking of intoxicating liquor by accused with enlisted men constitutes conduct prejudicial to good order and military discipline condemned by Article of War 96 (CM ETO 3714, Whalen; CM ETO 6235, Leonard).

In November 1944, Captain William A. Carmicheal, the company commander of accused's organization, gave orders and instructions to the members of his company concerning when and under what conditions drinking was permitted and specifically "told" accused not to engage in drinking while on duty. The fact that he so instructed him in this manner indicates a positive command. "The form of an order is immaterial" (MCM, 1928, par.134b, p.149). Accused's drinking on this occasion while on duty, constituted a violation of the order as alleged (CM ETO 4193, Green; CM 235408, Jordon, 22 BR 55; Winthrop's Military Law and Precedents (Reprint, 1920), pp.573-574).

Concerning Specification 3 hereof, the evidence is clear and substantial that accused was drunk in camp in his bivouac area, as charged. His eyes were watery and glassy and his speech thick. He fell down the stairs a very drunk man. The fact that he was returned to his quarters by members of the military police does not justify his drunken condition or constitute a defense to the charge of being drunk in camp (CM ETO 4184, Heil; CM ETO 4339, Kizinski).

There is substantial evidence to support a conviction of all the offenses alleged and such specifications do not constitute an unreasonable multiplication of charges (MCM, 1928, par.27, p.17).

6. The charge sheet shows that accused is 29 years of age and enlisted 19 July 1940. He was discharged for the convenience of the Government on 18 March 1943 and commissioned a second lieutenant, 19 March 1943, at Fort Knox, Kentucky.

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 authorized upon conviction of

an offense in violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

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CONFIDENTIAL

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 Second Lieutenant WILLIAM E. ROBERSON (O-1016985), Company H, 41st Armored Infantry Regiment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10760. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10760).

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

(Sentence ordered executed. GCMO 330, ETO, 12 Aug 1945).

CONFIDENTIAL

10760

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 10761

U N I T E D S T A T E S	3RD AIR DIVISION
v.	
Second Lieutenant HAROLD J. BALDOCK (O-761385), 849th Bombardment Squadron (Heavy), 490th Bombardment Group (Heavy)	Trial by GCM, convened at AAF Station 134, APO 559, U.S.Army, 27 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 61st Article of War.

Specification: In that Second Lieutenant Harold J. Baldock, 849th Bombardment Squadron (H), 490th Bombardment Group (H), did, without proper leave, absent himself from his command at AAF Station 134, APO 559, U.S.Army from on or about 31 December 1944 to on or about 7 March 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was

sentenced to be 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, 3rd 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, though deeming it 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.

3. The evidence without contradiction established that accused was absent without leave from his station from 31 December 1944 to 7 March 1945 when he surrendered himself to military authority.

The finding as to his mental responsibility for his actions, implicit in the court's findings of guilty, is supported by substantial evidence (CM ETO 4219, Price; CM ETO 5747, Harrison; CM ETO 9424, George E. Smith, Jr).

4. The charge sheet shows that accused is 20 years 10 months of age and entered on active duty 4 December 1943 to serve for the duration of the war plus six months. He had prior service from 1 February 1943 to 4 December 1943 training as an Air Cadet.

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

6. Dismissal, total forfeitures and confinement at hard labor are authorized as punishment for an officer convicted of violation of the 61st Article of War. The designation of 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

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 HAROLD J. BALDOCK, (O-761385), 849th Bombardment Squadron (Heavy), 490th Bombardment Group (Heavy), 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 10761. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10761).

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

(Sentence ordered executed. GCMO 222, ETO, 24 June 1945).

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

BOARD OF REVIEW NO. 2

30 APR 1945

CM ETO 10780

U N I T E D S T A T E S	84TH INFANTRY DIVISION
v.	Trial by GCM, convened 13 March 1945 at Krefeld, Germany.
Private First Class ALBERT J. OLSEN (32269305), Company C, 309th Engineer Combat Battalion	Sentence: Dishonorable discharge, total forfeitures and confinement for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification 1: In that Private First Class Albert J. Olsen, Company C, 309th Engineer Combat Battalion, did, at Krefeld, Germany, on or about 0300 hours, 10 March 1945 with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Georg Weirich, a human being, by shooting him with a carbine.

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Specification 2: In that * * * did, at Krefeld, Germany, on or about 0300 hours, 10 March 1945 with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Anneliese Feckenstedt, a human being, by shooting her with a carbine.

Specification 3: In that * * * did, at Krefeld, Germany on or about 0300 hours, 10 March 1945 with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Elisabeth Trix, a human being, by shooting her with a carbine.

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

Specification: In that * * * did, at Krefeld, Germany, on or about 10 March 1945, with intent to do her bodily harm commit an assault upon Christine Weirich, by shooting her with a dangerous weapon to wit a carbine.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of 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, 84th 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, on 22 April 1945, confirmed the sentence. On 7 June 1945 after reconsideration, the confirming authority recalled his previous action, confirmed the sentence but commuted it to dishonorable discharge, total forfeitures, and confinement at hard labor for 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 may be summarized as follows: About 11:15 pm of 9 March 1945 the accused, a soldier in the military service of the United States (R21) entered the apartment of Herr Sessing at 54 Weberstrasse, Krefeld, Germany. There he washed his hands and had Herr Sessing bind up his injured hand. He conversed with Herr Sessing, his wife and daughter, hid under the bed when he heard a motor vehicle pass, and suggested that he sleep with the daughter (R26-27). He departed about 11:45 and, about one hour latter, accused entered 52 Weberstrasse and the apartment on the first floor thereof of Herr Hartgens

and his wife. He asked for schnapps and was given some whiskey in a bottle which he put in his pocket (R40-42). He left after 10 minutes and went upstairs to the apartment of Frau Straubel and her daughter. There he asked for whiskey, searched the closet for it when told there was none, and then demanded that the mother get out of the bed and sleep on the floor while he slept with the daughter. He threatened to shoot them if either of them screamed. The daughter screamed. Accused attempted to load his rifle. Two men rushed in. As one pushed the rifle down it was discharged. Accused was finally persuaded to leave but took with him a locket and chain belonging to the daughter which was later found in his possession (R42-44).

Accused next visited 56 Weberstrasse and entered the apartment of Herr Peter Bruns who lived with his wife and daughter and who had already retired for the night. Accused indicated to Herr Bruns that he wished to sleep with his daughter (R51). They cried for help. Accused fired a shot into the floor. During the confusion that followed the women departed (R51). This "astounded" accused, who then took a guitar off the wall and walked out with it (R51). Accused then went to Herr Weirich's apartment on the third floor of 56 Weberstrasse (R45,47,49). Herr Georg Weirich, Frau Christine Weirich, their daughter, Frau Anneliese Feckenstedt, Frau Elisabeth Trix with her child, and Frau Leopoldine Thomas were present in that apartment (R45). He ordered Frau Thomas out of the apartment, closed and locked the door and then herded the others into a bedroom. Frau Weirich, the only survivor, testified that he wanted to take her daughter and discharged his gun into the floor. He struck Frau Weirich and chased her and her husband and their daughter close to a window and there counting, "one, two, three", he shot Herr Weirich through the body, shot the daughter, Frau Feckenstedt, through the chest and shot Frau Weinrich in the elbow and the ribs. The three fell to the floor. Accused then shot Frau Trix through the head. As a result of the gunshot, Herr Weirich, his daughter and Frau Trix died immediately or shortly thereafter (R12,46,48-49; Pros. Exs.B,C,D,E).

After he had killed Frau Trix, he jumped upon the bed where her body lay and he remained there for about five minutes (R48). There was no evidence however of any physical relations (R14-15). The medical officer who examined the bodies was of the opinion that the cause of the death of each was gunshot wounds from .30-caliber bullets of a carbine or M-1 rifle (R13-15). The lone survivor, Frau Weirich, was the only witness to testify as to what took place in her apartment. She was unable to identify the accused in the courtroom as the soldier who committed the offenses (R46).

The accused then returned to the Sessing apartment. Herr Sessing had heard the shots fired. Accused looked wild. With his rifle and helmet he laid himself down on a couch and Sessing got a blanket and covered him. About two minutes later he jumped up and tried to persuade Frau Sessing to sleep with him. When she refused he left (R28-29). Accused appeared as if he had been drinking heavily but he could talk clearly, was steady on his feet and was "quite capable of thinking" (R32-33).

In the room with the corpses was found the guitar taken by the accused from Herr Brun's apartment (R55-56; Pros.Ex.J).

4. The evidence for the defense discloses that: The accused after his rights as a witness were fully explained to him elected to testify in his own behalf (R57). On the afternoon of 9 March 1945, he went out to look for a radio. At the first house he entered he was handed a bottle of "schnapps" which he drank while roaming around until mealtime. After "chow" he found another bottle which he also drank, and then a third with some pink liquid in it. On another street he went into a house and got a bottle about two-thirds full, and the next thing he remembered he was in a house where some girl lived (R58). He remembered that he had her bracelet and locket, that she said something and he shoved her back in bed, that he wrestled with a man and while he was wrestling his gun went off (R58,59). He did not remember leaving the house, but remembered sitting on a curb with a bottle and taking a couple of drinks from it, running into a pushcart, taking another drink while sitting in a weapons carrier at his own command post, and later getting into camp safely (R59). He was worried that the sergeant would penalize him for drinking so he went in very quietly and went to sleep on the floor. In the morning when he washed he could not recall how the bandages came to be on his hand (R59). He did not remember shooting anyone or having a guitar which he cannot play and the only witness that he remembered is the girl from whom he took the bracelet and locket (R59-60). He did not remember crawling under any bed or asking anyone to sleep with him (R61).

A member of a Board of Officers appointed to inquire into accused's sanity testified that they had found accused to be sane and able to distinguish right from wrong and to adhere to the right in the early morning of 10 March. They also found accused to be suffering from a psychiatric condition known as constitutional psychopathic state and that in the Board's opinion if accused's actions were abnormal at the time of the alleged offenses it was due to acute alcoholic intoxication in an individual who is a constitutional psychopath (R7-9; Pros.Ex.1).

5. The record of trial establishes beyond any reasonable doubt that the accused did at the time and place alleged in the specifications kill the three human beings therein named and wounded Frau Christine Weirich by shooting them with his carbine. Murder is the unlawful killing of a human being with malice aforethought. Malice may be presumed from the

deliberate use of a deadly weapon in a way which is likely to produce, and which does produce, death (Underhill's Criminal Evidence (4th Ed., 1935), sec.557, p.1090. An eyewitness described how the accused deliberately shot and killed the three unarmed persons one after the other without provocation or excuse. His guilt of murder was clearly and legally proved (CM ETO 4294, Davis, et al; Dig.Op ETO 410, and authorities cited therein). In the same manner it was established that he also assaulted Frau Weirich with intent to do her bodily harm with a dangerous weapon as alleged in the Specification of Charge II in violation of Article of War 93 (MCM, 1928, par.149m, p.180). The uncontroverted evidence shows that he assaulted her with a rifle or carbine under circumstances indicating that he used that weapon in such a manner that it did produce great bodily harm. Accused's only defense was that his voluntary intoxication caused him to remember nothing whatsoever of the shooting and killing in the Weirich apartment. Voluntary drunkenness is no excuse for crime committed while in that condition, but may be considered as affecting mental capacity to entertain a specific intent (MCM, 1928, par.126a, p.136). Accused's asserted drunkenness to the extent that it affected his mental capacity to entertain a specific intent to commit the offenses charged is refuted by the testimony of some of the witnesses and certain facts inconsistent with such a condition. There was testimony that, though intoxicated, he could talk clearly, was steady on his feet and capable of thinking (R32-33). He was sober enough to remember to return from the Weirich apartment to the Sessing apartment in the adjoining building to retrieve his jacket (R69). Whether he was too drunk to consciously entertain and execute a murderous design was a question of fact for the court's determination. The record reveals substantial evidence to support the court's findings that accused committed the offenses as alleged (CM ETO 14745, Rowell; CM ETO 4497, De Keyser; CM ETO 5584, Yancy). The accused's sanity was established and he was therefore legally responsible forhis acts.

6. The charge sheet shows that accused is 27 years of age and was inducted 9 June 1942 at Fort Dix, New Jersey. 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 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

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275 and 330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

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

1. In the case of Private First Class ALBERT J. OLSEN (32269305), Company C, 309th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence 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 10780. For convenience of reference, please place that number in brackets at the end of the order. (CM ETO 10780).

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

(Sentence as commuted ordered executed. GCMO 403. USFET. 15 Sept 1945).

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

BOARD OF REVIEW NO. 1

16 NOV 1945

CM ETO 10799

U N I T E D S T A T E S	) DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)
Private ELLIS GLOVER (34100347), 3425th Quartermaster Truck Company	) Trial by GCM convened at Marseille, France, 26, 27 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Unites States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Ellis (NMI) Glover, Private, 3425 Quartermaster Truck Company, did, near Salon, France, on or about 20 October 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Helene Schneider.

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

Specification 1: In that * * *, did, near Salon, France, on or about 20 October 1944, unlawfully carry a concealed weapon, viz., a pistol.

Specification 2: In that * * *, did, near Salon, France, on or about 20 October 1944, in violation of standing orders, transport a civilian passenger in a government vehicle.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for committing an assault by pointing a pistol, unlawfully carrying a concealed weapon, and wrongfully discharging a service pistol, all in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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 the prosecution: On the morning of 20 October 1944, Madame Helene Schneider, 34 years of age, was travelling from Lyon to Grans, France, to visit her family (R18,41). Although the record is not clear, she apparently got off the train at Miramas about 0930 hours and started walking along the road to Grans because she had been informed that there were no trains running. She was carrying a valise and a bag. After walking a distance of about one kilometer she hailed a truck driven by accused who was a member of the 3425th Quartermaster Truck Company and whose assigned duty was truck driver. She asked for a ride to Salon and accused indicated a seat beside him in the cab for her and opened the door from the inside (R18-20,31,59).

After riding for about five minutes, accused placed his finger on his tongue, pointed toward her legs, and asked her if she understood (R20,32). She replied "pas compris", and immediately tried to get out the door but she could not find the handle. She also signalled to him to stop the truck (R20-21,32). He produced a gun, pointed it at her and said "compris". He put the gun away, drove on for about five minutes, and produced the gun again to show her that it was loaded (R21,32-33). With this, she became frightened and began to cry after a couple of minutes, he took a side road to the right and drove until they came to a culvert. The road ran through open country and they did not pass a single house, pedestrian or automobile. During the journey, the prosecutrix continued to cry and tried to indicate to the accused by gestures that she wanted to get out of the truck (R22-23).. Accused stopped the truck, alighted, took a blanket on which he had been sitting and the revolver that was under it, put the weapon in his pocket, walked around the front of the truck, and put the blanket on the ground about two or three meters from the truck (R23,34-36). He opened the door on her side of the truck and when she started to leave with her valise he took it away from her and threw it on the seat the prosecutrix saw accused place the pistol in his pocket and was crying at the time she got out of the truck (R24). He took her by the arm, in a "half-polite" gesture, led her to the blanket and indicated that she was to lie down.

Terrorized and "without strength", she complied (R38-39). The gun was in his pocket (R24). He lifted her skirts and started to take off her panties. She was unable to say whether she assisted him (R25.40). He then tried to have sexual intercourse with her. She did not push him away with her hands or kick him because she was frightened. As she put it, "I could not resist much because I was terrorized and limp through fear". However, she did attempt to prevent him from accomplishing his purpose by crossing her legs and tightening her "inner muscles" (R26,41-43). Unable to effect penetration, he made her change positions several times. In doing this he was not brutal, but he used great force (R41). He began to get angry (R26). After almost three-quarters of an hour she became so tired that she "had no strength left to resist any longer" and he then effected penetration (R42-43). She dressed and he ordered her to get back in the truck. He drove to the main highway and showed her the way to Salon, while he drove in the direction of Miramas (R26). The number of the truck was 445. She walked along the road for almost ten minutes until she was picked up by some French people in a truck. Crying, she told them what had happened, and they at her request took her to the National Gendarmerie at Salon (R27). It was then about 1100 hours (R50).

On 20 October 1944, Captain Sylvester A. Bachmann landed at the Istres airfield enroute from Epinal to Marseille. (Reference to authentic maps reveals that Istres is about five miles - airline distance - southwest of Miramas). Unable to obtain further transportation, he was walking into Istres when he was picked up by an unshaven colored soldier with a small moustache who was dressed in denims and driving a two and one-half ton truck bearing the number 445. The handle of the right hand door was missing. At the town of Fos they were stopped by the French military police. Unable to understand what the French wanted, Captain Bachmann persuaded them to go with them to the driver's orderly room. On arriving there, Captain Bachmann went into the orderly room, talked with a Lieutenant Steiger and there made arrangements to take the entire party to Battalion Headquarters. He climbed back into the truck. One of the French military policemen climbed on the running board and picked up a blanket that was lying on the seat. Underneath the blanket there was a gun but the driver prevented the military policeman from taking it saying "No, I can't give it to you, it belongs to the Major". In the meantime some negro soldiers milled around the truck evidencing resentment at the French. During the excitement a blanket was passed in or out of the truck (R68-76). Accused was identified as the driver of this truck by the French military policemen who arrested him (R51-52).

On 30 November 1944 the prosecutrix discovered that she was suffering a venereal disease, which she did not have prior to 20 October 1944 (R28-29).

Prior to 20 October 1944 orders were issued by the 59th Quartermaster Battalion, of which the 3425th Quartermaster Truck Company was a part, forbidding the carrying in United States Government vehicles of civilian passengers who did not have a pass. Similarly, orders were issued prohibiting the carrying of pistols by enlisted men (R60-62,67; Pros. Ex 1). These orders were read to the men and published on the

bulletin boards (R65,67).

4. Evidence for the defense: For the purpose of showing prior inconsistent statements, the defense offered a statement signed by Madame Schneider and witnessed, which she gave to one Serge Corfu, Inspector of National Police, attached to the Criminal Investigation Division (R92; Def. Ex A). In this statement she was quoted as saying that she gave in to accused because it was the only way to get rid of him (R94; Def. Ex A).

It was stipulated by and between the defense, the prosecution and the accused that if Captain Thomas B. Halton, Medical Corps, were present in court he would testify that accused was admitted to the Hospital on 21 October 1944 suffering from a moderately large penile ulcer diagnosed as a syphilitic chancre, complicated by infection of the foreskin. Treatment "held" the chancre but the infection persisted. It subsided slowly and he was discharged on 8 November.

> "It is my opinion that it is doubtful that Private Glover could have participated in intercourse for several days prior to admission because of the condition of his penis which would probably have rendered intercourse painful to him" (R95).

Accused, after being advised of his rights, elected to remain silent (R96).

5. In rebuttal, Captain Seymour I. Nathanson, Medical Corps, testified that he examined accused on 21 October 1944 and found evidence of a venereal disease. His penis was moderately swollen and there was a discharge from the meatus. It was not only possible but "likely" that accused could have had intercourse within the preceding 24 hours. He had no doubt that accused could have had an erection although it may possibly have been painful enough to nullify his sexual desires (R97-101).

6. Appended to the record of trial is a letter dated 28 February 1945 signed by the President of the court in which he states that on the second day of the trial accused, through his defense counsel and then personally, "stated to the court" that the prosecutrix had been sitting in the lobby of the Hotel Bordeaux shortly before the trial opened on the previous day and that the trial judge advocate came into the room and asked for accused; that when he responded the trial judge advocate ordered him to step forward and he noticed that at that time the prosecutrix was watching him. The letter goes on to say that the court then re-called Madame Schneider. Her testimony on this point appears on pages 90-92 of the record. She denied seeing accused in the lobby on the morning in question, although she admitted being there and seeing several colored soldiers. Likewise, she denied hearing anyone call accused's name. The first time she saw accused after 20 October was when she identified him from the witness stand, and she was sure that he was the man involved.

Because the letter of the President referred to statements by accused and his counsel and the record contained only the above testimony of Madame Schneider, the Board of Review and Assistant Judge Advocate General had grave doubts as to whether the record accurately reflected the entire proceedings on this issue and, accordingly, it was returned to the reviewing authority with directions to take corrective action and supply the missing portion of the proceedings (Cf. CM 280470).

Thereafter the reviewing authority returned the record with an affidavit signed by six of the seven members of the court who sat on the case, which in substance stated that the record contained all the proceedings which occurred in open court and that the complaints of accused and his counsel were made during a recess. Affidavits of the specially appointed assistant defense counsel, accused, trial judge advocate, and reporter were to the same effect.

The trial judge advocate in his affidavit stated that he had told the court that it was his practice to check the prisoners when they were brought from the stockade; that in checking them in the lobby of the hotel he directed his remarks to the guard in a low voice and not to accused; that none of the prisoners made any response; that he did not see the prosecutrix in the lobby and was sure that she was not near him during the roll call. He further stated that when addressing the court during the recess accused admitted, in reply to his question, that the affiant also had called out the names of 10 or 12 other prisoners.

Accused in his affidavit described the proceedings substantially as summarized in the letter of the President of the court. In addition however, he stated that when the trial judge advocate asked him whether the names of all the prisoners had not been called, he replied that only his had been called.

The specially appointed assistant defense counsel filed a supplemental affidavit, much of which is more properly described as a brief. He did state, however, that he and the specially appointed defense counsel had a pretrial interview with the prosecutrix and that she told them she could not identify her assailant because of the lapse of time. At the trial, according to him, when the prosecutrix was asked to identify her assailant, accused and five other soldiers, who had been carefully chosen for their resemblance to him, stood up and the prosecutrix "with barely a glance in their direction, * * * only half turning to look, pointed to the accused". The affiant was "astounded" at the "unstudied and nonchalant identification". Further bearing on the point of identification of accused, the affiant stated that accused "questioned" whether he had driven his truck on 20 October 1944, because of mechanical trouble.

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He quoted accused as saying that if certain "dispatch sheets" were made available to him, together with the dispatcher as a witness, he could ascertain whether he had driven his truck on the day in question, or that he might remember the names of the mechanics who would be able to furnish the same information. Affiant stated that he searched for the dispatch sheets and communicated with accused's unit in an unsuccessful effort to locate them. A continuance was granted for that purpose but finally, when it appeared that they could not be found, "the defense reluctantly consented to going to trial". Some weeks after the trial the trial judge advocate gave the missing dispatch sheets to affiant who immediately turned them over to the reviewing authority. Affiant "believes" that the latter interviewed accused about the dispatch sheets. Affiant stated that "I believe the with holding of this evidence was deliberate". In addition to the foregoing, there was forwarded at the request of the specially appointed assistant defense counsel an affidavit signed by General Prisoner William Thorpe who stated that on the day of the trial he was a garrison prisoner awaiting trial and that he was asked to appear in an identification lineup at Glover's trial; that he was brought to the Hotel Bordeaux for that purpose; that while he was waiting in the lobby to be told where to go, he noticed a blond lady, apparently French, sitting in a chair; that,

> "Just then a Major came out and called out, 'Is Ellis Glover there' and then he said 'Glover, step out'. So Glover steps out to the Major, right in front of this here French lady, the blonde. Then, the Major, says okay, you all go back to the back room. So that's where we went".

On receipt in the office of the Assistant Judge Advocate General of the record with this additional charge of misbehavior by the trial judge advocate, it was again returned to the reviewing authority recommending that he disapprove the findings of guilty and order a rehearing because of (1) the possible prejudice resulting to accused arising ffom the incident in the hotel lobby and (2) the charge by the special assistant defense counsel that the trial judge advocate suppressed evidence.

The reviewing authority "upon further thorough reconsideration of the entire case" declined to follow the above recommendation and again returned the record of trial. In his indorsement he stated that any prejudice resulting from the incident in the hotel lobby would persist at a second trial of accused. He further stated that he requested the special assistant defense counsel to furnish a supplemental affidavit specifying precisely the manner in which accused was prejudiced by not having the dispatch sheets, and that consideration of the dispatch sheets and the supplemental affidavit, submitted in response to his request, failed to show that he was prejudiced. Lastly, he referred to the fact that a certificate, signed by the special assistant defense counsel and bound into the record, admitted that the defense at its own request had been granted a delay of 86 days.

to prepare its case. This in his (the reviewing authority's) opinion afforded ample opportunity to the defense to develop any evidence disclosed by the dispatch sheets or the detail lists and any other evidence tending to establish the alibi of accused. The detail lists and the supplemental affidavit were bound with the record of trial and are before us for our consideration.

7a. Charge I and Specification: We turn to the merits of the case first, and in so doing, we do not consider any evidence not contained in the record of trial proper. That record presents two questions. (1) Was the prosecutrix raped? (2) Was accused the rapist?

The uncontradicted evidence shows that while the prosecutrix was riding in the cab of a truck, the driver thereof indicated that he desired some sort of sexual relations with her, emphasizing his indicated desires by pointing a loaded pistol at her, and that he then turned off the main road and continued until he reached an isolated spot. When he reached this spot, he took a blanket and put the gun into his pocket. When the prosecutrix attempted to leave, he prevented her. He then made her lie down on the blanket and, after about three-quarters of an hour, had sexual intercourse with her. During all the time she resisted by closing her legs and tightening her muscles. As soon as he released her, she made prompt complaints. We think that this constituted rape - carnal knowledge of a woman by force and without her consent (MCM, 1928 par. 148b, p.165). Although it is true the prosecutrix could have offered more physical resistance, the fact that accused was armed and had previously threatened her effectively deterred that. She was not required to enter into an experiment in violence with him to ascertain just how far she could resist without being shot. Those who enforce their sexual demands at gun-point have no just complaint if those whom they assail take them at their word and submit rather than risk death. They cannot be heard later to urge that their victim should have offered more resistance. Under the circumstances here shown, her fear and lack of consent were sufficiently manifested to the accused and he had no basis for interpreting her failure to resist more vigorously as consent.

As to the identity of the rapist, substantial evidence pointed to accused. He was a truck driver for the 3425th Quartermaster Truck Company. He was identified by the prosecutrix as the driver who raped her. At the time he was driving truck number 445. He was identified by the French military Policeman as the driver of a truck whom he stopped on the afternoon of the day in question. At that time, he was driving truck number 445 and there were a blanket and a gun on the seat of this truck. The prosecutrix contracted a venereal disease shortly after the rape and accused was suffering from a venereal disease on the day of the rape. The conflict in the medical testimony as to whether accused could or could not have sexual intercourse on the day in question was for resolution by the court. In our opinion, there

was substantial evidence that accused was the rapist.

As to the incident that took place in the hotel lobby, the prosecutrix testified she did not notice it. The question of her credibility on that, as on all issues, was for the court. The record is legally sufficient to sustain the findings of guilty of Charge I and Specification (CM ETO 12056, Reyes; CM ETO 13824, Johnson et al; CM ETO 14338, Reed; CM ETO 16971, Brinley).

b. Charge II and Specifications: Accused was charged by these specifications with unlawfully carrying a concealed weapon, viz., a pistol (Specification 1) and transporting a civilian passenger in a Government vehicle in violation of standing orders (Specification 2). The evidence establishes that an American soldier transported a civilian passenger in a Government vehicle, as alleged, and that this soldier carried a pistol, which was sometimes concealed. It further establishes that both of these actions were in violation of orders. As developed above, there is substantial evidence that accused was this soldier. The record is legally sufficient to sustain the findings of guilty.

8. We consider now the matters developed by the affidavits and the action of the reviewing authority in failing to follow our recommendation to grant a new trial and returning the record to us. The manual makes no specific provisions for motions for new trial or for any motion after verdict and judgment (MCM, 1928, par. 71,pp.55-56). We treat the case as if a motion for new trial were made on the grounds suggested, and consider the whole record and the affidavits and exhibits submitted therewith to determine whether such motion should have been granted (Cf: Glasser v. United States, 86 L. Ed. 680, 315 U.S. 60 (1942)).

It is elementary that the action of a lower court in denying a motion for a new trial will not be reversed unless an abuse of discretion is shown (Coplin v. United States (C.C.A.9th) 88 F (2nd) 652, cert. denied 81 L. Ed. 1357, 301 U.S. 703 (1937); Jordan v. United States (C.C.A. 5th) 120 F (2nd) 65, cert. denied 86 L. Ed. 489, 314 U.S. 608 (1941)), by analogy we adopt the same rule as applicable to the reviewing authority's action in this case.

The first question arises from the incident in the hotel lobby. Accused insisted in the affidavits that the prosecutrix witnessed the scene and was thereby enabled to identify him at the trial. A general prisoner in his affidavit corroborated accused to a large extent. On the other hand, the trial judge advocate's affidavit and the prosecutrix' testimony warranted a finding that she did not see the incident. Moreover, the former gave a somewhat different version of the event from accused, and negatived any intent to display accused to the prosecutrix.

The specially appointed assistant defense counsel in his affidavit charged that at a pretrial interview the prosecutrix stated that she was unable to identify her assailant but that when she was on the witness stand she unhesitatingly and without pause selected accused from a lineup with five other soldiers who resembled him. However, the record of trial belies the defense counsel's statement. At no time did the defense seriously contest the issue of identity. The cross-examination of the prosecutrix covers 15 pages of the record, yet not one question was asked her about her identification of accused. If counsel, as he says, proceeded to trial on the theory that she could not identify accused and was "astounded" when she did, he gave little evidence of it at trial. One of the lieutenants of accused's organization who was present when accused was brought to the orderly room after having been apprehended by the French military police was available as a witness. He testified at the trial. If accused was not the man who was apprehended he was available to deny it, yet he was not called by the defense. To be sure, the burden was on the prosecution to prove that accused was the assailant, not on the defense to prove that he was not, but when the defense in proceedings for a new trial makes the claim of surprise that they have made, the reviewing authority, and the Board of Review are entitled to take into consideration the theory of the defense's case at the trial to ascertain whether there is any substance to the claim.

The second ground for a new trial was based on the alleged suppression of evidence by the trial judge advocate, a suppression which, according to the defense counsel, was deliberate. If that were proved to be the case, a serious question would be presented. Such conduct is utterly inconsistent with the fair and impartial administration of military justice and, regardless of our idea of the value of the suppressed evidence to accused, it is at least doubtful whether we would not have to reverse the conviction automatically. However, the only proof that the suppression was deliberate rests on the naked assertion of defense counsel which the trial judge advocate, having been transferred, was unable to answer. The reviewing authority was not required to take that assertion as true. It is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. (Glasser v. United States, supra).

We treat this evidence, then, purely as we would any other piece of newly discovered evidence. This evidence - the so-called "dispatch sheets" - consists of ordinary "detail lists" assigning men of the 3425th Quartermaster Truck Company to certain details as truck drivers. The first of these is dated 16 October 1944 and contains the details for the morning of that day. There are some 27 names on it and next to each name is a three-figured number which we take to be the number of the truck they were detailed to drive. This list contains the entry "Glover 445". The detail list

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for the afternoon of 16 October 1944 does not carry the name of "Glover" but has the statement "Mulligan 445". For the morning of 17 October Glover is again assigned to truck 445 and there is the pencil notation "pull" next to his name. The list for the afternoon of that day does not contain Glover's name but after the statement "Pull the following trucks this P.M." there are eight trucks listed, one of which is 445. For the morning of 18 October 1945, Glover is again assigned to truck 445 and the initials "M.P." are next to his name. A note on this sheet states, "'M.P.' - Denotes truck in company motor pool". Thirteen of the trucks are so designated. For the afternoon of 18 October "Williams, J." is listed as driving the truck 445. Glover is not listed. For the morning of 19 October Glover is assigned 445; although eight trucks are designated "M.P." and one of these eight is further designated "Maint.", Glover's is not one of them. For the afternoon of 19 October "Williams, J." is assigned truck 445 and Glover's name is not listed. For the morning of 20 October - the day in question - Glover is assigned truck 445. Four trucks are designated "M.P." but truck 445 is not one of them. For the afternoon of 20 October "Perkins" is assigned truck 445.

If this proves anything, it proves, contrary to defense's contention, that truck 445 was in operating condition on the day in question and accused was assigned to drive it. Indeed, it would seem that this truck was operating for all the days before 20 October for which we have the lists. Only once - the morning of the 18th - is it listed as being in the motor pool, which does not necessarily mean it was not in running condition. The designation that the truck was in the company motor pool loses any significance it might have as indicating that it was not in operating condition in the absence of the further notation of "Maint." which we take to mean that the indicated truck was undergoing maintenance.

Accused further contended that the dispatch sheets would have enabled him to obtain the names of men who could testify as to his whereabouts on the day in question. They do contain a great many names. However, defense counsel admits that he "contacted" accused's unit "continually" by telephone during his preparations for trial. He admits that he was given an 86-day continuance in order to enable him to prepare his case. Certainly, in this time he could have found these alleged witnesses without the aid of the dispatch sheets. Even now there is no assurance that these witnesses would be able to establish an alibi for accused. In fact, neither accused nor his counsel state just what that alibi is. The defense counsel quotes accused as saying that he was not out with the truck that day but he does not say where he was. We conclude that there was no abuse of discretion in denying accused a rehearing.

9. The charge sheet shows that accused is 23 years of age and was inducted 3 April 1941. He had no prior service.

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

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

Judge Advocate

Judge Advocate

(DETACHED SERVICE) Judge Advocate

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

BOARD OF REVIEW NO. 3

CM ETO 10841

21 JUL 1945

U N I T E D S T A T E S	8TH ARMORED DIVISION
v.	Trial by GCM, convened at Lebberich, Germany, 20 March 1945.
Private First Class WESLEY T. UTSEY (34516355), 148th Armored Signal Company.	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 92nd Article of War.

Specification: In that Private 1st Cl. Wesley T. Utsey, 148th Armored Signal Company, did, at Grefrath, Germany, on or about 4 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Kaeze Lehnen, a German woman.

CHARGE II: Violation of the 96th Article of War.
(Disapproved by the Reviewing Authority).

Specification: (Disapproved by the Reviewing Authority).

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be

confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved "the findings of Charge II and its Specification", approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at 1:00 pm on 4 March 1944, Mrs. Kaeze Lehnen, wife of a German soldier, and her 76-year-old father were preparing to each lunch in the kitchen of their home in Grefrath, Germany. Violent knocks were heard at the front door, which was closed but not locked. Mrs. Lehnen came from the kitchen and saw accused standing in the hallway inside the door with a gun which resembled a .30 calibre United States carbine (R6-7, 11-12). She testified that he immediately pointed the gun at her and asked if she spoke German or English (R7). She did not speak or understand English (R10). He then came closer to her, with the gun still aimed at her, and pointed upstairs with his finger. When her father looked out of the kitchen, accused turned the gun toward him, motioned for him to go away, and pointed upstairs again. He kept the gun pointed at prosecutrix' abdomen while she walked backwards up the stairs and into her bedroom in accordance with his gestured directions. He then closed the door behind him and "held the gun with one hand while with the other he pointed at /her/ slacks and then he also pointed with his gun towards /her/ slacks". She was crying but did not scream because she was afraid "he may have shot" (R6-7, 10). With respect to what then ensued she testified:

> "I gave him to understand that I was menstruating at the time. In spite of that he continued to motion that I should take my slacks off. * * * Then he wanted that I should take my step-ins off also. * * * He stood with his bank against the door. * * * Then he put down his gun on top of the chest of drawers. He took his blouse, or jacket, off but he watched me all the time. I was crying. Then he took off his sweater and his helmet. Then he took his trousers off. Then he took a condom and pushed me with his hands on the bed. Then he laid himself on top of me" (R7).

He had sexual intercourse with her two times during 20 minutes. After the first time she "sat up and he was immediately ready for the second time" (R7,10). He kissed her but she did not kiss him back. She believed, but was not sure, that he had been drinking. During the act his gun remained on the chest of drawers, which was within about 20 inches or arm's reach of the bed. When he finished he got up and put on his clothing, and she put on her slacks. He pointed at a picture on the chest of drawers and gestured as though he wanted to know who it was. She said it was her husband. He then took two pictures of women from his pocket and showed them to her. Then he "put on his helmet and went backwards out of the room in a great hurry and hastened down the steps". He

did not make her a present of anything. She went downstairs crying and told her father what had happened. He had remained in the kitchen and "did not dare to leave the room". She also told the mayor when he passed her house about 10 minutes later (R7-8).

The pictures which accused showed Mrs. Lehnen in her room were subsequently taken from him and were identified by her before and at the trial, and introduced in evidence (R9,16, Pros.Ex.A).

Mrs. Lehnen's father corroborated her testimony regarding accused's entry into the house and testified that accused

> "held the gun pointed forward. He motioned to my daughter that she should go upstairs. I wanted to follow and also go upstairs. He waved me aside with his gun so I went back into the kitchen and closed the door" (R11).

The witness never went upstairs during the "good half hour" accused and his daughter were there. He heard no outcray, loud talking or crying, but Mrs. Lehnen was crying when she came downstairs and told him what had taken place (R12).

After being warned of his rights under Article of War 24 by a staff sergeant of the military police, accused on 7 March personally wrote and signed a statement, which was introduced in evidence without objection, as follows:

> "The boys that lived in the room with me had some whiskey. So I was pretty high when I left the house. I stumbled into this house and asked if there was a girl in the house. She pointed upstairs. I went with her upstairs and found this girl and laid her. I give her some cigarettes and then went back to my quarters" (R16-17, Pros. Ex.B).

4. Accused, after being warned of his rights as a witness, elected to testify under oath (R18). At about 9:00 am on 4 March he began drinking brandy and champagne, and after drinking a considerable amount he "just stumbled into" Mrs. Lehnen's home without knocking at about 11:00 am. He had his weapon on his back and did not point it at anybody while he was in the house. He saw an old man, and an old woman who motioned for him to go upstairs. He proceeded upstairs where he saw Mrs. Lehnen, for the first time, standing in a bedroom. He produced some cigarettes and made motions for her to pull off her clothes, which she did voluntarily and immediately, without any assistance from him. His gun was still on his back,

and he "stood it up" in a corner of the room where he could not have reached it from the bed. She did not cry or object and did nothing unusual while he was having intercourse with her. She kissed him and he kissed her. "She was whispering 'Goot' which means 'Good' in English". She was having her menstrual period. She accepted cigarettes from him and smoked one right after he finished. He was not too drunk to know what happened, and he "sobered up" about 2:00 pm. He did not remember showing her the pictures (R18-23).

5. In rebuttal, Mrs. Lehnen testified that accused did not offer her any cigarettes. There was no bleeding after either intercourse, but she had pains the following day. She had no physical examintion after the acts. She had made a statement that she did not care to prefer charges against accused because she thought he might be married and have children, and she did not want him sentenced to death (R23-24).

6. The testimony of both Mrs. Lehnen and accused establishes his carnal knowledge of her at the time and place alleged in the Specification of Charge I. The only question presented for determination is whether the act of intercourse was accomplished by force and without her consent under circumstances which constitute rape. The testimony of the prosecutrix and her aged father shows that accused entered her home, pointed his rifle at her, and motioned for her to go upstairs. About the same time he pointed his rifle at her father and indicated that he should remain downstairs. Mrs. Lehnen further testified that accused continued to point the rifle at her while she walked backwards upstairs and into her bedroom, and while she removed at least a portion of her clothing. After laying his gun down within reach, he pushed her on the bed with his hands and had intercourse with her. While no great amount of physical force was employed by accused, "the force involved in the act of penetration alone is sufficient where there is in fact no consent" (MCM, 1928, par.148b, p.165). The more serious difficulty arises when it is considered that the testimony of the prosecutrix indicates a total lack of actual physical resistance and a minimum amount of protestation on her part before and at the time of the act. At most it is shown that she was crying and that she gave him to understand that she was menstruating prior to his intercourse with her. It is well settled, however, that if a woman submits to intercourse and fails to resist, or ceases resistance, because of fear of death or other great harm, the consummated act is rape (CM ETO 3740, Sanders, et al; CM ETO 5870, Schexnyder; 1 Wharton's Criminal Law (12th Ed.1932), sec. 701, p.942). It is reasonable to assume that the unexpected entry of accused, without permission, into the home of Mrs. Lehnen would inspire in her more than an ordinary degree of fear or apprehension. He was an armed member of the conquering force, and had never seen her before. She was unable to understand his words or to make verbal protestations against his demands in any language which he could understand. For him, under these circumstances, of which he was fully aware, to point a gun at her while soliciting sexual intercourse was reasonably calculated to produce in her a reasonable fear of death or grievous bodily harm and to support the inference that he intended to use ultimate force if necessary to accomplish his purpose. She testified that she did not scream because

she was afraid he might shoot her. She was crying when she reported the incident to her father shortly after the act occurred, and she reported it to the mayor ten minutes later. Upon the showing made, the court was warranted in concluding that she was induced to refrain from resisting only by accused's clearly implied threat to shoot if she did, and that she submitted to his demands through no other reason than fear of her life or great bodily harm (see CM ETO 3933, Ferguson, et al).

Accused's testimony directly conflicts with that of Mrs. Lehnen as to whether she willingly consented to the intercourse, and the court might well have concluded that she did not take such measures to frustrate his design as were within her ability and did therefore in fact consent. However, since there is substantial evidence that she submitted through fear alone, the findings of the court can not be disturbed (CM ETO 10715, Goynes; CM ETO 10644, Clontz).

7. The charge sheet shows that accused is 24 years of age, and was inducted 1 December 1942 at Fort Jackson, South Carolina. No prior service is shown.

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

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of 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 Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Levy Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3

23 AUG 1945

CM ETO 10842

U N I T E D S T A T E S	)	5TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at St. Tonis, Germany, 22 March 1945.
Private WILLIAM H. RAMEY (39235651), Headquarters Company, 127th Ordnance Maintenance Battalion	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. 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 William H. Ramey, Headquarters Company, then Headquarters, 127th Ordnance Maintenance Battalion, Fifth Armored Division, did, at Walheim, Germany, on or about 12 December 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Paris, France, on or about 30 December 1944.

Specification 2: In that * * *, did at Paris, France, on or about 30 December, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 7 February 1945.

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

Specification: In that * * * in conjunction with First Lieutenant RICHARD H. SOHN, Headquarters Company, 127th Ordnance Maintenance Battalion, Fifth Armored Division, did, at Walheim, Germany, on or about 12 December 1944, wrongfully and willfully apply to his own use and benefit, a Government vehicle, to wit: a one-quarter ton Command and Reconnaissance Truck, United States Army Number 20357852, of a value of about One Thousand Dollars ($1,000.00), property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty. He was found guilty of Specification 1 and 2 of Charge I except the words "desert the service of the United States" and "absent in desertion", substituting therefor the words "absent himself without leave" and "absence without leave"; not guilty of the excepted words but guilty of the substituted words; not guilty of Charge I but guilty of violation of the 61st Article of War; guilty of Charge II and its Specification except the words "12 December 1944" substituting therefor the words "8 January 1945". No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for fifteen years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution:

On 12 December 1944, the commanding officer of the accused's organization, Headquarters Company, 127th Ordnance Maintenance Battalion, at Walheim, Germany, detailed the accused, whose duties were that of a quarter-ton motor vehicle (jeep) driver, "to drive an officer to Ondenval, Belgium" (R9). The officer was First Lieutenant Richard H. Sohn of the same company. The lieutenant's duty was to supervise the loading of some trucks at Ondenval and convoy them back to Walheim. The accused did not return until 7 February 1945. Accused was entered by the company commander on the organization's morning report for 16 December 1944 as "Dy to AWOL as of 12 December 1944, 1800" (R8, Pros.Ex.A), and for 13 February 1945 as "AWOL to abs. conf1709th M.P. Bn Stockade as of 1630, 7 Feb 45" (R8, Pros.Ex.A). Accused had no other authority than the above to be absent (R9). Accused was seen at Ondenval, Belgium, on the afternoon of 12 December 1944 driving the quarter ton truck for Lieutenant Sohn (R24-26).

When questioned upon his return in February, accused voluntarily related that he drove a quarter-ton truck to Ondenval for Lieutenant Sohn and then, upon being directed to do so by Sohn, he drove him to Verviers and thence to Luxembourg where they remained for two or three days. They started back boward the division the day the Germans started their push into Belgium, but ran into enemy fire at Bastogne and, taking the only road remaining open, returned to Luxembourg where they again remained for several days. He was then told by Lieutenant Sohn that they "had to go to Paris" so he drove the lieutenant to Paris arriving there about the 22nd or 23rd of December. There they remained until picked up by the military police on 7 February 1945 (R13-15). Previously, about 30 December 1944 they had been "picked up" by the military police and, at the military police headquarters in Paris, a two-hour order was given to Sohn to get out of town (R15). While in Paris, accused lived with some other enlisted men for a while and with some woman. Lieutenant Sohn gave accused a copy of written orders purporting to show their authority to be in Paris. He saw Sohn every few days. The officer told him when he wanted to see him and told him to park the vehicle at the transient parking lot and to take it out and renew the parking ticket regularly as there was a 48 hour parking limit there. Lieutenant Sohn - who was under the influence of liquor "a great deal of the time" - told accused on several occasions that they would soon return to their organization (R17-18). Although worried about being away accused learned for the first time that "we were AWOL" on or about 7 January 1945, when the lieutenant told him so(R19). The two were apprehended when they went to get the vehicle repaired in preparation for returning to their organization. When the vehicle was not in the parking lot he used it for driving around Paris sight-seeing. This was done with the authority of Lieutenant Sohn. He managed to live on money supplied him by Sohn and by "some girls" (R22).

There was introduced in evidence without objection a mimeographed form of an order by Headquarters Seine Section in which the accused, Lieutenant Sohn and others were ordered to report to their organization. The accused's signature appeared on the back of the order form (R9-10, Pros.Ex.B).

4. Evidence for the defense:

Lieutenant Richard H. Sohn testified that accused was under his command from 12 December 1944, when accused was assigned to him as his driver, until 7 February 1945. During that time he saw the accused at least once every day and ordered him to drive him to the various places that they went. It was not until 7 or 8 January that he told accused that he himself was not on official business in Paris but he also told him to stay with the witness "a couple of days" and they would return to the division. He provided accused with purported copies of orders authorizing their stay in Paris (R28-29). When, on 30 December 1944, the written order to return to their organization (Pros.Ex.B)

was handed to the witness, he instructed accused to return to his hotel telling him that he, the witness, would "take care of it in the morning". The next day he supplied the accused with the false orders purporting to authorize their stay in Paris. The accused believed that they were true orders (R30). He always gave accused authority to drive the motor vehicle, even for accused's personal sight-seeing trips around Paris (R30). "I kept him as my driver and gave him orders which would lead him to believe my orders were for official business" (R31).

Accused elected to testify and in his testimony he repeated in substance his pre-trial statement outlined in the preceding paragraph to the effect that he acted entirely under orders of Lieutenant Sohn (R33). He added that he did not surrender himself to the military authorities when he learned from Lieutenant Sohn that "we were AWOL" because, when he suggested that he turn himself in to the military police, the officer kept telling him that in a few days they would return to the organization (R38), and that it would be better "to stay there with him until he came back" (R34,41). With reference to the incident of 30 December, they were picked up during a check-up by "MP's" because they had no orders (R40). He did not use the vehicle for his own purposes at any time without first obtaining the authority of Lieutenant Sohn (R42). The lieutenant and a Sergeant Monicolico made out the trip ticket as his authorization to drive the jeep (R43). The sergeant acted under the direction of Lieutenant Sohn (R44).

5. Discussion: Upon the foregoing evidence the accused was found guilty (1) of being absent without leave on or about 12 December 1944 at Wilheim, Germany, until apprehended at Paris on 30 December 1944, (2) of being absent without leave on 30 December 1944 until apprehended 7 February 1945, and (3) of wrongfully and wilfully applying to his own use on or about 8 January 1945 a Quarter-ton command truck, U.S.A. NO. 20357852, of a value of $1000, property of the United States furnished and intended for the military service thereof.

In the opinion of the Board of Review the record of trial does not legally support the findings of guilty of (1) and (3). Accused's company commander authorized him to be absent from his organization and to drive the motor vehicle supplied him. He was detailed to drive the vehicle under the directions of Lieutenant Sohn, one of the officers of the same organization. There was no evidence that accused had any knowledge of the purpose of the lieutenant's trip to Ondenval, or of its duration, or of any limitation on Sohn's authority, or if or when accused was to return to the organization. It clearly appears from the record that he was detailed as a driver for Lieutenant Sohn and therefore, after leaving the organization, was under his command. It would be unjust and unreasonable to expect a private under such circumstances to question the authority of his commanding superior officer, to whom he had been detailed for duty as a driver. Accused's explanation of his absence was put in evidence by the prosecution. It was not improbable, nor was it contradicted. It cannot be ignored by the court (CM ETO 7397, De Carlo).

From the date of his departure from Walheim, Germany until the officer informed him that their absence was unauthorized, accused acted under the directions and orders of Lieutenant Sohn. His continuing absence and the use that he made of the motor vehicle from 12 December 1944 until 8 January 1945 was not contrary to the orders originally given him by his company commander. During that period of time it appears without contradiction that he was under the direction of his superior officer, without knowledge of any lack of or limitation on the latter's authority as exercised, to utilize accused's services or the vehicle assigned to him.

The court's finding that accused was absent without leave from 12 December 1944 until 30 December 1944 under Specification 1 of Charge I cannot therefore be legally supported on the evidence. It is apparent from the court's findings with reference to Charge II and its Specification - that the offense of wrongfully applying the motor vehicle to his own use occurred on 8 January 1945 instead of 12 December 1944 - that it recognized as valid the apparent authority of Lieutenant Sohn over the accused in the interim.

The fact that accused and the lieutenant were "picked up" by military police during a check up, for failure to have with them copies of their orders, was not sufficient evidence to put the accused on notice that Lieutenant Sohn was absent without leave from his organization. Whatever question was raised in the accused's mind was immediately dispelled by Sohn's action in ordering him to remain in Paris and by supplying him with what appeared to be authentic orders authorizing them to be there. It was not until the 7th or 8th of January that accused definitely learned that the lieutenant was absent from his organization without authority and therefore had no authority to keep him away from their organization. From that time until he was apprehended on 7 February 1945, accused was admittedly conscious of being absent without leave from his organization. This period of time is covered by Specification 2 of Charge I. The evidence is therefore legally sufficient to sustain a finding of guilty of an absence without leave limited to this period of time. In defense accused contended that even during that period of time he was justified in remaining away because he was continually told by Sohn to remain with him and that they would return to their organization in a few days. True, the accused was in a sifficult situation. His only excuse for being absent and for operating the vehicle was Sohn's authority. If he turned himself in and thereby antagonized Sohn, the latter might fail to protect him. If he did not turn himself in he knowingly remained absent with proper authority and took his chances. He elected to follow the latter course. He was therefore clearly guilty of being absent without leave from 8 January to 7 February 1945. His predicament should however be considered in mitigation.

The specification, Charge II, alleges wrongful misapplication of a government vehicle at Walheim, Germany, on 12 December 1944. By

exception and substitution the court found accused guilty of wrongful misapplication of such vehicle at Walheim, Germany, on 8 January 1945. The uncontradicted evidence shows that both accused and the vehicle were continuously in Paris, France, from about 23 December 1944 until about 7 February 1945. The court obviously undertood, by its finding of guilty of the specification as amended to convict accused of misapplying the vehicle at Paris rather than at Walheim, and, through inadvertance, omitted to further amend the specification by substituting Paris for Walheim as the place of the commission of the alleged offense. But the offense of which accused was thus found guilty is distinct from the offense alleged, committed at a substantially different place and a substantially different time from that to which he entered his plea. There is no such similarity as is to be cured by the action of the reviewing authority or Article of War 37 (CM 130973 (1919) Dig. Op. JAG, 1912-1940, sec.433 (4), p.305). The conviction cannot be supported.

6. The charge sheet shows that the accused is 33 years four months of age and was inducted 10 April 1942 at Los Angeles, California. He had no prior service.

7. The court was legally constituted and had jurisdiction over the accused and the offense. Except as above noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Specification 1 of Charge I, and Charge II and its Specification, but is legally sufficient to support the findings of guilty of Charge I, so much of the findings of guilty of its Specification 2 as finds the accused guilty of being absent without leave from his organization from on or about 8 January to 7 February 1945, and the sentence.

8. 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).

R. C. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Levy Jr. Judge Advocate

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

11 AUG 1945

CM ETO 10857

U N I T E D S T A T E S	)	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Privates MELVIN WELCH (38188299) and JOHN H. DOLLAR (38108979), both of Battery D, 537th Anti-Aircraft Artillery Automatic Weapons Battalion	)	Trial by GCM, convened at Caen, France, 26 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Melvin Welch and Private John H. Dollar, both of Battery D, 537th Anti-Aircraft Artillery Automatic Weapons Battalion, acting jointly, and in pursuance of a common intent, did, at or near La Cochere, Orne, France, on or about 24 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Georgette Aucher.

(Confidential)

10857

Each pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification. As to Welch, evidence was introduced of one previous conviction by summary court for absence without leave of six days; as to Dollar, no evidence of previous convictions was introduced. Three-fourths of the members 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 or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of "your" natural life. As to each, the reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

At La Cochere, Orne, France, between 2100 and 2200 hours 24 August 1944, the two accused rode horses to the home of Madame Germaine Debeurre, entered, demanded drinks, and were given cider of which they drank very little. They were drunk, especially Dollar. In addition to Madame Debeurre, there were present her children, her husband, and a refugee woman. The refugee departed when one of accused indicated he wanted to sleep with her. Dollar played with the children putting "his hands around the leg of one" whereupon the children began to cry. Three American soldiers then came and took accused away. In all, accused were at the Debeurre home, which was distant some 300 yards from Madame Georgette Aucher's home, for about an hour (R6-11).

About 2230 hours the same day, accused came to the home of Emile and Georgette Aucher, husband and wife, 49 and 45 years of age respectively (R27,39), rapped on the door and, upon admission, were given food and drink (R12-13,33-34). They were drunk, especially Dollar (R13,28-29,39). After they had emptied a bottle of cider, the prosecutrix went to the cellar for another (R12-13,33-34). Upon her return, she saw accused guarding her husband with a luger or revolver. One of them locked the kitchen door and Welch asked her to go into the bedroom with him (R13-14). She refused (R15) whereupon he pointed a pistol at her and took her there (R31,34). Dollar remained guarding the husband with a knife (R34-35,41-42).

In the bedroom, according to the prosecutrix, Welch threw her on the bed (R15). "He was making a great noise and he say to me to do mother and father with him, and I say no, and he use his arms to beat me. * * * on the face and on my legs" (R18). "He was beating me because I was crying and I did not agree to do what he wants" (R29).

"He was on me and I was obliged to stay under, he was stronger then me" (R21). "I was unable to defend myself" (R16). "He raped me" (R15). She further testified to Welch's tearing her clothing (R20-21), opening his trousers (R19), and placing, without her consent, his penis in her private parts (R22). Welch was with her for about an hour (R16,18,22,35). During this time the husband heard her scream and cry loudly asking help. He had remained in the kitchen with Dollar who had a knife on the table (R34-35,41-42).

Upon leaving the prosecutrix's bedroom, Welch returned to the kitchen and, at the point of a revolver, took the husband to the cellar to look for cider (R36-37). Dollar went to the prosecutrix in the bedroom (R15,22-23,36-37). There Dollar "threw me on the bed too, and he enter my body but he was so drunk, that he did not stay a long time in the bed room" - 15 minutes. "He tried - just a little - he tried" to place his penis in her private parts. His penis was not hard for he was too drunk. There was some penetration, how much she did not know for she was too much afraid. She did not consent. She "was obliged to resist, but just a little, because I was afraid that they kill my husband" (R15,22-24). When the husband and Welch returned from the cellar, Dollar came out of the bedroom (R37) whereupon Welch again went to the prosecutrix in the bedroom (R24,37). Dollar remained in the kitchen with a revolver which he pointed at the husband (R38,41). In the bedroom, Welch

> "throw me again on the bed, and asked me to take out all my clothes, what I did not want to do, and himself he take out his clothes and seeing that I did not want to take out all my clothes, he tore my blouse, and my trousers" (R24) "and he used me like the first time, * * * He did the work he wants to do on me" (R25). "I was obliged [to consent], and I was not able to defend myself. * * * I call for help but we have no neighbors" (R26) [nearer than] "about 300 yards" (R29).

His penis entered her private parts (R26). He remained with her for about an hour. During this time Dollar remained with the husband and fired twice through the window. Though the husband heard no struggle or fight, he heard his wife crying (R23,24,38,40).

Still drunk (R40) accused departed about 0120 (R27,39). The prosecutrix next saw accused "the day after" when an American doctor came to her home (R27).

4. After his rights as a witness were explained, each accused elected to make an unsworn statement through counsel (R42-43).

Welch landed in France on "'D' plus five". On 18 September 1944, with 96 days in combat, he was taken out of the line and placed in the guardhouse. On 26 August 1944 he made a statement to an investigating officer wherein he denied the charges and stated that on 24 August 1944 he went riding on a captured horse with Dollar, drank a quart of cognac and ran into some men from the 90th Division from whom he procured another quart of cognac, the most of which he drank, and that thereafter he only remembered trying to find his way back to the battery (R43).

Dollar landed in France on "'D' plus six". On 18 September 1944, with 95 days in combat, he was taken out of the line and placed in the guardhouse. On 26 August 1944 he made a statement to an investigating officer wherein he denied the charges and stated that on 24 August 1944 he went riding on captured horses with Welch, got lost several times but finally returned to the battery about 0100 hours. He had two or three drinks before leaving but nothing during the ride. In April 1942 he had one testicle removed. Since then he had never had intercourse or an erection (R44).

5. The record of trial supports the findings of guilty (CM ETO 1202, Ramsey and Edwards; CM ETO 3859, Watson et al; CM ETO 9083, Berger et al). The drunken condition of the accused did not constitute an excuse (MCM, 1928, par.126a, p.136). In rape no wrongful intent is required other than that inferable from the act itself (Winthrop's Military Law and Precedents (Reprint, 1920) p.293). The proof of penetration by Dollar is none too convincing, particularly when considered in the light of his unsworn statement that since April 1942, when he had a testicle removed, he had had neither an erection nor intercourse. The possibility that only Welch actually accomplished penetration is immaterial. It is abundantly evident that they aided and abetted each other and that Welch accomplished penetration.

> "One who aids and abets the commission of rape by another person is chargeable as principal whether or not the aider or abettor engages in sexual intercourse with the victim"(CM ETO 3859, Watson).

6. The charge sheets show that Welch and Dollar are, respectively, 29 years one month and 31 years three months of age, and were inducted, respectively, on 20 July and 16 September 1942. No prior service was shown.

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

rights of accused were committed during the trial. The Board of Review is of the opinion the record of trial is legally sufficient to support the findings of guilty and 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 United States Penitentary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec.II, par.1b(4), 3b).

B A Cooper Judge Advocate

(ON LEAVE) Judge Advocate

B N Mewey 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 10860

22 JUN 1945

U N I T E D S T A T E S	9TH BOMBARDMENT DIVISION (A)
v.	Trial by GCM, convened at Paris, France, 15, 16, 17, 18 January 1945. Sentence as to each accused: To be hanged by the neck until dead.
Technician Fifth Grade ANDREW J. SMITH (33408302) and Private HERMAN J. TOLL (35303512), both of 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group	

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

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

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

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

Specification: In that Technician Fifth Grade Andrew J. Smith, 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group, and Private Herman J. Toll, 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group, acting jointly, and in

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pursuance of a common intent, did, at Chartres, Eure et Loir, France, on Highway N-188, on or about 10 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal William Nunn, Jr., a human being by shooting him with a carbine.

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

Specification: In that * * * acting jointly, and in pursuance of a common intent, did, at Chartres, Eure et Loir, France, on Highway N-188, on or about 10 October 1944, with intent to commit a felony, to-wit: murder, commit an assault on Sergeant Mitchel Harrison by willfully and feloniously shooting him in the shoulder with a carbine.

Each accused pleaded not guilty and, all of the members of the court present at the times the votes were taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced against Smith. Evidence was introduced of one previous conviction against Toll by summary court for wrongfully being with a female person in an Army barracks in violation of Article of War 96. All of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority, the Commanding General, 9th Bombardment Division (M), approved only so much of each sentence as provided that accused be hanged by the neck until dead, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed each sentence, as approved and modified, and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. The testimony for the prosecution was in substance as follows:

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At about 2145 hours on the night of 10 October 1944, five American soldiers were walking along the left side of a road about a mile east of Chartres, France, returning from there to their station. A command and reconnaisance car approached them from the opposite direction (R15-19, 29). As it slowed and passed at a speed of 10 to 20 miles an hour, a soldier wearing a garrison (overseas) cap leaned out of the right front and asked them if they had seen "any black bastards" (R16,17,28-32). A few seconds later the soldiers heard several shots close behind them. As they took cover in the ditch, one of them looked back and saw a man fall. He was across the road and 50 yards away, clearly visible in the lights of the car (R16,41). The motor of the vehicle increased its speed and it continued west towards Chartres until at some distance it made a sharp left turn to the south (R16). The only unusual thing they noticed about the car was that it had side curtains in the back but not in front (R40,41). There were no other vehicles on the road at the time (R20).

Where the falling man was seen, the soldiers found Corporal William Nunn, Jr., wounded in the abdomen and thigh, and Sergeant Mitchel Harrison with a gunshot wound in the arm (R28,175). Both were negroes. Nunn was taken to the hospital where he died the next day from these injuries, which were of such size as would be inflicted by .30 caliber bullets (R173). Harrison was sent to a nearby dispensary. There he saw Walls, a member of his company, and told him that he and his companion had been shot from a command car (R66,82). Walls went immediately to the adjacent company bivouac at AAF Station A-40, north of Highway N-188, to report the matter and informed some of the men in the company gathered around a fire of the shooting and of what Harrison had told him (R78,79,100).

That night soon after the shooting three .30 caliber carbine shell cases were found in the middle of the road at the scene, and another the next morning at the side of the road (R51-58). Possession of these was traced and accounted for until the time of trial.

Soon after 2215 hours that night, the two accused drove up to the above mentioned fireside (a fire which

used gasoline for fuel) in a command car which had side curtains only in the rear (R86,94,106). Accused Smith wore a garrison cap, despite existing orders to wear helmets (R17,100). He and accused Toll had left Cambrai, France, earlier in the day in this vehicle under orders to proceed to their station at the 91st Depot Group at AAF Station A-40 (R10-14,183). The scene of the shooting was on their authorized route, but to reach either the 91st Depot Group area or the fireside directly, a right and north turn off Highway N-188 through a military police gate should have been made (R14,47; Pros.Ex.33). They could, however, have reached the fireside circuitously in about fifteen minutes by turning left, doubling back, and recrossing the highway along a dirt road (R119,120; Pros.Ex.33). No command car entered the aforesaid gate between the hours of 2130 and 2200 (R46).

The soldiers at the fire, having already heard of the shooting from Walls, were suspicious of the accused who asked directions and a cigarette (R107,110). They inspected the command car, and finding a carbine on the front seat with Smith's name burned on it, which had a shell in the chamber and smelled of recent firing, inquired how long since it had been fired. Smith replied, "about fifteen minutes ago" (R87-92,103,141). Accused were then detained. Both appeared to be under the influence of liquor, Smith more than Toll, but neither was drunk (R96,97,105,110). The provost marshal, a captain, was located and he and other officers were of the opinion, because of the odor and the condition of the bore, that Smith's rifle "had been just fired" (R91,116,133). When the captain made a statement to that effect at about 2230 hours in Smith's presence, Smith said he had fired it about an hour or two before at some "blackbirds" along the road from Paris (R115,116,121). In the car was also a bottle of liquor and on the back seat another carbine which had not been fired (R92,103,104,133). Company records showed that the rifle with Smith's name on it had been issued to him and the other to Toll (R13,14).

Between 0330 and 0400 hours the next morning, Smith after being warned of his rights, admitted to an agent of the Criminal Investigation Division that he had fired at some negro soldiers while riding in a command car the preceding evening. He stated that Toll was driving at the time (R152,167). He requested to see his company commander before reducing the statement to writing, and the next morning was taken before him.

The agent told the officer of Smith's admissions and he advised accused not to sign a statement. Accused thereafter refused to make any written statement (R152). Toll made no statement.

Three ballistics experts testified that the shell casings found at the scene were without doubt fired from Smith's and not Toll's gun (R190-230). It was the opinion of one that any man who had handled a gun could tell by the smell whether it had recently been fired (R231).

4. The defense introduced testimony to show only: that spent shell cases when ejected by firing usually fly to the right and back of a weapon; determination by scent of how recently a weapon has been fired is not a good test; the company commander merely advised accused of his rights under the Articles of War, and he did not remember being told by the CID agent that accused had made any admissions (R184,185,228).

Each accused, after his rights as a witness were fully explained to him, elected to remain silent (R237).

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 the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

Assault with intent to commit murder is an assault aggravated by the concurrence of a specific intent to murder. It is an attempt to murder and must consist of an overt act beyond mere preparation or threats (MCM, 1928, par.149l, pp.178-179). The malice above discussed is an essential element of the offense and where accused would be guilty of murder had death

of the victim of the assault ensued, his guilt of assault with intent to murder is an automatic legal sequence (CM ETO 2899, Reeves, and authorities therein cited; CM ETO 78, Watts).

Direct and circumstantial evidence in a chain excluding every reasonable hypothesis except that of guilt, proved the commission of these crimes by Smith. He wore a garrison cap, which was unusual, and he rode in a command car without curtains in front. He was present nearby within a few moments, and in possession of his carbine. Shell cases on the road came from his gun, which had been recently fired. The wounds were made by .30 caliber bullets. He admitted: first, that the rifle had been fired fifteen minutes before; later, that he had fired at some "blackbirds" along the road; and finally before dawn according to the CID agent, that he had shot at some negroes while Toll was driving. The conclusion is inescapable that it was by his hand that death and bodily injury resulted, and the court was justified in so finding (MCM, 1928, par.78a, p.63; CM ETO 3200, Price; CM ETO 2686, Brinson and Smith; CM ETO 3837, Smith; CM ETO 7702, Shropshire). Malice, presumed from the use of the weapon and unexplained, is also abundantly shown by his query as to "black bastards" which a simple computation reveals to have been made only five or ten seconds before the shooting.

6. The evidence will not support the theory that Toll fired the fatal shots. Since he was ordered to leave Cambrai that day with Smith in the command car, since the shooting occurred on the route, and since he was in the car with Smith shortly thereafter, in possession of his own gun, the court was justified in inferring that he was present at the time the shots were fired. Besides presence, the only evidence that he may have been the killer was the testimony of one witness that the taller of the two white men at the fireside "said he last fired it [Smith's carbine] fifteen minutes ago" (R103). Aside from the fact that other witnesses said Smith made this statement (R89,90,103,111), it must be recognized that if made by Toll, who is the taller, it is subject to the construction that Toll referred to

firing by Smith who was then present, and the words "he fired" are a direct quotation. The damning admissions by Smith of firing at "blackbirds" and at negroes along a road while Toll drove, are absent. Furthermore, the man wearing the garrison cap inquired as to "black bastards", and Smith's gun fired the shots. The law is not so lax as to hold that such fragmentary circumstantial evidence will support conviction of Toll as the person who shot these victims. The circumstances are equally consistent with his not having done so (CM ETO 7867, Westfield; People v. Razezicz (1912), 206 N.Y. 49, 99 N.E. 557; Buntain v. State, 15 Tex. Crim. App. 490).

7. The legality of the conviction of Toll depends on whether he aided and abetted Smith, and is therefore liable as a principal (sec.332, Federal Criminal Code (18 USCA 550); CM ETO 1453, Fowler; CM ETO 3740, Sanders et al; CM ETO 5068, Rape and Holthus). To test the legal sufficiency of the evidence on this point, his acts prior to, and at the time of, the firing of the fatal shots will be examined. His subsequent acts, unless material to show preconcert of action with the principal, affect only his liability, if any, as an accessory after the fact. Thus in Bishop on Criminal Law (9th Ed.), section 692, it is stated:

> "In reason * * * one who renders this [subsequent] assistance, thus adding his will to an evil thing after another has done it, does not thereby become a partaker in the guilt because only when an act and evil intent concur in time, is a crime committed".

In a stabbing case, with respect to an accused aider and abettor, it was held:

> "What he said [and did] after the fatal wound was given must also be excluded, because it could not encourage, aid, or abet Matthews [the principal] to give it * * *" (State v. Matthews (1878), 78 N.C. 523).

To the same effect is the following excerpt from an annotation in 12 American Law Reports 275 at page 286:

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> "In Walker v. State (1891) 29 Tex. App. 621, 16 S. W. 548, where deceased jostled a drunken man whom defendant was escorting home at night, and the drunken man immediately shot him, it was held that if the defendant, immediately on hearing the pistol, knocked the deceased down, that did not make him a principal offender".

If, in this case, Toll helped Smith to escape, that would not make him an aider and abettor and a principal. As put by Mr. Justice Cardozo: "If all he did was to help the murderer to escape, he was not a principal, but an accessory /after the fact/ * * *" (People v. Galbo (1916), 218 N.Y. 283, 112 N.E. 1041, 2 A.L.R. 1220,1226).

The offense of aiding and abetting as a principal is separate and distinct from that of an accessory after the fact (IV Blackstone, Commentaries, p.40). The Federal Statute making aiders and abettors liable as principals, did not abolish the distinction between such offenders and accessories after the fact (United States v. Johnson (C.C.A. 7th 1941) 123 F (2nd) 111, rev. on other grounds, 319 U.S. 503, 87 L.Ed. 1546; Morei v. United States (C.C.A. 6th 1942) 127 F (2nd) 827; sec.332 Fed. Crim. Code (18 USCA 550)). "An accessory after the fact cannot be convicted on an indictment charging him as principal" (1 Wharton's Criminal Law (12th Ed., 1932), sec.285, p.373), for the offense is not lesser included (People v. Galbo, supra). It must be concluded therefore that if Toll be liable for his acts subsequent to the fatal shots, as an accessory after the fact (which is extremely doubtful on the evidence adduced), such offense is not alleged and will not be considered here. It may be noted in passing that the maximum penalty for an accessory after the fact where the principal receives death, is dishonorable discharge, total forfeitures and confinement for ten years (sec.333, Fed.Crim.Code (18 USCA 551)).

8. The issue as to Toll's conviction is therefore resolved into whether his prior and concurrent acts aided and abetted Smith, and the nature of this case is such and the points so novel that careful and exact analysis of the elements of this offense is requisite. The formula of the statute, "aids, abets, counsels, commands, induces, or procures" (sec.332, Fed.Crim. Code (18 USCA 550)), is,

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as Judge Learned Hand has observed, not new but old, and one whose puzzles Bracton, Coke, Hale and Blackstone have pondered before us (United States v. Peoni (C.C.A. 2nd 1938), 100 F (2nd) 401). As will appear from the authorities hereinbelow, the necessary elements are:

a. Preconcert of action or prior arrangement with the principal actor, plus presence at the crime; or

b. Overt act aiding or encouraging the crime done with intent to aid or encourage.

No definition is satisfactory, but Halsbury's is perhaps the best:

> "mere presence at the crime is not enough; there must be a common purpose and intent to aid or encourage the persons who commit the crime, and an actual aiding or encouraging" (Halsbury's Laws of England, Vol.9, sec.528, underscoring supplied).

It is a legitimate inference that Toll was present in the car which the evidence shows to have slowed as the malignant remark was passed, from which shots were fired five or ten second later, and which then picked up speed and turned off the direct route. The record is silent as to how the the vehicle reached the fireside, but the court could reasonably infer that it was done circuitously, or by delay off the route until after 2200 hours and entry through the regular gate. The court was also perhaps justified in inferring that Toll was driving although there is no direct and positive evidence that there was anyone else than Smith on the front seat (R23,24,30,32,150, 156). It is undisputed that at the time of the offense the accused were on a lawful mission in a place where they had a right, and were ordered, to be.

Nevertheless if Toll were present and driving, whether the car was slowed by him upon hearing an apparently innocent request by Smith, or with knowledge of intended murder, and whether thereafter he speeded up the motor to save the negroes from receiving further fire, or through fear of a murderer, or under threat of a gun, or to avoid retaliatory fire from the negroes, or willingly to aid escape, and made his left turn through

a like motive, are matters of conjecture. A trial court cannot ramble about in the field of suspicion but is bound by the stubborn common law presumption of innocence to choose from equally plausible inferences those favorable to the accused.

> "If the circumstances make one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion which would mitigate his guilt" (People v. Galbo, supra, citing People v. Lamb (N.Y. Ct. of App.) 2 Abb.Pr. N.S. 148).

> "All that we should require of circumstantial evidence is that there shall be positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn those facts" (People v. Harris, 136 N.Y. 423, 429, 33 N.E. 65,67) (Underscoring supplied)

Separate and apart from the above, if the inference be drawn that Toll increased the speed of the car to assist Smith to escape, such inference must rest upon a prior duplex inference that (1) Toll was actually in the car and (2) that Toll actually drove the car. Under the doctrine of People v. Razezicz, supra, the ultimate inculpatory inference is too remote to be of any probative value.

On the above facts, considering the proven actions of Toll before and after the shooting, the Board of Review is of the opinion that the evidence is insufficient as a matter of law to show preconcert of action by him. The case of Hicks v. United States, 150 U.S. 442, 14 S. Ct. 144, 37 L.Ed. 1137 (1893), is in point, and the rule thereof according to the citator has never been modified. Hicks and Rowe were drinking. Hicks threatened the deceased in Rowe's absence. As they joined Rowe there was some conversation not overheard. Rowe twice raised his rifle and aimed at deceased, and as he did so, Hicks laughed, removed his hat, and told deceased: "Take off your hat and die like a man". Rowe raised his rifle a third time and shot and killed deceased. Rowe and Hicks rode off together. The court held:

> "The evidence * * * shows no facts from which the jury could have properly found that the encounter was the result of any previous conspiracy or arrangement. * * * There was no substantial evidence of any conspiracy or prior arrangement between him and Rowe".

The case was reversed and remanded for trial on the issue of whether Rowe committed an intentional overt act of aiding or encouraging. The leading case of People v. Galbo, quoted hereinabove, held that the subsequent possession and disposal of the body of the victim was not sufficient evidence of prior arrangement or participation in murder, where the deceased was a strong man who died after a fierce struggle and accused a legless cripple.

Since preconcerted action cannot be said to be proven in this case, guilt will not be inferred merely from accused's presence (16 CJ, sec.121, p.132; 14 Am. Jur., sec.89, p.829); CM ETO 804, Ogletree, et al) although such guilt would be inferred from his presence if preconcert of action were shown such as in the case where the accused with knowledge accompanied the murderer upon his unlawful mission of robbery and was in position to warn or assist (CM ETO 1453, Fowler, III Bull. JAG 285).

9. In the absence of a showing of a prior plan or conspiracy, other circumstances amounting to an overt act of aiding and encouraging the crime, must have been proved if Toll's conviction is to be sustained (United States v. Hicks, supra; State v. Cione (1920), 293 Ill. 321, 127 N.E. 646, 12 A.L.R. 267). The Cione case is an example of such "other circumstances": the accused joined in the crime by helping bury the victim alive, thereby hastening his death from a mortal blow.

To show intent to aid Smith, knowledge of Toll that a felony was about to be committed, must have been proven. Thus a driver of a car on a mission to purchase narcotics cannot be convicted of aiding and abetting unless he knew what the purchaser intended (Morei v. United States (C.C.A. 6th 1943), 127 F (2nd) 827). It must also have been proven that he consented to or at least acquiesced in the crime. An owner of land who knew an illegal still was operated on his land was not legally convicted of aiding and abetting in its operation where the proof did not show his consent (Bovette v. United States (C.C.A. 5th 1931), 48 F (2nd) 482). The Board of Review is

of the opinion that proof of the statement by Smith concerning "black bastards" five or ten seconds before the shooting is insufficient to prove Toll had knowledge Smith would commit a felony and that Toll intended to aid him therein (CM ETO 4294, Davis and Potts; Renner v. State, 43 Tex. Crim. Rep. 347, 65 SW 1102 (1901)).

The only overt acts shown, prior to the shooting, which might be those of Toll, are the slowing down of the car at the time of the statement, and its continuance along a lawful mission. The Board of Review is likewise of the opinion that there is no substantial evidence that Toll committed any overt act to aid Smith in assault and murder.

Toll's case, as shown by the evidence, is clearly one of those where another has suddenly and unexpectedly committed murder in his presence without his intended help, well illustrated by the following extract from the Annotation, 12 American Law Report 275, page 277:

> "In Burrell v. State (1857) 18 Tex. 713, where the deceased was killed while riding with two men who had joined him shortly before, the court said as to the nonkilling defendant: 'It was of vital importance to the defendant Burns that the jury should be given to understand that unless satisfied that he was cognizant of the intention of his companion, and in that sense privy to the killing--that is, privately knowing (which is evidently the sense in which the term privy is used in the instruction),-- it would be their duty to acquit him * * *" (Underscoring supplied).

(See also: People v. Leith (1877) 52 Cal. 251; Waybright v. State (1877) 56 Ind. 122; State v. Rector (1894) 126 Mo. 328, 23 SW 1074; Walker v. State (1891); 29 Tex. Cr. App. 621, 16 SW 548).

It is the conclusion of the Board of Review that the circumstances of the case do not exclude every reasonable hypothesis except guilt, but are instead as consistent with lack of guilt. Reason and not suspicion are required to overcome the presumption of innocence, and the law will not forfeit the life of Toll upon the weak chain of circum-

stances in this case. The evidence is therefore legally insufficient to sustain the conviction of Toll, either of the murder of Nunn or the assault upon Harrison with intent to commit murder. Both crimes have the same factual incidents.

10. The charge sheets show the following with respect to accused:

Smith is 27 years three months of age, and was inducted 22 December 1942 at Erie, Pennsylvania. Toll is 32 years five months of age, and was inducted 22 April 1942 at Cleveland, Ohio. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

11. The court was legally constituted and had jurisdiction of the persons and offenses. No errors (except as noted herein) 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 Smith, but, for the reasons stated, legally insufficient to support the findings of guilty and the sentence as to accused Toll.

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

_____ Judge Advocate

_____ Judge Advocate

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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 Technician Fifth Grade ANDREW J. SMITH (33408302) and Private HERMAN J. TOLL (35303512), both of 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot 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 as to accused Smith, and legally insufficient to support the findings of guilty and the sentence as to accused Toll. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as to accused Smith.

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 10860. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10860).

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

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

(As accused TOLL findings and sentence vacated. GCMO 241, ETO, 3 July 1945).

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

BOARD OF REVIEW NO. 2

15 JUL 1945

CM ETO 10863

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIAM H. JOHNSON (35207233), 3413th Quartermaster Truck Company.	Trial by GCM, convened at Le Mans, Sarthe, France, 23 December 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William H. Johnson, 3413th Quartermaster Truck Company, did, at or near the Village De Madelin, Asse Le Boisne, on or about 29th August 1944, forcibly and feloniously, against her will, have carnal knowledge of Augustine Collet.

He pleaded not guilty and, all members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was intreduced of two previous convictions by special court-martial for absence without leave for 16 days and two days respectively, each in violation of Article of War 61. All

the members of the court present when the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Brittany Base Section, Communications Zone, European Theater of Operations, approved the sentence, recommended because of the extraordinary circumstances shown and in deference to the victim's plea for clemency, that the penalty be commuted to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for twenty year, 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 this case and the recommendation of the convening authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Madame Augustine Collet, a forty-six year old (R8) housewife of the village of Madelin, Asse Le Boisne, France (R6), testified that she was sitting at a table by the door of her home taking strings out of beans about seven o'clock in the evening of 29 August 1944 when a colored American soldier came up to her, said something she didn't understand and then "he laid his hand on my knee and up to my private parts", over her clothing. By his gestures she understood what he meant (R7) and tried to get out the door and the "fight started". He held her mouth as well as that of her 20 month old baby whom she held in her arms. Accused then got his gun and put the muzzle to her breast, during which time she was shouting and the baby was crying. Accused struck her on the forehead with his fist knocking her against an iron bed by the door and bruising her leg (R8). There was another bed at the end of the room. Her 14 year old son Daniel came in and accused locked the door. She put some food on the table but accused would have none of it but motioned to her and pushed her with his gun to the bed at the end of the room after first giving the baby to the boy, and being afraid of the gun, she lay down, accused got on top of her and put his penis in her private parts (R9,10), completing the act.

He then motioned the woman and her two sons into a little cellar of the house, shut and locked the cellar door and left the house. Accused wore olive drab trousers and shirt (R11,17). He had no raincoat. He had his gun and a knife about 18 inches long which he took out of the sheath to threaten them (R11,21,23). He also had a bracelet (R11). After perhaps ten minutes, a neighbor

released them from the cellar (R12,28), and she went to the village for help but was directed to go to the camp. Her husband had been working during this time but she met him on the way and he went to the camp and with a sergeant returned to bring her in the car to identify the soldier (R12).

She got in the rear of the car which stopped by the camp and the men came around the car to see what was happening (R13). Among them she recognized the soldier and said, "Here he is, don't look for him". He was "just by the truck". She knew him by his face and his bracelet (R14,17.19,20). It was about two hours after he had been at the house (R20) and it was getting dark. She identified accused who was the only colored person in the courtroom as the man who was at her house on the 29th (R15). She described the bracelet as yellow, rather shiny with round links. He had touched her on the left shoulder with his knife which he had at his side (R16). He had his gun in his left hand (R17) when they were on the bed (R16). No other American soldiers were at her house that day (R17).

Daniel Collet, the 14½ year old son of Madame Collet (R20), corroborated his mother's story from the time he came into the house. He said the soldier "caught her arm and dragged her suddenly to the bed", (R22) and "she tried to free herself but could not. She was exhausted" (R23). He identified accused as the soldier in question (R24).

Technical Sergeant James K. Ralph, 3988th Quartermaster Truck Company, testified that on 29 August (1944) in the evening two men, civilians, came to the motor pool to see the captain who was not then around. He could not understand the men and so took them in a car to their house where they found the wife of one of them in the yard. After getting an interpreter they found what it was all about (R34) and took the two men and the woman in the car back to the area to have a formation to see if the woman could pick the man out. As they reached the camp gate a "strange" man standing there started down the road. They drove past him, stopped, called him over to the vehicle and asked the woman "if she identified the man and she says 'yes'" (R35-36). The woman told them to look at his left arm and on pulling up his sleeve they found a brass bracelet. At this time there were the accused and two other men on the ground (R35,37), the interpreter, the woman and the two civilian men in the vehicle (R35). Sergeant Ralph identified accused as the soldier so identified by the woman (R36).

Agent Jack H. Cohen, 10th "C.I.D., * * * U. S. Army" (R38) testified that about 11:00 o'clock on the night of 29 August he was given the information already secured and was requested to interview accused. He identified the bracelet worn that night by accused (Pros.Ex.2) admitted in evidence. It was also identified to him by Madame Collet (R39). No statement was secured from accused the night of 29 August but at their third interview on the afternoon of 31 August, a statement (Pros.Ex.1) was secured after accused had been duly advised of his rights. Accused stated that "he wanted to clear his conscience" and after the statement was read back to him (R41) he signed and swore to it (R42).

Agent Robert H. Wilbur, 10th "C.I.D., * * * U. S. Army" testified to substantially the same facts. He was with Agent Cohen when the statement was secured (R44-50). The statement (Pros.Ex.1) was admitted in evidence (R53) and reads as follows:

> "About 17:30 hrs on the 29th August 1944 I left the intersection where I was stationed as convoy guide for my organization. This intersection is GC 4 and G.C 9. I walked down a lane off the main road running into Assé. I went into a farm house yard and then saw a door to the house which was ajar and I pushed the door open and asked the lady for some water she gave me the water I drank it then I grabbed her by the arm and told her to get to the bed which was right in the kitchen. I pointed my carbine at her in order to make her get on the bed. At that time a boy walked in the house. I ordered him to sit down and again I used my carbine to make him comply. I then went over to the bed and placed my carbine at the side of the bed. I got on the bed and fucked her for about five minutes. I lost my load in her. I then got up told the woman and the boy to get in a small ante room at gun point and after they were inside I took a small knife from the kitchen table and put it through the latch of the door so they couldn't get out. I then left the house and returned to where I had previously been on duty outside the 3988 QM Truck Co at the intersection.
>
> I wish to state that the above statement is true and realize that I have committed a serious crime".

4. In substance the evidence for the defense is as follows:

First Lieutenant Paul W. Boyd, 3413th Quartermaster Truck Company, testified that he was acting company commander on 29 August 1944 and that Madame Collet lived in a small town about two miles from where the company was bivouacked. He had placed accused as a guide to wait for the commanding officer in this small town about six o'clock in the

evening of 28 August. He saw accused again about three o'clock on the afternoon of 29 August in this town (R54). He then had on "OD" pants, a raincoat and a helmet liner and had a carbine. No other weapons were issued to him. He saw no bayonet and did not know what accused was wearing under his raincoat. There were two colored soldiers with him (R55), Butler and Scott, neither a member of his organization. They had a bottle of what they said was cognac and were drinking it. Neither was seen to have weapons (R56). Accused all during this time had not been relieved (R57) and appeared sober (R58). Technician Fifth Grade Warren Wilcox of the same company testified that he was the driver of Lieutenant Boyd's vehicle on 29 August and that he saw accused and the two other soldiers drinking cognac (R59). The two soldiers were very drunk (R60) and they left them but brought accused back to the post (R61).

Accused elected to remain silent (R63).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.149b, p.165). The evidence is undisputed that accused was posted as a guide in the vicinity of the home of his victim and that he was left there with little or no supervision, without relief for many hours. The evidence shows and he admits in his confession that he entered the home and in the presence of her 14½ year old son and her baby, forced the woman to the bed and had sexual intercourse with her. He admits, in his confession, and the woman and boy testified that he used physical force toward the woman and threatened them with his carbine and they say knife also, in compelling her to submit to him. There is a no question but that accused was the soldier who committed the acts described in the record of trial and that all the essential elements of the crime of rape were not only proved but admitted (1 Wharton's Criminal Law, 12th Ed., 1932, sec.701, pp.942-944; CM ETO 11188, Parker).

6. The charge sheet shows accused to be 26 years of age. He was inducted, without prior service, on 9 June 1941.

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. A sentence of death or life imprisonment is mandatory upon a conviction of rape (AW 92) and confinement in a penitentiary is authorized (AW 42; sec.278 and 330, Federal Criminal Code (18 USCA 457,567).

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

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

1. In the case of Private WILLIAM H. JOHNSON (35207233), 3413th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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 10863. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10863).

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

(Sentence as commuted ordered executed. GCMO 236, ETO, 30 June 1945).

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

BOARD OF REVIEW NO. 1 1 SEP 1945

CM ETO 10864

U N I T E D S T A T E S	RHINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JAMES C. SMITH (33328791), 574th Quartermaster Railhead Company	Trial by GCM, convened at Paris, France, 1 February 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 charges and specifications:

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

Specification: In that Private James C. Smith, 574th Quartermaster Railhead Company, European Theater of Operations, United States Army, did, at his organization, APO 403, United States Army, on or about 8 September 1944 desert the service of the United States and did remain absent in desertion until apprehended at Paris, France on or about 20 November 1944.

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

Specification: In that * * * in conjunction with Private George Columbus, 3077th Ordnance Company, European Theater of Operations, United States Army,

did, at Paris, France, on or about 20 November 1944, wrongfully dispose of seven hundred and fifty (750) gallons of gasoline, of the value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof, by selling the same to Itale Francois Roccati, thereby tending to impede the war effort.

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 three previous convictions, one by special court-martial for absence without leave for 59 days, and one by summary court for absence without leave for two days, both in violation of Article of War 61, and one by summary court for breach of restriction in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Seine Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of the Specification of Charge II as involved a finding that accused did, in conjunction with Private George Columbus, 3077th Ordnance Company, European Theater of Operations, United States Army, at the time and place alleged, wrongfully dispose of approximately six hundred (600) gallons of gasoline, of some value, property of the United States furnished and intended for the military service thereof, by selling the same to Francois Itale Roccati, thereby tending to impede the war effort. He confirmed the sentence, but, owing to special circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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. Competent and substantial evidence, including accused's own testimony, establishes that he absented himself without leave from 8 September 1944 and remained absent until apprehended in Paris, France, on 20 November 1944. There is thus revealed an absence without leave of over two months in an active theater in wartime. In view of the fact that much of his absence was spent in Paris where he could have returned to military control with ease, the court was fully warranted in disbelieving his testimony that during all that time he was engaged in a vain search for his own organization. As bearing on his intent, the court could consider his admitted failure to return to military control (CM ETO 952, Rogers; CM ETO 1549, Conners et al) and the fact that at the time of his apprehension he was engaged in the larceny and sale of United States Army gasoline (CM ETO 2901, Childrey et al; CM ETO 2216, Gallagher). They could conclude that his continuing to wear the uniform was merely a device to avoid detection and possibly to further his black market opera-

tions (CM ETO 1629, O'Donnell). On all the evidence, the finding that accused intended to desert was fully warranted (CM ETO 952, Kosser, supra; CM ETO 1577, LeVan; CM ETO 1629, O'Donnell, supra).

4. With respect to the Specification of Charge II, the prosecution's evidence showed that accused and Private George Columbus drove a United States Army truck containing 600 gallons of gasoline, property of the United States furnished and intended for the military service, into a garage in Paris, and sold the gasoline to a French civilian for 75,000 francs. Accused in his testimony admitted complicity in the sale and the receipt of 45,000 francs of the proceeds. The Specification is insufficient to charge accused with impeding the war effort by diverting to his own use property furnished and intended for the military service under the principles of CM ETO 3234, Young, et al. It does however charge and the proof sustains the offense of unlawful disposition of Government property furnished and intended for the military service in violation of the ninth paragraph of Article of War 94 (CM ETO 9643, Meyers; CM ETO 9987, Pipes; CM ETO 11075, Cheeak; CM ETO 11078, Wade). The action of the confirming authority is consistent with this conclusion. The addition in his action of the phrase "thereby tending to impede the war effort" is harmless and may be treated as surplusage. The fact that the offense was laid and confirmed under the 96th Article of War is immaterial (CM ETO 3118, Prophet; CM ETO 6268, Maddox). This situation is nonprejudicial to accused and requires no corrective action.

5. The confirming authority in his action reduced the gravity of the offense of which accused was found guilty (Specification of Charge II) by approving only so much of the findings as involved a finding that he wrongfully disposed of 600 gallons of gasoline "of some value". This was improper. Although the value of the gasoline was not proved the court was authorized to take judicial notice of the quarter annual reports made by the Quartermaster, European Theater of Operations to the Quartermaster General, Washington, D. C. (CM ETO 5539, Mufenick). By reference to that report, it can be seen that the value of the property wrongfully disposed of by accused was in excess of $50.00.

6. The charge sheet shows that accused is 37 years four months of age and was inducted 18 August 1942 at Philadelphia, Pennsylvania. No prior service is shown.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (A.W. 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 authorized (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4),3b).

WM. F. BURROW
Judge Advocate

EDWARD L. STEVENS, JR.
Judge Advocate

DONALD K. CARROLL
Judge Advocate

A True Copy:

Douglas N. Sharretts

DOUGLAS N. SHARRETTS
Captain, JAGD
Executive

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 1 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. In the case of Private JAMES C. SMITH (33328791), 574th Quartermaster Railhead Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 10864. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10864).

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

(Sentence as commuted ordered executed. GCMO 657 USFET, 23 Dec 1945).

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

BOARD OF REVIEW NO. 1

9 JUN 1945

CM ETO 10871

U N I T E D S T A T E S	XVI CORPS
v.	Trial by GCM, convened at Altfeld, Germany, 22,23,24,25 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates WILLIAM A. STEVENSON (34741533), and WILLIAM N. STUART (32816510), both of Battery B, 777th 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 soldiers named above has been examined by the Board of Review.

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private William N. Stuart, Battery B, 777th Field Artillery Battalion, and Private William A. Stevenson, Battery B, 777th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 7 March 1945, forcibly and feloniously against her will, have

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carnal knowledge of Martha Loeven, to wit: while the said Private William N. Stuart had the carnal knowledge as aforesaid, the said Private William A. Stevenson stood guard over other members of the household then present.

Specification 2: In that * * * acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 7 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Anna Loeven, to wit: while the said Private William A. Stevenson had the carnal knowledge as aforesaid, the said Private William N. Stuart stood guard over other members of the household then present.

Specification 3: (Findings by court of not guilty)

Specification 4: In that * * * acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 7 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mathilde Gelen, to wit: while the said Private William A. Stevenson had the carnal knowledge as aforesaid, the said Private William N. Stuart stood guard over other members of the household then present.

Specification 5: In that * * * acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 1945, 7 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Elizabeth Ansteeg, to wit: while the said Private William A. Stevenson had the carnal knowledge as aforesaid, the said Private William N. Stuart stood guard over other members of the household then present.

Specification 6: In that * * * acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 2000, 7 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Elizabeth Ansteeg, to wit: while the

said Private William N. Stuart had the carnal knowledge as aforesaid, the said Private William A. Stevenson stood guard over other members of the household then present.

Specification 7: In that * * * acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 9 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Kathe Scheibelhut, to wit: while the said Private William N. Stuart had the carnal knowledge as aforesaid, the said Private William A. Stevenson stood guard over other members of the household then present.

Specification 8: In that * * * acting jointly and in pursuance of a common intent, did, at Altfeld, Germany, on or about 9 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Kathe Hoogen, to wit: while the said Private William A. Stevenson had the carnal knowledge as aforesaid, the said Private William N. Stuart stood guard over other members of the household then present.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 3, and guilty of the remaining specifications and the Charge. Evidence was introduced as to Stevenson of two previous convictions, one by special court-martial for absences without leave for four days and ten days respectively in violation of Article of War 61 and for breaking arrest in violation of Article of War 69, and one by summary court for disobeying the order of a first sergeant in violation of Article of War 65. Evidence was introduced as to Stuart of two previous convictions, one by special court-martial for absence without leave for five and one-half hours in violation of Article of War 61 and one by summary court for failure to perform properly driver's maintenance on a weapons carrier in violation of Article of War 96. Three-fourths of the members of the court present at the time the votes were taken concurring,

each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused, considered the sentence inadequate in view of the vicious and bestial course of conduct disclosed by the record in this case, nevertheless approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, recommended that clemency shall not at any time in the future be afforded the criminals, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence proved beyond reasonable doubt that the accused engaged in sexual intercourse with the German women at the times and place alleged in the specifications of which they were found guilty. The accused both in their courtroom testimony and their extra-judicial voluntary statements (Pros.Exs.9 and 10) admitted the sexual acts as proved, but attempted denials that they were accomplished with force and violence or as a result of fear of death or great bodily harm engendered by them in the hearts and minds of their victims. It is not necessary to set forth the evidence of the obscene, animalistic conduct of accused which support the findings, inasmuch as it is corroborated by the admissions and testimony of each of them. The facts and circumstances shown by the record of trial disclose a cold-blooded, deliberately planned course of violent action by the accused having for its purpose the wholesale ravishment of German women. The Board of Review affirmatively declares that the orgy initiated by and participated in by accused is probably the most fiendish, barbaric and brutal sexual episode, involving American soldiers, which has come before the Board on appellate review. The only possible issue of fact which could arise in the case revolves about the question whether the victims voluntarily consented to indulge in sexual intercourse with accused. The negative answer to such question, as is implicit in the findings of the court on the specifications of which accused were found guilty, was the only possible answer under the state of the evidence. The admissions of each accused made in court and in their voluntary extrajudicial statements deny and defeat their contention that the women were willing, cooperative and voluntary parties to the several sexual acts. There was in truth no genuine issue of fact on this score. The evidence produced by

the prosecution and defense alike is overwhelming in its probative force that each victim in each instance submitted her body to the lusts of the accused under fear of death or great bodily harm. Each accused was the aider and abetter of the other and is equally liable as a principal for the acts of his companion (CM ETO 3740, Sanders, et al; CM ETO 4234, Lasker and Harrell; CM ETO 5068, Rape and Holthus). The record of trial is legally sufficient to support the findings of guilty of both accused (CM ETO 3740, Sanders, et al; CM ETO 3933, Ferguson, et al; CM ETO 4194, Scott; CM ETO 4444, Hudson, et al; CM ETO 5363, Skinner; CM ETO 6042, Dalton; CM ETO 7078, Jones; CM ETO 7977, Immon; CM ETO 8837, Wilson). The crimes well merited the death penalty and it is difficult to understand the action of the court in imposing the lesser of the mandatory sentences.

4. The charge sheet shows that accused Stevenson is 20 years five months of age and was inducted 19 February 1943 at Atlanta, Georgia, and that accused Stuart is 21 years eight months of age and was inducted 25 February 1943 at New York, New York. Each was inducted to serve for the duration of the war plus six months. Neither had prior service.

5. 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.

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).

B. Franklin Riter Judge Advocate

Wm. F. Sprow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 3 23 JUN 1945

CM ETO 10891

U N I T E D S T A T E S	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Bigge, Germany, 11 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Lewisburg, Pennsylvania.
Private HOBART L. MURPHY (6985843), 5th Quartermaster Company	

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

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

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

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

Specification: In that Private Hobart L. Murphy, 5th Quartermaster Company, did, at Laubach, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Kate Valerius, a German civilian.

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

Specification: In that * * * did, at Laubach, Germany, on or about 14 March 1945, wrongfully, wilfully, and in violation of standing orders fraternize with a German civilian by entering a civilian occupied house for the purpose of obtaining liquor.

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he pleaded not guilty to, and 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 prosecutrix testified that accused was one of four American soldiers who visited her home between 1600 and 1700 hours, 14 May 1945. "In broken English and gestures" they asked if they could get quarters for one night. She told them they could sleep in the kitchen, but accused and one of his companions insisted on seeing the entire house (R9-10). She accompanied the two upstairs. There accused detained her; his companion went below. When she tried to force her way past accused, he put his hand to his pistol. "He kept heading me off away from the stairs; held me tight and grabbed me by the back and threw me towards the /bed/ room" (R11,19). Once in the bedroom, she testified,

> "I guarded myself. He threw me towards the bed. Then the incident took place. He began undressing me; took my bloomers off. I sat down at the edge of the bed and tried to ward him off, but he threw me down again. Then he tried again but he couldn't. He kept pushing himself towards me and hurting me. But as I yelled at him he didn't care. I tried to ward his organs away but he pushed my hand away in turn. Then he finally succeeded". (R12).

"During the incident" one of accused's companions knocked at and spoke through the door. When it was over he returned, whereupon accused opened the door and "while these two were exchanging words I grabbed my shoes and ran down the steps" (R12,14). She had on her bloomers

(R14) which she had put on hurriedly; "in fact, I had both feet in one part of the bloomer" (R19). She was upstairs with accused for "three-quarters of an hour or less" (R12). She was menstruating and kept telling accused so while they were in the bedroom together. She, however, spoke only German and he seemed to know only a few German words "and they were 'Keep quiet, Keep quiet'". She began screaming before it all started but "I didn't scream loudly. I cried and made noises because I didn't know what he wanted to do". She kept screaming and pleading with him and he repeatedly put his hand over her mouth. He was wearing his helmet, a light blouse and a revolver which he placed on the bed when he joined her there. Asked if his private parts actually penetrated hers, she answered "Yes" (R13,19). Having escaped down the stairs, she fled to the nearest house. There she found her sister-in-law, who accompanied two other women to the house of the prosecutrix and found the soldier gone (R12). An American officer was found. With him she went to try to identify some soldiers. She recognized none of the soldiers presented. She then saw a soldier walking down the road whom she recognized - this some 30 to 60 mirutes after the alleged rape (R15,16). That night she was examined by an American doctor (R17). A day or two later, she recognized the second soldier, but not the accused, in an identification parade (R18). At the trial she identified accused as her rapist (R16) and, pointing to a soldier seated in the court room, described in the record of trial as "Private Clayton", she testified that "in all probability I am very sure he is" the other soldier who came upstairs (R17). Accused did not ask for or look for any liquor (R20).

Gunter Valerius, prosecutrix's 11 year old son, was sworn without voir dire. He corroborated her testimony that four soldiers entered, asked for quarters, were not satisfied with the kitchen, and asked to see other rooms (R20-21). He went upstairs with his mother and two soldiers. Accused told him to leave whereupon the second soldier brought him down. While descending he heard his mother scream and saw her grabbed by accused. The other soldier gave him a cigarette and his carbine saying if the soldier upstairs killed his mother, he could kill him in turn (R21-22,25). He was taken in the kitchen and restrained from going to his mother by

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the three soldiers. One soldier asked for wine and went to the cellar. After about 45 minutes he heard his mother running down the steps. At that time two soldiers - accused and the second - were upstairs (R21,23,25). Accused came downstairs and departed with the two remaining below. The other soldier had disappeared. Later in the day, he went with his mother to identify soldiers. He saw accused walking down the street and recognized him immediately. The next day at a line-up he recognized three soldiers including accused (R24,25).

A medical officer testified that about 2000 on 14 March, he examined a Mrs. Valerius, a markedly agitated woman about 35 to 40 years of age. His examination revealed no bruises or marks upon her person. She was extremely anxious and worried and practically in tears throughout the examination. He recalled nothing unusual about her underclothing. She was still menstruating. He could not say whether she had engaged in intercourse - forcibly or otherwise (R27-28).

Major Henry G. Metzger, of the same company as accused, testified that about 1730, 14 March 1945, after some trouble was reported to him, he went to the scene and interviewed a woman through an interpreter. He took her to the company where, after failing to identify any of the first group of soldiers assembled, she exclaimed in German "That is he" and pointed to accused who was walking down the street. Questioned by Major Metzger, accused denied all knowledge of the incident (R31-33).

A military police officer testified that about 2000 of the 14th, he went to the prosecutrix who was so nervous he could not complete his examination - "she had some sort of attack and sort of passed out" (R34). The next day at an identification parade, she picked out Private Arvin Clayton, of accused's company, as the soldier who came upstairs with him, but she failed to identify accused. Her son, Gunter, however, picked out accused as the man who remained upstairs with his mother, identified Clayton as the soldier who was also upstairs, and Private First Class Charles S. Whittington, of the same company, as one of the soldiers involved (R34-35).

Technician Fifth Grade Carl D. Gordon, also of the same company, Private Whittington, and Private Clayton, all testified that they went to a civilian house about 1600 on 14 March with accused. Gordon testified that upon entering he saw accused going upstairs (R37,38). Clayton and Whittington were in the kitchen with two children while he remained in the hallway. Neither Whittington nor Clayton went upstairs (R39). He heard two cries but he could not say from whom or where they came (R38-41). He saw no woman while there (R40-41) and remained in the hallway from eight to 15 minutes (R37). When accused came down the stairs they left (R41).

Clayton testified that they went to the house to get something to drink (R45) and when they entered he saw a woman and two children (R43). He and accused tried to make the woman understand they wanted something to drink (R43) then accused and the woman went upstairs (R44). He and Whittington were in a room playing with the children and Gordon was in the hall (R44,45). He heard no noises and did not see the woman come downstairs. Accused came down in about ten minutes, whereupon they left (R45,47).

Whittington likewise testified that they went to the house to get something to drink (R49-52). When he and Clayton went into a room with the children he saw accused and the woman standing in the hallway (R50-51). He heard no noises. Gordon was in the hall (R51). They were in the house from three to five minutes (R53) and all left together (R51).

The court took judicial notice of letters of the Commanding Generals of the 12th Army Group and the Third Army dealing with relations with Germans (R6).

4. No witnesses were called by the defense. Accused elected to remain silent after his rights were explained to him (R53-54).

5. a. At the outset consideration must be given to the competency of Gunter Valerius, age 11, who, without voir dire, was sworn and testified. At common law a child

under 14 was presumptively incompetent to testify (Wheeler v. United States, 159 U.S. 523, 40 L.Ed.244). His competency is dependent upon his apparent sense and his understanding of the moral importance of telling the truth (MCM, 1928, par.120b, p.124-125). This may be determined by the character of his testimony alone without any preliminary examination touching thereon (CM 141609; CM 174484; CM 192609, Dig. Op JAG 1912-40, sec.395(58), p.238). Gunter's testimony, while clear and intelligent, is devoid of anything showing whether or not he possessed an understanding of the moral importance and duty of telling the truth. The competency of children as witnesses has been thoroughly considered and discussed in CM ETO 2195, Shorter. No purpose would be served in reconsidering the principles and authorities there set forth, since, for the purpose of this holding, it will be assumed that he was incompetent and his testimony improperly admitted. The question for determination then becomes, as in the Shorter case, "whether the admission of this testimony 'injuriously affected the substantial rights' of the accused within the purview of Article of War 37".

b. Substantial and compelling testimony supports the findings of guilty of Charge I and its Specification. All the elements of the offense are shown by the testimony of the prosecutrix and corroboration as to the surrounding circumstances is found in the testimony of the three enlisted men who accompanied accused to her house. One of them heard two screams coming from whom and where he did not know. The prosecutrix made a prompt complaint as shown by the testimony of Major Metzger. She was extremely nervous some hours later when examined by medical and military police officers. While the medical examination was inconclusive as to evidence of sexual intercourse, forcibly or otherwise, it should be remembered that the prosecutrix was menstruating at the time. While it revealed no evidence of bruises, the prosecutrix's testimony fails to disclose acts of such a violent nature as likely to leave bruises. The Board of Review is of the opinion that notwithstanding the assumed erroneous admission of the testimony of Gunter Valerius, the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, in view of the compelling nature of other testimony in the record.

c. The court's findings of guilty under Charge II and Specification are not supported by any evidence of "fraternizing" by accused as this word has been defined by holdings of the Board of Review. While two of accused's companions testified that they went to the house to obtain something to drink, the conduct of accused was consistent only with the intent to commit rape which he consummated quickly and brutally on the prosecutrix before she made her escape from the house. Such behavior does not come within the meaning of the term "fraternization" and "fraternizing" as used in connection with the relationship of American soldiers and the German civilian population (CM ETO 10967, Harris; CM ETO 10501, Liner). It follows, therefore, that the evidence is legally insufficient to support the court's findings of guilty under Charge II and Specification.

6. Certain subsidiary questions are raised by the record of trial.

a. Major Dietz, a member of the court, stated he took the oath of accuser and was summary court in the cases of Gordon, Whittington, and Clayton; that he had formed no opinion as to the guilt or innocence of accused; and that he believed himself capable to sit as an unprejudiced member of the court. Thereupon, he was challenged for cause by the defense. The challenge was not sustained and the major resumed his seat as a member of the court and was sworn after the defense refused to challenge any member peremptorily (R2-4). It was the function of the court to determine whether prejudice existed and its action cannot be regarded as erroneous (CM 152101, Dig.Op.JAG 1912-40, sec.375 (2),p.185).

b. Two witnesses testified as to the prosecutrix's and her son's identification of accused shortly after the alleged offense. Reference is made to CM ETO 7209, Williams, where authorities are collected dealing with the competency of such testimony. Even if incompetent (CM 270871, 4 Bull. JAG 4), its admission was not prejudicial error for there was other substantial and compelling evidence as to the identity of the accused (CM ETO 6554, Hill), and the prosecutrix had previously testified as to this identification by her (CM ETO 7209, Williams).

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7. The charge sheet shows that accused is 24 years ten months of age and he enlisted 18 October 1939. He had no prior service.

8. The court was legally constituted and had jurisdiction of the offense and person. Except as hereinbefore noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification and the sentence as approved, but legally insufficient to support the findings of guilty of Charge II and Specification.

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

2 JUL 1945

CM ETO 10898

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at APO 149, U. S. Army, 10 April 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor, WILLIAMS for five years, HUTCHENS for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Privates HALWARD A. WILLIAMS (35393737) and WILLIAM A. HUTCHENS (15100355), both of Detachment A, 34th Mobile Reclamation and Repair Squadron (Heavy), and both on detached service with 1st Quartermaster Truck Company Aviation (Provisional)	

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:

WILLIAMS

CHARGE I: Violation of the 94th Article of War

Specification: In that Private Halward A. Williams Detachment "A", 34th Mobile R & R Squadron (Heavy), on DS with 1st Quartermaster Truck Company Aviation (Prov), did, in conjunction with Private William A. Hutchens, Detachment "A", 34th Mobile R & R Squadron (Heavy) on DS with 1st Quartermaster Truck Co Avn (Prov), at Athis Mons, France, on or about 17 January 1945, feloniously take, steal, and carry away 25 gallons of gasoline value of about

$3.87, and 5 cans value about ten dollars ($10.00) all of a total of about thirteen dollars and eighty seven cents ($13.87), property of the United States, Furnished and intended for the military service thereof.

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

Specification: In that * * * did * * * at Athis Mons, France, on or about 17 January 1945 attempt to wrongfully and unlawfully dispose of gasoline and cans, military property of the United States, vitally needed for combat operations, which attempt if consummated would have prejudiced the success of the United States Forces.

HUTCHENS

Identical charges and specifications, except for appropriate transposition of names.

Charge I and Specification preferred against each accused alleged larceny of 25 gallons of gasoline of value $3.87 and 5 cans of value $10.00, total $13.87, property of the United States furnished and intended for military service thereof. This is a crime under the 9th paragraph of the 94th Article of War. Each accused pleaded guilty to this Charge and the evidence supplemented the pleas and fully supported the finding of guilty (CM ETO 9288, Mills; CM ETO 11233, Melis; CM ETO 11936, Tharpe et al). The maximum punishment includes hard labor for six months (MCM, 1928, par 104c, p.100).

3. Charge II and Specification preferred against each accused charged an attempt to commit the offense under the 96th Article of War of interfering with or obstructing the national defense or prosecution of the war by diverting supplies furnished and intended for the military service from their regular channels of distribution to combat or other troops during a critical period of military operations (CM ETO 8234, Young et al; CM ETO 11076, Wade). However, the evidence proved no more than an attempt to dispose of property of the United States furnished and intended for the military service thereof - an offense under the 9th paragraph of the 94th Article of War - of a total value of $13.87. The placement of the five cans of gasoline by the hole in the fence preparatory to the delivery of same to the prospective civilian purchaser constituted the overt act performed towards the commission of the offense (CM 194441, Meuro, 2 BR 145 (1931); CM 198672, Suggs et al, 3 BR 243 (1932). The evidence necessary to elevate the offense to an attempt to commit the more serious offense under the 96th Article of War is entirely lacking Prosecution's evidence on this issue exhibits all of the weaknesses of

CM ETO 7506, Hardin and CM ETO 6226, Ealy.

The maximum punishment for the wrongful disposition of property of the United States furnished and intended for the military service not in excess of $20.00 in value is dishonorable discharge, total forfeitures and confinement at hard labor for six months (MCM 1928, par 104c, p 100) and the included offense of attempting to make such disposition is subject to the same maximum limits of punishment (MCM, 1928, par 104c, p 96; CM 212056, Smith, 10 BR 199, 209 (1939); CM 218818, Artibee and Barrow 12 BR 153, 155 (1941).

4. The court was legally constituted and had jurisdiction of the persons and the offenses. Except as noted, no errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty of Charge I and its Specification, and so much of the findings of guilty of Charge II and its Specification as involves findings that accused did at the time and place alleged wrongfully and unlawfully attempt to dispose of gasoline, military property of the United States, in violation of Article of War 96, and so much of the sentence as involves dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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BOARD OF REVIEW NO. 3

28 MAY 1945

CM ETO 10916

U N I T E D S T A T E S	)	5TH ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at St. Tonis, Germany, 28 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Disciplinary Barracks, Greenhaven, New York.
Private BARTOLO COLON (32887384), Headquarters Battery, 47th Armored Field Artillery Battalion	)	

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

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

2. In view of the testimony of the officer allegedly assaulted that accused was drunk, unable to control his movements, mumbled some words, was uncontrollable, and that he gave no indication of recognizing the officer (R9,10,12,17) and the evidence of the large quantity of liquor consumed by accused just prior to the offense set forth under Article of War 64 (R26), the Board of Review is of the opinion that the evidence is legally insufficient to support the court's findings of guilty of Charge III and its Specification and legally sufficient to support the remaining findings of guilty and the sentence (CM ETO 9162, Wilbourn).

3. The place of confinement is designated merely as United States Disciplinary Barracks, Greenhaven, New York. It should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Dewey Judge Advocate

10916

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

BOARD OF REVIEW NO. 3

15 JUN 1945

CM ETO 10939

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.	
Sergeant ANTHONY P. GERNER (32782865), Section 21, Maintenance Division, BAD No. 1, AAF 590	Trial by GCM, convened at APO 635, U. S. Army, 23 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. Accused was tried for violation of the 96th Article of War as set forth in the Charge and 17 specifications thereunder, which, for the purpose of this holding, it is unnecessary to set forth in full.

Each specification recites that accused did, at the times and places respectively alleged, "with intent to influence the beliefs of" the enlisted man or enlisted men named in each specification, "wrongfully and unlawfully utter to" the said described enlisted man or enlisted men "oral statements substantially as follows:" Each specification then narrates the alleged statement, which consists in each instance of language characteristic of

Nazi doctrines. The court found accused guilty of all of the specifications, except the words in each specification "with intent to influence the beliefs" of the enlisted man or enlisted men described and the word "unlawfully" substituting therefore the word "provokingly", of the excepted words, not guilty, of the substituted word, guilty, and not guilty of the Charge, but guilty of a violation of Article of War 90. No evidence of previous convictions was introduced. The reviewing authority approved only so much of the findings of guilty of Specifications 1,2,4,5,6,8,10,13, and 16 as included a portion of the alleged statements set forth in each of these specifications, 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. A review of the evidence presented by the prosecution and the defense is not necessary since it is considered by the Board of Review that the offense of using provoking speeches to another in violation of Article of War 90 is not a lesser included offense of wrongfully and unlawfully uttering Nazi doctrines with intent to influence the beliefs of another in violation of Article of War 96. The original specifications properly stated an offense in violation of the Act of Congress of June 28, 1940, 18 USCA, sec.9,13 (CM ETO 2005, Williams and Wilkins). Article of War 90 has a long history and its main object was to check such manifestations of a hostile temper as, by inducing retaliation, might lead to duels or other disorders. Article of War 90 is a modification of the language of Article of War 25 as contained in the Code of 1874, which was concerned with the prevention of duels between officers or soldiers (Winthrop's Military Law and Precedents (Reprint, 1920), pp.590-591). To influence successfully the beliefs of another by conversation requires an intent supported by tact, judgment and understanding. To provoke another with words, no such intent is necessary and the effect is produced by opposite qualities such as anger, conceit and hatred. No extended discussion is necessary to indicate that the alleged offense of wrongfully and unlawfully uttering words to another with intent to influence his beliefs in violation of Article of War 96 is an offense entirely different

from the offense of unlawfully provoking another by uttering words in violation of Article of War 90. A court may find an accused guilty of an offense lesser than the offense charged only when the lesser offense is necessarily included in that charged (MCM, 1928, par. 78c, p.65). Thus, absence without leave is included in desertion, assault and an attempt to commit manslaughter are included in a particular charge of voluntary manslaughter (MCM, 1928, par.149a, p.167), assault with intent to commit mayhem, assault and battery, assault and an attempt to commit mayhem are included in a particular charge of mayhem (MCM, 1928, par.149b, p.167) and assault with intent to commit rape, assault and battery, assault and an attempt to commit rape are included in charge of rape (MCM, 1928, par.149b, p.165). In the instant case, the court found the accused guilty of an offense not charged and not necessarily included in that charged (CM 144811(1921); 182393 (1928), Dig.Op. JAG, 1912-40, sec.395(45), p.230).

> "It need scarcely be noted that while a court-martial may always convict of a lesser kindred offence, it is not empowered to find a higher or graver offence than the one charged, nor an offence of a different nature" (Winthrop's Military Law and Precedents (Reprint 1920), p.383).

The Board of Review is therefore of the opinion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence, which therefore are invalid and should be vacated.

6. The charge sheet shows that accused is 23 years of age and was inducted 1 January 1943 at New York, New York. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. Errors affecting the substantial rights of accused were committed as above set forth. 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.

Sick in Hospital Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

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BOARD OF REVIEW NO. 3

11 AUG 1945

CM ETO 10955

U N I T E D S T A T E S	)	84th INFANTRY DIVISION
	)	
v	)	Trial by GCM, convened at Krefeld,
	)	Germany, 31 March 1945. Sentence:
Private MATTHEW R. VOLATILE	)	Dishonorable discharge, total for-
(32960569), Company A, 334th	)	feitures and confinement at hard
Infantry.	)	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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Matthew R. Volatile, Company A, 334th Infantry did, at Waurichen, Germany, on or about 30 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: engage the enemy, and did remain absent in desertion until he was apprehended at Liege, Belgium on or about 21 March 1945.

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

3. Evidence for the prosecution shows that on or about 26 November 1944 accused was assigned as a reinforcement to Company A, 334th Infantry, which, a few days later, was "dug in" in a rear assembly area in the town of Waurichen, preparatory to moving to the forward assembly area for an attack against the enemy. At a meeting of his squad held on 29 November, accused was told what time he would move out, what equipment to carry, and so much of the plans of the attack as his squad leader knew about. On 30 November, after the company had received orders to move out at 2030 hours that night, the squad leader went to accused's foxhole, at about 1330 hours, and told him where they were going and what the mission was. Accused was present when the company assembled at 2030 hours, but the order was rescinded from battalion headquarters. The men returned to their permanent positions and remained until 2230 hours, when they again were ordered to assemble and move out. Accused was not present with his squad. His squad leader searched his platoon that night and checked through the whole company the following morning, but accused was not found (R5-7).

Without objection, the prosecution introduced in evidence a duly authenticated extract copy of the morning report of Company A for 26 March 1945, showing accused "Dy to AWOL 2230 as of 30 Nov 44", in correction of an entry for 6 December 1944 which showed him from duty to missing in action in the vicinity of Lindern, Germany, as of 2 December 1944 (R7, Pros Ex A).

The prosecution stated that it was stipulated by the prosecution, accused and counsel that accused was returned to military control by apprehension at Liege, Belgium, on 21 March 1945 (R7).

4. After being warned of his rights as a witness, accused made the following unsworn statement:

"It was about the morning of the end of the month, I am not sure what day and I was trying to calm myself, I was nervous. All I remember is that I was walking down the street, it was dark and it was night time, the same day and I was afraid to come back, scared of the consequences. Well, I kept putting it off and then about two months ago I met my cousin and he said to me that I was supposed to be in action in Belgium and if I wanted to desert why wasn't I in civilian clothes and I said that I had no intention of deserting. A month and a half ago I met the CID man, he knew I was AWOL. He kepton me because he thought I was in the black market or the leader of a black market. He always saw I was broke and had no money most of the time, he gave me money to get drinks because I had no money. Then one Tuesday, last Tuesday, I said to him, 'Bob', that was his first name, I don't know the last one, 'I am getting tired of this being tracked so I said I am going to give myself up'. He said that it was the best thing I could do. The following day I went to the Red Cross and he called me over and took me in, he said that he was waiting for some fellows that were supposed to be in the black market so he took me in and told the CID officer that I was not in the black market, just AWOL and from there I came to the division. That is all I have to say" (R8-9).

5. Absence without leave of accused from 30 November 1944 to 21 March 1945 is established by the testimony, the stipulation and the morning report entries, which are corroborated generally by accused's unsworn statement. The evidence shows that while accused was in a foxhole in a rear assembly area he was advised by his squad leader as to the place and nature of a night combat mission only a few hours before the company was to move out. Although he was present when the company assembled to move out at the time originally scheduled, 2030 hours, he was not present when his company moved out only two hours later, at 2230 hours. By his unsworn statement he admitted he was nervous and was trying to calm himself when he left. The evidence is convincing that he was fully aware of the tactical situation, and the court was warranted in inferring that he absented himself with a then existing intent to avoid engaging the enemy as charged (CM ETO 5293, Killen; CM ETO 7413, Gogol; CM ETO 10443, Mays).

6. Neither accused nor his counsel expressly consented to the stipulation relating to termination of the alleged desertion, and it does not appear that the court accepted it. Since accused's unsworn statement indicates that he surrendered voluntarily to military control, the court should have scrutinized the stipulation more closely and should have rejected any part of it not satisfactory to accused (See CM ETO 4564, Woods). However, since the offense was committed at the instant accused left his organization with the requisite intent (CM ETO 9975, Athens, et al), and since proof as to termination of the desertion is immaterial (CM NATO 2044, III Bull. JAG 232), accused's substantial rights were not injuriously affected.

7. Although it appears that accused was tried on the same date the charges were served upon him, defense counsel expressly stated that accused did not object to being tried at the time (R4). Accused's unsworn statement suggests a probability that he would not have benefited by further time in which to prepare for trial, and in the absence of a showing of prejudice resulting to him from trial on such short notice, the findings cannot be disturbed (CM ETO 3475, Blackwell; CM ETO 5255, Duncan; CM ETO 5445, Dann).

8. The charge sheet shows that accused is 21 years and six months of age and was inducted 25 May 1943 at New York, New York. No prior service is shown.

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

10. The penalty for 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).

E. C. Cooper — Judge Advocate

(ON LEAVE) — Judge Advocate

E. H. Avery Jr. — Judge Advocate

Branch Office of The Judge Advocate General
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APO 887

BOARD OF REVIEW NO. 3

10 AUG 1945

CM ETO 10957

UNITED STATES	)	65TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Neunkirchen, Germany, 27 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private GRADY S. TURNER (34818863), Battery C, 869th Field Artillery Battalion	)	

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

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

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

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

Specification 1: In that Private, then Technician 5th Grade, Grady S. Turner, Battery C, 869th Field Artillery Battalion, did, at Hangard, Germany, on or about 25 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one August Schuorr, a human being, by shooting him with a carbine.

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Specification 2: In that * * * did, at Hangard, Germany, on or about 25 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Emma Molter, a human being, by shooting her with a carbine.

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

Specification: In that * * * did, at Hangard, Germany, on or about 25 March 1945, with intent to do her bodily harm, commit an assault upon Katharina Schuorr by shooting her in the shoulder and chest, 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. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the 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. About 1830 or 1900 hours (R7,14), 25 March 1945, at Hangard, Germany (R5), Corporal Fahrow said to accused, Private Joe B. Shelton, and Private James McNinch, all of the same organization, "Let's go up here and search these houses. * * * It's all right * * * we got orders from higher up to come out of the CP and search the houses" (R14). Thereupon the four left the battery area, drove some 200 yards to a house, dismounted, procured a bottle from its inhabitants, and returned to the jeep where each took one drink from the bottle (R7) containing an intoxicant (R15). The four then went to the home of Emma Fries some 100 to 150 yards from the first (R8,26) and some 50 yards from the jeep (R19), entered the kitchen, and asked for schnapps (R22,26). Obtaining none, Fahrow and McNinch departed with one of the men of the house. Accused and Shelton remained in the kitchen which was a rectangular room about "ten by twelve or twelve by fourteen" (R8,22,26). After a time Shelton went to the jeep (R9), returned with and gave the bottle to accused who drank therefrom draining its contents (R11,22,25,27). The kitchen contained two doors--one leading from the outside and the other from a bedroom. Accused, facing toward the center of the room (R18), was seated to the right of the outside door (R10,22,23). In the

wall to his right was the door leading to the bedroom. Near the left was a table and, at the end of the table and against the left wall, was a bed (R8,10). Seated on the bed were Private Shelton, Emma Fries, her daughter, Elle, and Katharina Schuorr (R11,23,27). Seated at the table were August Schuorr, husband of Katharina, and August Molter, the father of Emma Fries. Standing to accused's right was Emma Molter, the mother of Emma Fries (R22-24,27). The room was dimly lighted (R10,15,18,24). The only visible arms were accused's and Shelton's carbines (R11-12).

August Molter testified that August Schuorr was seated at the table doing nothing when suddenly accused turned to him and asked, "What are you doing?" (In cross-examination Molter testified he understood the words, "was host".) Schuorr replied, "I'm not doing anything," whereupon accused half arose, pointed his gun at Schuorr, and fired three times. Schuorr rose and fell out of the door. Accused ran outside, turned, and fired two or three shots which struck Emma Molter and Katharina Schuorr. Shelton ran away. No soldiers returned to the room that night (R22-25).

Emma Fries substantiated Molter in all material matters save that she heard accused say, "Du Machts" and Schuorr reply, "Nix," and that she did not actually see accused fire after he ran out of the room. She further testified that Emma Molter was shot through the shoulder; August Schuorr, in the breast; and Katharina Schuorr, in the chest. Accused was drunk and she believed he would not have done anything had he been sober (R26-30).

Shelton testified he had noticed no disturbance when suddenly he heard two shots "pretty close" to him--"10 feet, or something like that." Thereupon he ran out of the house to the jeep. Accused followed within a minute, turned around, and went back saying he was going for his helmet. When accused started back, Shelton heard Fahrow call, "I am lost." A little after this he heard more shots but was unable to say from where they came. Within a few minutes accused returned to the jeep with Fahrow and McNinch. The four then returned to the battery and were called in by Captain Howland (R12-21). It was "pretty hard to tell when he /accused/ gets drunk until he gets awfully drunk" and ready to fall down (R15).

The next morning Eugene Fries, husband of Emma Fries, found three empty cartridge cases in the kitchen and four or five outside. They were about four centimeters long and for a bore of from seven to eight millimeters.

August Schuorr died of shock secondary to three gunshot wounds of the abdomen (R5;Pros.Ex.A). Emma Molter died of pulmonary hemorrhage

and edema secondary to a gun shot which entered the left scapula and emerged through the center of the wing of the right scapula (R6;Pros. Ex.C). Katharina Schuorr was found by a medical officer to have been wounded in the left chest by a gun shot (R6;Pros.Ex.B). These gunshot wounds were inflicted by a carbine, .30 caliber (R6;Pros.Ex.D).

4. Summary of evidence for defense:

Private James McNinch testified that about 1900 or 1930 he left the battery area with accused, Shelton and Corporal Fahrow who had told him they were to look for "anything you could find." First they went to a house some "150-200 yards" from the battery area and procured a bottle of cognac. They then went to the Fries home leaving the jeep about 50 yards therefrom. The four entered and stayed for a while. Fahrow tried unsuccessfully to obtain something to drink. Finally one of the men of the house took witness and Fahrow to another house, leaving accused and Shelton at the Fries home. He, Fahrow, and the civilian had been at the second house for about an hour when he heard a shot outside the door and a girl's scream. Immediately, he and the civilian left for the Fries home, Fahrow remaining behind. He met accused, without his helmet, standing in a path alongside the Fries home. Accused "seemed kind of excited" and said, "I think I've shot somebody." Accused and McNinch then went into the Fries home and recovered accused's helmet from under the table on the left. The room was dimly lit and McNinch saw no one lying on the floor or ground. Upon leaving the house he heard Fahrow call and fire a shot. Accused answered by firing in the air. They then went to Fahrow and the three went to the jeep finding Shelton there. The four then returned to the battery. (R30-38)

Captain Wallace Howland, accused's commanding officer, testified that accused was a truck driver, that his character was excellent and his efficiency was "low excellent." Upon cross-examination, he testified that a battery guard reported hearing shots whereupon he sent an officer to investigate. Within a few minutes he saw accused, and others, in a jeep. He talked to accused who had been drinking but was not drunk. Upon redirect examination, Captain Howland expressed the opinion that accused had deliberately tried to conceal information when interviewed by him that night (R38-42).

5. After his rights as a witness were explained, accused elected to remain silent (R42-43).

6. The evidence discloses sudden and unprovoked shootings by accused of August Schuorr, Emma Molter, and Katharina Schuorr, resulting in the death of the first two. No logical, reasonable or plausible motive or excuse therefor appears unless, from accused's question to

Schuorr, "What are you doing?", it be inferred that Schuorr had made some suspicious move. But the evidence was that Schuorr was seated at the table doing nothing. There was undisputed evidence that accused was drinking and one prosecution witness testified that accused was drunk. Voluntary drunkenness, while not an excuse, "may be considered as affecting mental capacity to entertain specific intent" (MCM, 1928, par.126a, p.136). "Whether he was too drunk to entertain a specific intent * * * was a question for the court's determination" (CM NATO 774, II Bull. JAG, p.427). One of accused's companions of the evening, Private Shelton, observed of the accused, "It's pretty hard to tell when he gets drunk until he gets awfully drunk"--ready to fall down. Accused's battery commander, who saw him a short time after the shootings, testified that accused, although drinking, was not drunk. From this testimony and accused's conduct of the evening, the court could reasonably infer that he was in sufficient possession of his faculties to entertain the necessary specific intents (CM NATO 774, supra; CM ETO 6159, Lewis). There remains for consideration whether the evidence supports the findings that accused did, in fact, have the alleged intents.

> "Murder is the unlawful killing of a human being with malice aforethought" (MCM, 1928, par.148a, p.162).
>
> "A deliberate intent to kill * * * may be inferred under the rule that everyone is presumed to intend the natural consequences of his acts" (1 Wharton's Criminal Law (12th Ed. 1932), sec. 420, p.633).
>
> "Malice does not necessarily mean hatred or personal ill-will toward the person killed * * *. The use of the word 'aforethought' does not mean that the malice must exist for any particular time * * *. It is sufficient that it exist at the time the act is committed" (MCM, 1928, par.148a, p.163).
>
> [Where a deadly] "weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act"(1 Wharton's Criminal Law (12th Ed. 1932), sec. 426, p.655).

Accused's conduct was of the pattern considered in CM ETO 6159, Lewis. There and in the cases there considered, sudden and unexpected killings, to all appearances without motive as here, were held to be murder. In accordance with the Lewis case, supra, and the cases therein considered, the evidence is sufficient to support the findings of guilty of Charge I and specifications.

That accused intended to inflict bodily harm upon Katharina Schuorr may be inferred from "the circumstances surrounding the event, the nature of the weapon used and the character of the wounds inflicted" (CM 193085, 193449, Dig. Ops. JAG, 1912-40, sec.451(10), p.313). The record of trial supports the findings of guilty of Charge II and Specification.

7. The charge sheet shows that accused is 26 years eight months of age and that he was inducted, without prior service, 16 November 1943 at Fort McClellan, Alabama.

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 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 AW 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567); and also upon conviction of assault with intent to do bodily harm with a dangerous weapon by AW 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper. (Cir.229, WD, 8 June 1944, sec.II,pars.1b(4), 3b).

_____ Judge Advocate

(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

24 MAY 1945

CM ETO 10967

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Buren,
	)	Germany, 25 April 1945. Sentence:
Private First Class WALTER HARRIS (36776839), Company D, 377th Infantry	)	Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private First Class Walter Harris, Company "D,", 377th Infantry, did at or near Beckum, Germany on or about 5 April 1945, forcibly and feloniously, against her will, attempt to have carnal knowledge of Elisabeth Groepper, a female child of the age of about thirteen (13) years.

Specification 2: In that * * * did, at or near Beckum, Germany on or about 5 April 1945 wrongfully fraternize with German civilians.

He pleaded not guilty to the Charge and Specification 1 thereof and

guilty to Specification 2 thereof. He was found guilty of the Charge and both specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 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 a period of 20 years, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence, corroborated by accused's own testimony showed that accused and two unnamed and unidentified men - "displaced persons" - (designated in the record of trial as "the Pole" and "the Italian"), near midnight on 4 April 1945, intruded themselves into the home of a German burger, one Ferdinand Groepper, in Beckum, Westphalia, Germany, in an effort to secure alcoholic beverages. The Groepper family consisted ot the husband, wife and four children - three daughters and a small son. Elisabeth, the second oldest daughter, was born on 28 May 1931, consequently on the date of the events here involved she was of the age of 13 years, 10 months and six days (R7-8). The three men searched the house, demanded "schnapps" and threatened the inmates with violence for a considerable period of time during which the mother and the oldest and youngest daughters escaped from the house. The father, Herr Groepper, Elisabeth and the small son remained in the home. For an hour or more Groepper was held prisoner in the kitchen by "the Pole" who threatened him with a pistol or revolver which had been given to him by accused (R8,9). During this time accused detained Elisabeth in an upstairs bedroom and compelled her to lie on a bed. He disrobed and in the nude entered the bed with the girl and embraced, kissed and fondled her. While the girl was fully clothed in a shirt, slip, skirt and stockings, accused succeeded in displacing her garments and placed his penis near her vaginal entrance. The girl did not know whether penetration was effected, although she experienced pain in the area of the vulva (R16-19). The facts of the incident are such that the court was fully justified in inferring that Elisabeth neither invited nor consented to the attack upon her (R18,19). During the ordeal the girl persistently called for her father's help but Groepper was held in the kitchen under the revolver by "the Pole" (R9,11,18). A neighbor, Bernard Steffens, was summoned by Frau Groepper. Upon entering the kitchen he was compelled by "the Pole" to remove all clothing except his underwear and was then forced to go upstairs. He saw Elisabeth in bed with accused on top of her, but did not succor her (R18,27,29). Accused finally released Elisabeth who fled from the house (R11,13,17). At this point accused, "the Pole" and "the Italian" discovered a linen chest which was locked. Accused demanded that Groepper open it, but the latter stated he had no key. Thereupon accused with the revolver

shot the lock and opened the chest (R31,33). Steffens was permitted to dress and went to the police station to summon the military police (R32), who upon arrival at the house took accused, "the Pole" and "the Italian" into custody (R12,36,38).

4. The accused as a witness in his own behalf denied that he had assaulted Elisabeth or that he had in any respect been familiar with her. However, he admitted his presence in the Groepper household with "the Pole" and "the Italian" on the night of 4-5 April 1945 and that he had committed acts of violence and disorder therein which included the breaking open of the linen chest (R42-44).

5. Specification 1 charged that accused did

> "forcibly and feloniously, against her will, attempt to have carnal knowledge of Elizabeth Groepper, a female child of the age of about thirteen (13) years".

The evidence would have substantially proved the crime of assault with intent to commit rape (CM ETO 5765, Mack; Cf: Hammond v. United States (App. DC, 1942) 127 Fed (2nd) 752). Such offense may be committed upon a female under the age of consent (52 CJ Sec.45, p.1032; Walters v. United States (CCA 9th 1915) 222 Fed.892; Cf. Ann. 81 ALR 601).

The allegation of the Specification which charged that accused did "attempt to have carnal knowledge of * * * a female child of the age of about thirteen (13) years "alleged in effect that accused attempted to have sexual intercourse with the child (6 Words and Phrases (Permanent Ed.), pp.160-163). However, the Specification does not meet the requirement of the civil criminal law with respect to charging the crime of attempting to commit rape inasmuch as it does not allege the commission of an overt act.

> "An indictment for an attempt to commit rape must aver the intent and the overt act constituting the attempt. It must set forth the acts done toward the commission of the offense. It has been held that it is not sufficient to allege merely that the defendant 'unlawfully and feloniously' did attempt to commit a rape, by then and there attempting carnally to know the prosecuting witness because it does not set forth any physical act done toward the commission of the offense" (Underscoring supplied) (44 Am. Jur., sec.48, p.930).

(See also 52 CJ sec.66, p.1047; Cf: CM 194441, Mauro, 2 B.R. 145 (1931); State of Missouri v. Fred Scott (1933), 58 SW (2nd) 275, 90 ALR 860.)

Nevertheless as a pleading before courts-martial it is probably sufficient. By implication the necessity of pleading the commission of an overt act in charging the indigenous offense of attempting to commit a crime is eliminated by the Manual for Courts-Martial (MCM, 1928, App. 4, Form 128, p.254). Therefore the Specification may be construed as charging the crime of an attempt to commit rape. The evidence fully sustains that charge.

Although viewed as a courts-martial pleading, Specification 1 may be construed as alleging facts sufficient to constitute the crime of an attempt to commit rape, the Board of Review believes that the real test in determining whether the Specification alleged facts constituting an offense under the 96th Article of War is to consider the allegations not in their technical, legalistic aspect but as a factual statement of accused's actions at the time and place alleged. When thus analyzed it is obvious that there is described a course of conduct by accused which falls short of the act of intercourse but which includes action directed at the girl with the intention of engaging her ultimately without her consent in the sexual act. Such conduct involving a young girl of the age of 13 years may well be considered of such nature as to reflect discredit upon the military service. The evidence fully sustained the allegations. Accused, in a nude condition, for nearly an hour held a young girl in bed and indulged his lustful appetite upon her body. Whether he consummated the coition is not revealed definitely by the evidence. However, his treatment of the child included all acts of abuse (short of the sexual act) included in the charge of carnal knowledge without consent.

The accused was a member of the invading and victorious American Army in Germany. The victim was an enemy alien. There was and is a definite standard of conduct of American soldiers in respect to their relationship with the peoples of the conquered land. Respect of women and their persons is one of the cardinal principles of the American way of life. Such ideal does not accord women who are alien enemies any different course of treatment than is demanded with respect to American women at home or to women of friendly foreign countries. The ideal and principle of respecting the dignity of the human personality remains inviolate regardless of lands or races. The recognition of any other standard would be a relapse into barbaism and would discredit Christian concepts and ideals. The violation or attempted violation of the persons of German women by American soldiers has an especial impact upon the military service which cannot be denied or treated casually. The occupation of Germany by American military forces for an indefinite period of years is part of the accepted program for the discipline and ultimate rehabilitation of the German people. If the American people are to assume the role of teacher and preceptor, their standards of human relationship and the conduct of their representatives in Germany must be beyond reproach.

The Board of Review has no difficulty in concluding that accused's conduct was highly discreditable to the military service of the United States.

There is no maximum punishment prescribed in the table of maximum punishments for the offense alleged (MCM, 1928, par.104c, pp.96-101). The most closely related offense appears to be assault with intent to commit rape. The maximum punishment for the latter offense is dishonorable discharge, total forfeitures and confinement at hard labor for 20 years (Ibid., p.99). Such maximum should be applied in the instant case.

6. Specification 2 alleged that accused did "wrongfully fraternize with German civilians". The word "fraternize" has the following connotation:

> "To associate or hold fellowship as brothers, or upon comradely terms; to have brotherly feelings; as, to fraternize with the enemy - v.t: To bring into fellowship or brotherly sympathy" (Webster's New International Dictionary, 2nd Ed., p.1002) (Underscoring supplied).

The above general definition has been accepted and approved by higher authority in the military forces of the United States in the European Theater of Operations, with reference to association of American military personnel with Germans.

a. "Policy, Relations between Allied Occupying Forces and Inhabitants of Germany" (12 Sept. 1944, Supreme Headquarters, Allied Expeditionary Forces):

> "'Non-Fraternization' is the avoidance of mingling with Germans upon terms of friendliness, familiarity or intimacy, whether individually or in groups, in official or unofficial dealings. However, non-fraternization does not demand rough, undignified or aggressive conduct, nor the insolent overbearance which has characterized Nazi leadership".

b. "Special Orders for German-American Relations" (Commanding General, Communications Zone, European Theater of Operations):

> "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 streets or elsewhere. Particularly, avoid all discussion or argument with them. Give the

Germans no chance to trick you into relaxing your guard".

It is therefore self-evident that the terms "fraternization" and "fraternize" as used in connection with the relationship of American soldiers and the German civilian population definitely concern friendly association and comradely social relationships. The indigenous meaning of the words deny their application to instances wherein American soldiers inflict upon German civilians acts of violence or where the latter are victims of anti-social or criminal acts committed by the former. The Commanding General, Communications Zone, European Theater of Operations, in his Special Orders above cited, epitomized the whole purpose of the policy of non-fraternization:

"The occupational forces are not on a glad hand mission".

The evidence in the instant case disclosed a course of conduct by accused that does not fall within the definition of "fraternization". He was engaged in a criminal mission involving force and violence upon the German family. Under the protection of his uniform he secured entrance to the Groepper house and thereafter he committed criminal acts or aided and abetted their commission by his confederates. It would be a distortion of the plain, ordinary meaning of language to hold that such conduct constituted "fraternization" within the purview of the policy of the Supreme Commander of the Allied Expeditionary Forces. That accused was guilty of other crimes and offenses is obvious and for these he should have been charged, but he did not "fraternize". The record is legally insufficient to support the findings of guilty of Specification 2.

It is manifest that accused's plea of guilty was made under a misconception of the offense with which he was charged. The prosecution's evidence negatived his guilt of the offense of "fraternizing" with the Germans. It would be a travesty on the whole process of military justice for the Board of Review to consider that accused was bound by his plea when the undisputed evidence in the case showed he did not commit the offense charged.

7. The charge sheet shows that the accused is 22 years seven months of age. He was inducted 30 November 1943 at Fort Sheridan, Illinois, to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and of Specification 1 thereof, but, for the reasons stated,

legally insufficient to support the findings of guilty of Specification 2 and legally sufficient to support the sentence.

9. 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

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

BOARD OF REVIEW NO. 2 17 MAY 1945

CM ETO 10968

U N I T E D S T A T E S	)	95TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Buren, Germany, 27 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ANTHONY SCHIAVONE (42103172), Company B, 379th Infantry	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Anthony Schiavone, Company "B," 379th Infantry did, at or near Gravelotte, France, on or about 13 November 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with an armed enemy, and did remain absent in desertion until on or about 14 December 1944.

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

Evidence was introduced of one previous conviction by summary court-martial 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 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 joined Company B, 379th Infantry, about September 1944 in Normandy. The organization on 13 November 1944 was in a defensive position at Gravelotte, France. Two platoons were in Gravelotte and the first platoon, of which accused was a member, was about 800 yards to the southwest. The enemy was 200 to 400 yards directly in front and "the situation was pretty much static, receiving some small-arms fire and quite a bit of mortar and 88 fire" (R7,11). On this day the company received orders to jump off at 0600 hours on 14 November for an attack on the forts surrounding Metz and this information was disseminated throughout the entire company (R8,9,11). Accused was present when these orders were communicated to the personnel of the company, and it was general knowledge in the company that they were to attack the next morning (R12,15,16). About 1815 hours the members of accused's platoon were told to bring their bedrolls to the platoon "CP" so that they could be taken back to the Company CP. Accused was last seen at that time and was not present with his organization from 14 November 1944 to 21 March 1945 (R12,13,14,16,17). He did not have permission to be absent (R13,18). Company B attacked the enemy the next morning, received heavy mortar fire and suffered five casualties (R8).

The morning report for Company B for 3 December 1944, 21 and 24 March 1945, introduced without objection, lists accused as absent without leave from 13 November 1944 to 21 March 1945 (R9; Pros.Ex.A).

It was stipulated between the prosecution, the defense and the accused in open court that the accused returned to military control on 14 December 1944 at Oran, Africa (R18).

4. Accused, after his rights as a witness were fully explained to him (R18), was sworn and testified in substance as follows:

On 13 November 1944 he was a rifleman in the first squad, first platoon, Company B, 379th Infantry. The first platoon of Company B was attached to A company for the purpose of maintaining contact between them, and they were in a defensive position. They were told to make up their rolls and take them to the platoon CP, about 150 yards to the rear, and while they were not definitely told what they were going to do, "We all talked it over and took it for granted we were going into an attack. He was "quite afraid" and when he took his bedroll back he just kept on walking in the opposite direction from the front and was apprehended a few days later in Paris. While being brought back, he left a replacement depot at Neufchateau and went to Marseilles, France. He wanted to see his relatives and his brother in the 34th Division. A sailor told him the boat was going to Italy but about three days later he got off in Oran, Africa. He was taken from there to Naples and then to France, where he was finally returned to his unit on 21 March 1945. Since his return he has participated in actual combat with his organization in their last engagement (R19,20).

5. The evidence clearly shows and accused admits that he left his organization on 13 November 1944 without authority and because he was afraid to take his part in the impending attack on the enemy.

> "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 court was fully warranted in its findings that accused left his organization with the intent to avoid further hazardous duty (AW 28; CM ETO 5958, Perry et al; CM ETO 6937, Craft).

6. The charge sheet shows that accused is 27 years and nine months of age and was inducted 30 December 1943. His prior service is shown as "Engrs Unasgd from 10 Dec 1937, to 18 Dec 1940, Discharged as Pvt, Character Excellent; By reason ETS".

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

16 JUN 1945

CM ETO 11004

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM convened at Hurth, Germany, 21 March 1945.
Private WALLACE E. EVANS (35132821), Division Artillery Command, 3rd Armored Division	)	Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 92nd Article of War

Specification 1: In that Pvt Wallace E. Evans, Division Artillery Command, 3rd Armored Division, did, at Bickendorf, Germany, on or about 9 March, 1945, forcibly and feloniously against her will, have carnal knowledge of Mrs. Elizabeth Pugge.

Specification 2: In that * * * did, at Bickendorf, Germany, on or about 10 March, 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Elizabeth Pugge.

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

Specification 1: In that * * * did, at Bickendorf, Germany, on or about 9 March 1945, with intent to do bodily harm, commit an assault upon Mrs. Elizabeth Pugge, by hitting her on the arm with his pistol.

Specification 2: In that * * * did, at Bickendorf, Germany, on or about 9 March 1945, unlawfully enter the dwelling house of Joseph Pugge, a German civilian, with intent to commit a criminal offense, to wit: a wrongful search and trespass therein.

Specification 3: (Finding of not guilty)

Specification 4: In that * * * did, at Bickendorf, Germany, on or about 10 March 1945 with intent to do bodily harm commit an assault upon Joseph Pugge and Anton Putz, by threatening them with a pistol.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of Specification 1, Charge I, except the words "9 March" substituting therefore the words "10 March", of the excepted words not guilty, of the substituted words guilty; guilty of Specification 2, Charge I; guilty of Charge I; guilty of Specifications 1 and 2, Charge II, except in each case the words "9 March" substituting therefor the words "10 March", of the excepted words not guilty, of the substituted words guilty; not guilty of Specification 3, Charge II; guilty of Specification 4, Charge II, except the words "Joseph Pugge and" and the word "them", substituting for the word "them" the word "him", of the excepted words not guilty, of the substituted word "guilty"; and guilty of Charge II. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the 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:

On 10 March 1945, Mr. and Mrs. Joseph Pugge were at their home in Bickendorf, Germany. Mrs. Pugge was 66 years old and her husband was 61 (R6-7,35). They were in bed when, sometime between midnight

and 0100 hours, they heard a knock on the door. Before they were able to answer, a window was broken in. Mr. Pugge unlocked the door and accused pushed past him into the house. He was drunk and was armed with a revolver which he carried in a holster (R7,25,36,37). At this point Mrs. Pugge came out of the bedroom. Accused tried to put Mr. Pugge into the toilet room, but he refused to go and went into the kitchen with his wife. Accused followed them and looked about, going from the kitchen to the bedroom. The Pugges went with him, being fearful lest he discover their 43 year old daughter who was in the room. They managed to conceal her presence, however, and returned with accused to the kitchen. Accused then motioned to Mr. Pugge to leave. According to Mrs. Pugge's testimony, he pointed his pistol at her husband and she said "Joseph go, he will shoot". Pugge, however, said it was too dark for him to see whether accused had a pistol, and on cross-examination, Mrs. Pugge also indicated uncertainty as to whether accused had used the gun on this occasion. In any event, Pugge went into the hall and hearing his wife scream, left the house to find assistance (R7-10,14,18,35-37,40,43).

Meanwhile, Mrs. Pugge and accused were alone in the kitchen. He threw her on the couch holding his pistol against her chest. She tried to push him away but he struck her painfully on the arm with the pistol. She struggled and screamed "Shoot me, shoot me", "Don't disgrace me, I am a Mother", but being ill with heart trouble, she was unable successfully to resist and he succeeded in having sexual intercourse with her. Penetration was effected, but "not so very far". When he finished, he left (R37-38,41-42).

Mr. Pugge returned to the house some time later with two of his neighbors, Mr. Putz and Mr. Lohman. The latter was accompanied by an American soldier, Private Matthew J. Miska. By the time they arrived, accused had gone and Mrs. Pugge was alone (R10-11,14,16,21, 38,42). She did not tell her husband what had happened because "I wanted to sacrifice myself; I did not want to say anything; I would have carried it with me". She cried all night however and did not go to bed (R41). At about 0230 hours, accused returned, again in an intoxicated condition. Lohman and Putz were in front of the house and Mr. Pugge called them into the kitchen. Accused motioned the men out of the kitchen, holding his pistol against Putz. Since they were afraid he would shoot, they went into the hall (R11-12,21-22,24,26). They were unable to see into the kitchen, the door being closed, but Pugge heard his wife scream "Leave me alone, I am an old woman - * * * This is not the right thing to do" (R14). Lohman opened the door and Mrs. Pugge was seen lying on the couch and accused sitting on it with a pistol in his hand. Lohman then went into the kitchen and found accused lying on top of Mrs. Pugge. He threatened Lohman with his pistol, motioning him to leave. Partly because he felt he was "interrupting something" and "in affairs like this, no decent person

interrupts", and partly because he was afraid of being shot, Lohman left (R33). He did not tell Mr. Pugge what he had seen for he "was too decent for that". He did not notice any struggling by Mrs. Pugge and heard no talking in the kitchen, although Mr. Pugge testified that he heard his wife say "Mr. Lohman go out, he will shoot". The door was closed and the men remained in the hall, fearing to enter the kitchen. Mrs. Pugge continued to scream or "sigh" as if saying "don't do that" (R11-13,23-26,28-34,38-39).

During this time accused, who was more intoxicated than on his previous visit, again attacked Mrs. Pugge. He wanted her "to take it into my mouth", and in the face of her protests became brutal and threw her on the couch where he again had intercourse with her against her will. Upon finishing, he left the house. As the result of his drunkenness, he fell flat as he was leaving and Lohman picked him up. Mrs. Pugge cried throughout the night and "did not want to live any longer " (R13,30,39-41).

Between accused's first and second visits to the Pugge home, at least one and possibly two other soldiers, including the one accompanying Lohman, came into the house. They did not molest anyone however (R16-19,21,25,27). Accused, shortly before his first visit to the Pugges, had been in Lohman's apartment which was upstairs in the same house. He indicated that "he wanted to be together" with the three female members of Lohman's household, but Lohman dissuaded him and he left (R27). Accused had no military right at the time in question to enter the Pugge house (R19-20).

4. Accused after being warned of his rights by defense counsel, elected to remain silent (R47).

Evidence for the defense consisted of the testimony of Private Matthew J. Miska, a member of accused's organization. He stated that accused was on guard up to about 2345 hours, 9 March 1945. The witness visited the Pugge house, both upstairs and downstairs, sometime after 2400 hours. He did not see accused in the house at that time and had never seen him there. He had been informed by another member of the organization that there was a girl "upstairs" in the house whom he was trying to make, and there was a "lot of talk going around in the area that there are fellows going to different houses". He had seen other people going into the Pugge-Lohman house and "it could be" that he had mentioned that there was a young lady in the house to accused (R45-47).

Every element of the crime of rape has been proved by substantial competent evidence in each of the two offenses with which accused was charged (Specifications 1 and 2, Charge I), and the record of trial is therefore legally sufficient to sustain the findings of guilty (CM ETO 10079, Martinez). While Lohman's testimony

differs from that of the other witnesses with respect to the exact sequence of events in some instances and, taken alone, might well give rise to doubt on the issue of consent, the testimony of the other witnesses is sufficient to justify the court's findings. This is particularly true in view of the advanced age of the victim, a circumstance which in itself tends to corroborate her testimony that the intercourse was against her will.

With respect to the charge of housebreaking (Charge II, Specification 2), there is likewise sufficient evidence of unlawful entry and of the specified intent to support the findings of guilty.

Accused was also convicted of assault with intent to do bodily harm upon Mrs. Pugge and Mr. Putz (Charge II, Specifications 1 and 4). Under the circumstances, the wisdom of encumbering the case with these charges may well be questioned (see MCM 1928, pars. 27,80, pp.17,67). It should also be noted that both the assault specifications are defectively drawn. Each omits the words "feloniously and willfully" contained in the model form provided in the Manual for Courts-Martial for use in cases of assault with intent to do bodily harm (MCM 1928, App.4, Form 99, p.250), and Specification 4, in addition, is open to objection on ground of duplicity. The latter objection may properly be regarded as cured by accused's failure to object and by the court's elimination of the assault upon Pugge in the finding of guilty. Under the circumstances, therefore, it cannot be said that the duplicitous character of the pleading misled accused in the preparation of his defense or prejudiced any of his substantial rights (CM 195772, Wipprecht, 2 B.R. 273,293 (1931); CM 224765, Butler, 14 B.R. 184 (1942)). As for the omission of the words "feloniously and willfully", inasmuch as there is an allegation of assault coupled with the specific intent to do bodily harm, the omission although irregular is not fatal. The word "assault" is defined in the Manual for Courts-Martial as "an attempt or offer with unlawful force or violence to do a corporal hurt to another" (MCM 1928, par.149, p.177). Hence the use of the word assault combined with the allegation of intent is sufficient to imply that the acts charged were willful and felonious (see CM 218667 Johns, 12 B.R. 133 (1941)). With reference to the legal sufficiency of the record of trial to support the findings of guilty of assault, the evidence clearly justifies the inference that the assaults committed were accompanied by the intent to do bodily harm at least in the event of a failure on the part of the victim to comply with accused's requirements. Indeed, in Mrs. Pugge's case, it was shown that bodily harm was actually inflicted. When the intent to do such harm is conditioned upon compliance with a demand which accused has no right to make, the offense as described in Article of War 93 is complete (CM ETO 3255, Dove; CM ETO 7000, Skinner).

6. The charge sheet shows that accused is 28 years of age and was inducted 15 May 1942 at Abilene, Texas. He had no prior service.

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

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

[illegible] Judge Advocate

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

BOARD OF REVIEW NO. 2

28 MAY 1945

CM ETO 11006

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Hurth,
	)	Germany, 22 March 1945. Sentence:
Private FLORIO MAZZEO (32061790), Company D, 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. 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 Florio Mazzeo, Company D, 36th Armored Infantry Regiment, did at Villettes, Belgium, on or about 16 January 1945, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit: Combat operations against the German Army, and did remain absent in desertion until he was apprehended at Seraing, Belgium on or about 4 February 1945.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced by special court-martial for absence without leave for 64 days

in violation of Article of War 61. All of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution showed that on 16 January 1945, accused who had been discharged from the hospital, was assigned for duty to the 36th Armored Infantry Regiment, 3rd Armored Division. He with 13 others were picked up at the replacement pool, and returned to the Division on that day. At the Division, this group of replacements, including accused, was turned over to the personnel officer of the 36th Armored Infantry Division, and as of the same day he was picked up and carried: "Fr slightly wounded * * * To dy * * *" on the morning report of Company D of that regiment, to which company he was assigned by orders two days later as of 16 January 1945 (R6-9, 13; Pros.Exs.A,B,D). That night after being instructed to remain close by, the group of 14 was billeted in a house in Offet, Belgium, (evidently the site of regimental headquarters)preparatory for departure to their units. But the following morning, "when the transportation to the units left Offet", one of the group was missing. The area was checked and the missing soldier could not be found (R9,10). The absentee was accused, as appears from a writtent statement made by "Sergeant Clifford Boyer", which statement was, on stipulation, received in evidence as the testimony Sergeant Boyer would give were he present in court. In his statement, the sergeant identified Private Mazzeo as being with him at the time in question when they, on or about 16 January 1945, were "reported in" to the Service Company of the "36th Inf". They slept at that place that night awaiting transportation forward to their company. The next morning the sergeant called accused for breakfast. That was the last he saw of him (R12; Pros.Ex.C). Accused had no permission"to be absent from this group", nor did he "ever rejoin the company after he was returned to the outfit on 16 January" (R10,14). When the accused was wounded, 25 December, he had been a member of Company D, and that company had been engaged with the enemy at Grandmenil, Belgium. "The whole Division was fighting in the bulge to stem von Ronstedt's drive. At the time accused was returned, his company was fighting in the vicinity of Cherain, Belgium. Two days later it was at Sterpigny, and on the 18th it "pulled out of Sterpigny to the high ground beyond Cherain". The company was "in actual contact" with the enemy "on those dates" (R14,15). Accused was arrested in Seraing, Belgium, on 4 February 1945 (R15; Pros.Ex.E).

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

5. The evidence shows that accused after having been wounded and evacuated to a hospital was discharged from the hospital and returned to his regiment for duty. At a town in Belgium, where his regiment had its headquarters, he was billeted over night preparatory to leaving for his company the following morning. The next morning he absented himself from the area without authority, was not present when the transportation went forward, and did not thereafter join his company. His absence was terminated by arrest on 4 February. Between 16 and 18 January, inclusive, accused's company was in actual combat with the enemy. The court was fully justified by this evidence in believing that accused left his organization with intent to avoid hazardous duty, as alleged in violation of Article of War 58, and in its findings of guilty of the Charge and Specification (AW28; CM ETO 4701, Minnetto; CM ETO 6937, Craft).

6. The charge sheet shows that accused is 27 years of age and was inducted 30 November 1940 at Somerville, New Jersey. He had no prior service.

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

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 2

CM ETO 11009

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Hurth, Germany, 22 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM J. MARSH, (42018606), Company I, 33rd Armored Regiment	)	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private William J. Marsh, Company I, 33d Armored Regiment, did, at Baclain, Belgium, on or about 17 January 1945, misbehave himself before the enemy, by refusing to go into a bull-dozer tank as ordered by First Lieutenant Thomas A. Cooper, and to move out in same when the company moved out to engage with the German Army, which forces, the said command was then opposing.

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

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was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution showed that on 17 January 1945, accused was a private, Company I, 33rd Armored Regiment. On that date, his company was in Baclain, Belgium, "in the Belgium Bulge". It "had been attacking" the Germans from the north to the south (R6,7,10-12). The company was getting ready to go into the town of Cherragne, and on the evening of the 17th, the company commander assembled his men and told them that the company "would move out and in all probability the next morning" (R7,11). Then, as a result of earlier advice he had received, this officer talked to accused. He "told him (accused) he would have to get into a tank. If he refused and if he didn't, he would be court-martialed". He then asked accused if he "still refused to go forward". Accused answered he "would refuse" (R7,8,11). At that time, accused's assignment was bow gunner on a company tank bulldozer (R8,12,13). Accused did not "go forward" (the next day) (R8). The company subsequently (presumably on schedule) reached Cherragne, at which time the town was completely friendly, there being no Germans there when this company arrived (R11,12).

It was stipulated by the prosecution and the defense that were the division neuro-psychiatrist present in the court, he would testify that a psychiatric examination of accused made on 1 February did not reveal him to be suffering from any psychosis (R13).

4. A second lieutenant from accused's company was called as a witness for the defense. The purport of his testimony was that "the men in the crew" of the tank bulldozer, to which accused was assigned, "were not too well situated to go in a tank". In other words, in that crew, there were a couple of men "who had jumped tanks and were shaky and we put them in a bulldozer crew and we thought surely they would make out all right" (R14,15).

Accused, advised fully of his rights as a witness, elected "to take the stand". (The record does not show that he was sworn. He was cross-examined). He told of having served with the company since Mortain and of having had three of his tanks knocked out. He said that at the time in question he had no faith in his tank commander because he had known him to jump out of a tank when in a "hot spot";

that he "could not trust him", and felt that if a similar situation developed, on this particular occasion, this man would desert his crew. On cross-examination, accused said he refused to go into this tank, that he knew he had been ordered so to do, and that this occurred on the date and at the place in question (R16-18).

The defense, on its cross-examination of the company commander of accused, brought out that the soldier who was assigned to drive the bulldozer to which accused was also assigned, had been the subject of rumors to the effect that he "had jumped a tank", and that in the drive from Normandy, the enemy had disposed of three of his tanks. The company commander also said that charges had been preferred against this driver; but that on recommendation of the "senior non-coms" of the company, the charges had been droped and the soldier had been reduced to a private from technician fourth grade; and that since that time he had performed satisfactorily "in the drive to the Rhine" (R8,9).

5. The uncontradicted evidence shows that accused made an anticipatory refusal of a command that on the next day he get in a tank and go forward with his company. From the general tactical situation existing at that time, as shown by the record, it may be inferred that contact with enemy was expected on the following day. Accused actually did not go forward the next day. There is no direct evidence that at the time his vehicle was ready to proceed accused again expressly refused to get in it, or that this order was repeated. However, other elements of the offense being present and proved, such advance refusal would in itself be "misbehavior" within the meaning of Article of War 75 (CM NATO 1614, III Bull. JAG 146).

There is some indication that this company was not in as close proximity to actual phsyical contact with the enemy as had been expected on 17 January. In fact when it reached its objective, Cherragne, on 18 January, the enemy was not there. What happened after 18 January is not told. "Before the enemy" within the purview of Article of War 75 means existing or imminent contact with the enemy (CM 126112, Dig. Op. JAG 1912-40, sec.433(1), p.303; CM NATO 2893, IV Bull. JAG II). Whether or not accused was "before the enemy" was a question for the court to decide. It may be said that the general tactical situation offered sufficient proof of this element of the offense and that a finding of guilty, which necessarily includes an affirmative answer to this question, will in the absence of error not be disturbed by the Board of Review upon appellate review (CM ETO 1953, Lewis).

The record in this case shows that Major Richard H. Wills, who sat as a member of the court which tried accused, without objection of the latter, had been the investigating officer in the case and that this fact was not disclosed on the organization of the court. The investigation was held on February 2, 1945, 48 days before the trial.

In CM 210612, Maddox (9 BR 277), the Board of Review held that the presence of the investigating officer on the court was not jurisdictional error invalidating the proceedings, but procedural error only. It said that such error is not necessarily prejudicial to the rights of accused when there is competent compelling evidence of guilt.

In the present case the evidence is competent and compelling. Accused himself on the stand admitted in effect that he said that he would refuse to get in a tank and go forward the next day. This statement was in answer to an inquiry by his company commander as to whether or not he would perform his assigned duty the next day. The over-all and existing tactical situation, as pointed out, brought the misconduct of accused within the provisions of Article of War 75 insofar as it applies to misconduct in the presence of the enemy (CM NATO 2893, supra).

6. The charge sheet shows that accused is 19 years of age and was inducted 28 October 1943 at Newark, New Jersey. He had no prior service.

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

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

Judge Advocate

Judge Advocate

(DISSENT) Judge Advocate

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

BOARD OF REVIEW NO. 2

28 JUN 1945

CM ETO 11009

U N I T E D S T A T E S	)	3RD ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Hurth, Germany, 22 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM J. MARSH (42018606), Company I, 33rd Armored Regiment	)	

DISSENTING OPINION by JULIAN, Judge Advocate

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1. I cannot agree with the holding of the majority of the Board of Review. The investigating officer participated in the trial as a member of the court after having investigated the charges pursuant to Article of War 70 and MCM, 1928, par.35a, p.25. In his report he recommended trial by general court-martial and stated that there were no explanatory or extenuating circumstances. In the course of his investigation he examined four witnesses to the alleged offense. All four gave him sworn statements against the accused, and only two testified at the trial. Two of the witnesses gave him evidence damaging to accused which was not brought out at the trial. At the commencement of the trial the prosecution made the following request:

> "If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member, it is requested he state such facts" (R3).

The record shows that no response was made. The investigating officer remained silent.

Manual for Courts-Martial, 1928, paragraph 35a, page 25, provides as follows:

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> "Unless otherwise indicated by him, the submission of his report by an investigating officer will be regarded as a statement to the best of his knowledge and belief * * * that the matters set forth in the charges on which he recommends trial are true".

The report contained no indication that the matters set forth in the charges were not true. The conclusion is unavoidable that previous to the trial the investigating officer had investigated the offense charged against accused and had formed and expressed a positive and definite opinion that to the best of his knowledge and belief accused was guilty thereof.

2. The right of an accused to be tried by an impartial court is fundamental. The investigating officer in this case did not stand impartial. He had prejudged the case against the accused. Failure by accused to exercise his right to challenge and his statement that he did not object to any member present on the court did not in the circumstances constitute waiver. The identity of the investigating officer was not disclosed at the trial and there was likewise no disclosure that he had examined the witnesses against accused, formed and expressed the opinion that accused was guilty of the offense charged, stated that there were no extenuating circumstances, and recommended trial by general court-martial. It does not appear from the record or the accompanying papers that either accused or his counsel knew in fact that the investigating officer had formed and expressed the opinion that accused was guilty. Such knowledge is not to be presumed. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Courts indulge every reasonable presumption against waiver of fundamental rights and do not presume acquiescence in their loss (Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461; Glasser v. United States, 315 U.S. 60,70, 86 L.Ed. 680,699).

3. This case is to be treated as if the defense, having used its right to a peremptory challenge on another member, had challenged the investigating officer for cause on grounds stated in the sixth, seventh and ninth clauses of paragraph 58e, Manual for Courts-Martial, 1928, and the challenge was not sustained. The case is thus governed in principle by CM 261181 (III Bull. JAG 417). In that case the law member while functioning within the normal scope of his official duties as acting staff judge advocate had examined the charge sheet and the investigating officer's report pertaining to accused and also confessions made by accused. He had discussed the case with the trial judge advocate, who was then his assistant, prior to trial. He was challenged for cause by the defense but he averred under oath that he had formed no positive opinion

and had expressed no opinion as to the innocence or guilt of accused. The court refused to sustain the challenge. It was held that the record of trial was legally insufficient to support the findings of guilty and the sentence, that the challenge should have been sustained notwithstanding the law member's contention that he had formed no opinion; that in order properly to pass upon the correctness of the charges and Specification it was necessary for him to make a careful study of the facts of the case. The following conclusion was reached:

> "His mind on the issue of guilt or innocence could not help but be prejudiced against the accused and, even if it was not, the facts were such as to create a substantial doubt to that effect. It follows that the trial was not free from substantial doubt as to impartiality".

4. The application of the principle enunciated in the case cited enhances the efficacy of the court-martial system as an instrument for the maintenance of military discipline by instilling confidence in the fundamental fairness of the processes of military justice.

5. The fact that the evidence of accused's guilt may have been of such character as virtually to compel findings of guilty, cannot dispel substantial doubt as to the impartiality of the court in reaching its findings and in imposing a sentence which includes confinement for life.

6. On the facts of this case the investigating officer's participation in the trial as a member of the court injuriously affected accused's fundamental right to be tried by an impartial court. The error cannot be cured by inconclusive speculation as to what the court would have done if the prejudiced member had not been present thereon.

The record should be held legally insufficient and accused granted a rehearing.

Anthony Julian Judge Advocate

11009

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

BOARD OF REVIEW NO. 2

22 JUN 1945

CM ETO 11059

U N I T E D S T A T E S	)	ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private First Class WILLIE G. TANNER (34901742), 4205th Quartermaster Service Company	)	Trial by GCM, convened at Verdun, France, 12 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, HILL and JULIAN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willie G. Tanner, 4205th Quartermaster Service Company, did, at or near Consenvoye, Meuse, France, on or about 21 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Thomas W. Johnson, a human being, by shooting him with a rifle.

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

was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Accused was a member of the 4205th Quartermaster Service Company which was stationed near Consenvoye, France (R25). Shortly before midnight, 21 February 1945, he was playing cards in one of the billets with Private Thomas W. Johnson, the deceased. A dispute arose between them over some money and it quickly developed into a fist fight. Neither one was armed. Johnson who was a good boxer got the better of the fight. After a few minutes of fighting they were separated and accused was seen to be bleeding from the mouth. Both left the billet immediately after the fight. Johnson went to the mess hall near the billet, had coffee and a sandwich and then left, saying he was turning in (R14,15,16, 18,23,28,31).

Accused went to the guardhouse about 500 yards away where he took a rifle from the rack. He stated to the sergeant that it was almost time to go on guard. Outside, about 250 yards from the guardhouse, accused met Johnson and said something about money. Johnson went toward him with his hand extended saying "here's the money". When they were about 15 feet apart accused fired the rifle at Johnson. He fired but one shot. Johnson fell forward on his face, both arms outstretched. He had no weapon and was still holding money in one hand. As he lay on the ground he said he had been shot. He was unable to say anymore, was soon "just shaking all over", and lost consciousness. He had a bullet hole in his breast "almost at the heart" and another in his back where the bullet had come out. He was carried to the dispensary on a stretcher (R12,14,17,19,20,21,31-35,36). Immediately after the shooting, accused walked away and returned to the guardhouse where a member of the guard asked him what happened. Accused replied, "I just shot Johnson".

Approximately 20 to 30 minutes intervened from the time accused left the billet after the fight to the time the shot was heard. Except when on duty no one in the organization was permitted to carry arms or ammunition, and although accused was

scheduled to go on duty as a relief guard at 0030 hours, he was not authorized to take the rifle from the guardhouse (R12,16,18,20,25). The duty of accused as relief guard was to relieve temporarily the several members of the guard on post. The relief due to be posted at 0030 hours consisted of 18 men, three of whom were relief guards. There were 15 rifles for the men who were posted. The practice was for a relief guard to take the rifle of the man he temporarily replaced. Except when actually substituting for a sentinel on post, the relief guards were not armed (R51,53).

Accused made a statement before trial which was received in evidence (R40; Pros.Ex.3). In it he admitted fighting with Johnson in a dispute over money. The statement then continues as follows:

> "I started out to the mess hall so I turned back and went down to the Guard Hut. I got a carbine out of the rack. As I left the hut Sgt. Dodds, who was there, asked me what time it was. I replied that it was almost time to go on guard. I then went up the Railroad toward Post No. 9. I met Johnson between Post No. 9 and Post No. 7. I asked Johnson to give me my money. He started to run toward me along the track. I told him to stay away from me. I repeated: 'Get back away from me', but he continued to run toward me and I shot him. I did not see anything in his hand" (R40).

The defense neither objecting nor expressly consenting thereto, two exhibits were received in evidence to prove the cause and the date of Johnson's death (R10; Pros.Exs.1,2). Prosecution Exhibit 1 dated 23 February 1945, containing the heading "193D (US) General Hospital Advance Section Com Z APO 350", and purporting to be signed by Irving Yachnes, "1st Lt, MC Chief of Lab. Service" reads as follows:

> "C E R T I F I C A T E
>
> I certify that the death of Private Thomas W. Johnson, 42081017, 4205 Quartermaster Service Company, APO 350, U. S. Army, was caused by a high velocity missle passing through abdomen, tearing liver and causing profuse intra abdominal hemorrhage".

Prosecution Exhibit 2, dated 22 February 1945, containing the same heading and purporting to be signed by Paul A. Reeder, "Capt., MC" reads as follows:

"C E R T I F I C A T E

I certify that Private Thomas W. Johnson, 42081017, 4205 Quartermaster Service Company, APO 350, U.S. Army, was dead on arrival 0030 22 Feb 1945, this hospital. Cause of death: Gunshot wound, perforating, lower chest. (carbine)".

It was stipulated by the prosecution, defense counsel and accused that "Private Thomas W. Johnson, the deceased, was a human being" (R41).

First Lieutenant Robert S. Brown, investigating officer, a member of the company to which accused belonged, and who secured accused's statement (Pros.Ex.3), testified that accused was considered an excellent soldier in the organization (R41).

4. Accused after his rights as a witness were explained to him, elected to be sworn as a witness in his own behalf and testified substantially as follows:

He was playing blackjack with Johnson on the night of 21 February 1945. The play was for 100 francs for each deal. Johnson produced only 50 francs and when accused pointed this out to him, Johnson stated that he had the money in his pocket.

"This led to words. He never pulled out any money. I had 400 francs and some more change on me. I put that in my pocket. I still had the 400 francs. He grabbed up the whole thing. I asked him for it. I tried to get it back and grabbed him, by the hand. We scuffled. He hit me in the mouth. He hit me several times. He just whipped me. We scuffled all over the place. When we continued, some of the boys stopped us. I don't know who it was. I come on out and started toward the mess hall. I seen him go towards the mess hall. I turned around and went on back. I went to get me some coffee. I came back to the guardhouse, sat by the guardhouse, saw Sgt. Dodds, asked him what time it was. He said: 'About time to form the guard'. I told him NO. I said: 'I had better go up and see about relieving the guard'. I

usually wakes them up. I'm a relief guard. I wake them up and relieves them when they want to be relieved. I went to the car down the track. I walked down the railroad. I came on around. I was on the side of the track. I walked down the track. Johnson was over by the dump. He was coming down the track. I asked him: 'Johnson, are you going to give me my money?' He said: 'No.' He started towards me. I told him: 'Don't come up!' He slowed up. He started again. He ran. It was dark. I was scared. I couldn't whip him and I cocked the gun and I shot. I wasn't meaning to shoot him. He had already whipped me once in the house" (R42).

After he was shot, Johnson said "I'll give you your money". Accused did not want the money then, but walked back to the guardhouse where he informed the sergeant of the shooting and was placed in arrest. The fight occurred about 30 minutes or more before the shooting and accused had "cooled off". He was not "mad with Johnson" when he shot him. He got the rifle from the guardhouse but "didn't have no dream of even seeing" Johnson. It appeared to accused from the manner in which Johnson approached him that he was going to fight with him again. He did not get away from Johnson because he found himself next to a fence and there was no other place for him to go unless he went into a ditch. He was three or four feet away from Johnson when he shot him (R42-44, 50). The defense introduced no other evidence.

5. To establish that Johnson's death was caused by wounds inflicted by accused, the prosecution, without objection by the defense, introduced Prosecution Exhibits 1 and 2. Failure to object to these certificates on the ground that their genuineness was not shown may properly be regarded as a waiver of that objection (MCM, 1928, par.116b, p.20). It can be assumed, therefore, that each certificate was in fact signed by the officer whose signature purports to be thereon. The Board of Review is of the opinion that although the certificates were statements made by persons who were not witnesses testifying before the court under oath and subject to cross-examination they were in this case properly received as official writings (MCM, 1928, par.117b, p.121). Post mortem examinations by medical officers are required to be made in cases where death is due to foul play, violent or unnatural causes (except in certain instances not pertinent to this case) by paragraph 19d(1), Army Regulation 40-590, and paragraph 18b(1), Army Regulation 600-550. It is apparent that the prosecution, the defense and the court treated them as official writings. The certificates were made by medical officers stationed at an Army hospital who had the duty to know the

facts recited in the certificates(except the word "carbine" in Pros.Ex.2) and to record them. It does not appear that the entries in the certificates were not based upon personal knowledge. It is to be noted, nevertheless, that the question of the competency of Prosecution Exhibit 1 and 2 could have been avoided by having followed the far more satisfactory practice of calling the medical officers as witnesses. There is other evidence of Johnson's death and of the fact that it was caused by the gunshot wound inflicted by accused. The stipulation that "Private Thomas W. Johnson, the deceased, was a human being" carries the necessary implication that Johnson was dead at the time of the trial; that is, that he died at some time between 21 February and 12 March, 1945. This fact and the additional proved fact that the bullet passed through Johnson's body in the region of the heart followed by his immediate collapse, his inability to speak as he lay on the ground, and his lapse into unconsciousness, warranted the court in finding, in the absence of any indication to the contrary, that Johnson's death was caused by the gunshot wound he received on the night of 21 February.

There was ample proof that accused deliberately shot Johnson with a rifle and that he intended either to kill him or to cause him grievous bodily harm. The shooting occurred about 30 minutes after the fist fight in which he was beaten by Johnson. This lapse of time, the distance he walked to and from the guardhouse before the fatal encounter, and accused's own admission on the stand that he had "cooled off" before the shooting occurred, warranted the conclusion that death was not inflicted in the heat of sudden passion. Johnson's wrongful taking of money belonging to accused does not justify the killing or mitigate the offense of murder into manslaughter. The evidence is inadequate to sustain a claim that the homicide is to be excused on the ground of self-defense. No reasonable grounds are disclosed for a belief on the part of accused that resort to a deadly weapon was necessary to save his life or to prevent great bodily harm to himself. The evidence was sufficient to establish that accused killed Johnson without legal justification or excuse and with malice aforethought and that he was therefore guilty of murder (MCM, 1928, par.148a, pp.162-164).

6. The charge sheet shows that accused is 29 years, nine months of age, and was inducted 7 December 1943 at Camp Forrest, Tennessee. He had no prior service.

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

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of murder by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is 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

23 MAY 1945

CM ETO 11072

U N I T E D S T A T E S	2ND ARMORED DIVISION
v.	Trial by GCM, convened at Headquarters 2nd Armored Division, APO 252, U. S. Army, 26 February 1945.
Second Lieutenant SAMUEL COPPERMAN (O-1181846), Service Battery, 78th Armored Field Artillery Battalion	Sentence: Dismissal, total forfeitures, confinement at hard labor for two years, six months, fine of $1,000.00, and further confinement at hard labor until payment of fine not to exceed two additional 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 specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In thst Second Lieutenant SAMUEL (NMI) COPPERMAN, 78th Armored Field Artillery Battalion, did, in conjunction with Technical Sergeant Thomas W. McCraw, Service Battery, 78th Armored Field Artillery Battalion, at or near

Liege, Belgium, on or about 15 October 1944, wrongfully, knowingly and unlawfully sell to Achille Kruyen, a civilian, one (1) case of laundry soap of the value of about Four dollars ($4.00), property of the United States furnished and intended for the military service thereof.

Specification 2: In that * * * did, in conjunction with Technical Sergeant Thomas W. McCraw, Service Battery, 78th Armored Field Artillery Battalion, at or near Liege, Belgium, on or about 25 October 1944, wrongfully, knowingly and unlawfully sell to Achille Kruyen, a civilian, one (1) case of laundry soap, of the value of about Four dollars ($4.00); and one (1) case of "10 in 1" rations, of the value of about Seven dollars ($7.00), property of the United States furnished and intended for the military service thereof.

Specification 3: In that * * * did, in conjunction with Technical Sergeant Thomas W. McCraw, Service Battery, 78th Armored Field Artillery Battalion, at or near Liege, Belgium, on or about 5 November 1944, wrongfully, knowingly and unlawfully sell to Achille Kruyen, a civilian, two (2) cases of laundry soap, of the value of about Eight dollars ($8.00); and one (1) case of "10 in 1" rations, of the value of about Seven dollars ($7.00), property of the United States furnished and intended for the military service thereof.

Specification 4: In that * * * did, in conjunction with Technical Sergeant Thomas W. McCraw, Service Battery, 78th Armored Field Artillery Battalion, at or near Liege, Belgium, on or about 15 November 1944, wrongfully, knowingly and unlawfully sell to Achille Kruyen, a civilian, one (1) nineteen-pound tin of coffee, of the value of about Six dollars and Sixty-Five cents ($6.65); one (1) case of chocolates containing 144 bars, of the value of about Four dollars and Thirty Two cents ($4.32); five (5) cases of laundry soap, of the value of about Twenty dollars ($20.00); and two (2) cases of "10 in 1" rations, of the value of about Fourteen dollars ($14.00), property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and all 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, to pay to the United States a fine of $1000.00, to be confined at hard labor, at such place as the reviewing authority may direct, for a period of two years and six months and to be further confined at hard labor until the fine is paid, but not in excess of two years, in addition to the period before adjudged. The reviewing authority, the Commanding General, 2nd Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Competent, substantial evidence produced by the prosecution showed that accused on four separate occasions sold to Achille Kruyen, a Belgian civilian, at the times and places alleged in the specifications, soap and the various articles of food therein described. The evidence permitted no other inference than that the soap and articles were at the times and places of sale property of the United States furnished and intended for the military service thereof. Proof of the value of said property was unnecessary (CM ETO 5539, Hufendick).

The defense vigorously attacked the credibility and honesty of prosecution's chief witness, Kruyen, the purchaser of the Government property by proving certain prior inconsistent statements and upon cross-examination disclosed uncertainties and discrepancies in parts of his testimony given on direct examination. Accused, as a witness on his own behalf, denied the alleged sales although he admitted he had engaged in bartering transactions with Kruyen whereby he exchanged food and soap for cognac brandy. He asserted that the soap and food were his own property which he had either received from home or purchased at a post exchange. Additional evidence presented by the defense showed that Government property such as described in the specifications was not missing from certain sources of supply available to accused although three or four cases of "G I" laundry soap were missing from the Headquarters Battery, 78th Armored Field Artillery Battalion.

There was created by the total evidence in the case a situation which was peculiarly within the province and function of the court to consider. The credibility of Kruyen, the reliability of his testimony and the sharp conflict in prosecution's and defense's evidence presented essentially an issue of fact for resolution by the court. Its

conclusions, being sustained by competent, substantial evidence, are binding upon the Board of Review upon appellate review and will not be disturbed (CM ETO 1554, Pritchard; CM ETO 1631, Pepper). The record of trial is legally sufficient to support the findings of guilty (CM ETO 5539, Hufendick; CM ETO 6268, Maddox; CM ETO 9987, Pipes).

4. The table of maximum punishments is not applicable to officers (MCM, 1928, par.104a, p.95). Dismissal, total forfeitures and confinement at hard labor are authorized upon conviction of an officer of an offense under the 94th Article of War (See CM 238539, Bohall (1943), 24 B. R. 277). The imposition of a fine in addition to total forfeitures in adjudging the punishment of an officer is also authorized by the 94th Article of War (Winthrop's Military Law and Precedents (Reprint 1920), pp.419,709,710; Cf: MCM, 1928, par.103g, p.94).

5. The charge sheet shows that the accused is 31 years of age and that he was commissioned 13 May 1943. No prior service is shown.

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

7. Confinement in Eastern Branch, United States Disciplinary Barraks, Greenhaven, New York, is authorized by AW 42 and Cir.210, WD, 14 Sept. 1943, sec.VI, as amended.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant SAMUEL COPPERMAN (O-1181846), Service Battery, 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 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 11072. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11072).

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

(Sentence ordered executed. GCMO 188, ETO, 29 May 1945).

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

BOARD OF REVIEW NO. 1

24 JUL 1945

CM ETO 11075

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at APO 149, U. S. Army, 21 April 1945.
	)	
Private ARTHUR L. CHESAK (16035198), Headquarters and Headquarters Squadron, Ninth Air Force Advanced Depot Area Command	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
	)	

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

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

2. CHARGE AND SPECIFICATION:

Title to the blouse stolen by accused did not pass to Technical Sergeant John G. Megyesi by virtue of his act of reclaiming same from the supply sergeant of his Group as salvage and causing the same to be altered into a jacket. Unserviceable property remains property of the United States and disposition of same must be made pursuant to the directions of Army Regulations (AR 30-2145, 2 September 1942). The proved circumstances of the theft warranted the court in inferring that the blouse was property of the United States furnished and intended for the military service thereof and that it possessed value of less than $20 (MCM, 1928, par.150i, p.165). Accused's guilt was clearly established (CM ETO 675, Fazio; CM ETO 960, Fazio, Peteet and Nelson).

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3. ADDITIONAL CHARGE AND SPECIFICATION:

a. Accused's pretrial statement (R29; Pros. Ex.G-1, composed of pages 1a,1b,1c, and 1e) was properly admitted in evidence as a voluntary statement. Captain O'Brien, who was investigating accused's activities in connection with gasoline thefts and sales had previously interrogated accused as to the source of funds which accused had transmitted to his parents in the United states (R28,44,45,63). Accused asserted that he had won them through gambling activities (45,63). Thereupon Captain O'Brien informed him:

> "I will find out. I will verify that when I write home to your folks and see if that is what you told them" (R63).

Accused then stated "he wanted to get it off his chest" and proceeded to dictate the statement (R46). The evidence is clear that Captain O'Brien was exceedingly careful in familiarizing accused with his rights under the 24th Article of War and that except for the quoted declaration of Captain O'Brien there is no inference or suggestion that he exercised improper influence upon accused in order to secure the confession. The ultimate question for determination by the court was whether accused voluntarily gave the statement. This was one of law and fact and its determination was peculiarly within the function of the court. Upon appellate review the questions are whether there was substantial evidence before the court that accused did not act under force and compulsion when he gave the statement and whether the court abused its judicial discretion in determining the first of these two questions. A careful analysis of the evidence convinces the Board of Review that the first question must be answered in the affirmative. With respect to the exercise of judicial discretion by the court in reaching the conclusion that the statement was voluntary it should be remembered

> " * * * it is peculiarly the province of the trial, as distinguished from the appellate, court to pass on the preliminary proofs essential to the admission of certain kinds of evidence, such as * * * confessions * * * " (17 CJ, sec.3582, p.242).

There is no abuse of discretion shown and under such circumstances the finding of the court that the statement was voluntarily given by accused is binding upon the Board of Review upon appellate review (CM ETO 5747, Harrison; CM ETO 7518, Bailey, et al; CM ETO 9288, Mills).

b. There was adequate proof of the corpus delicti to support the admission in evidence of accused's statement with respect to the wrongful and unlawful disposition of the 500 gallons of gasoline (R29; Pros.Ex.G-1). The presence of Government-owned jerricans, one of which was filled with gasoline, colored red, in the house or on the property of a French civilian, and the presence of numerous jerrican marks on the dirt floor of his barn, was evidence that some irregular or wrongful disposition had been made of Government property. It was not necessary for this preliminary evidence to connect accused with the offence. (CM ETO 7609, Reed and Pawinski; CM ETO 8234, Young, et al; CM ETO 11497, Boyd).

c. The prosecution's evidence failed to prove more than a wrongful disposition of 500 gallons of gasoline, property of the United States furnished and intended for the military service thereof in violation of the ninth paragraph of the 94th Article of War. With respect to the more serious offense under the 96th Article of War (CM ETO 8234, Young, et al), prosecution's evidence exhibits the same deficiency as shown in CM ETO 6226, Ealy and CM ETO 7506, Hardin. Reference is made to the holdings in said cases for discussions of the reasons for this conclusion. See also CM ETO 11076, Wade, a companion case to the instant one.

d. The Board of Review may take judicial notice of the price of gasoline as reported in the quarter-annual report (Oct., Nov., Dec., 1944) of the Quartermaster, European Theater of Operations to the Quartermaster General under the provisions of the Act of Congress approved 11 March 1941, c.11; 55 Stat.31; 18 USCA secs.411-419, commonly known as the "Lend-Lease" Act (CM ETO 5539, Hufendick; CM ETO 9288, Mills). By reference to said report it is seen that both 73 and 80 octane petrol (gasoline) is valued at 1934 cents per Imperial gallon. The price per United States gallon will be 5/6 of the price per Imperial gallon (Webster's New International Dictionary (2nd Ed.), p.1029).

Therefore, the gallon value of the gasoline in this case on 22 December 1944 was .16117 cents and the total value of the gasoline of which disposition was made by accused (500 gallons at .16117 cents per gallon) was $80.58.

4. The maximum sentence which may be imposed upon accused for the offenses of which he was found guilty is dishonorable discharge, total forfeitures and confinement at hard labor for five years, six months. The period of confinement is determined as follows:

Charge and Specification	6 months
Additional Charge and Specification	5 years
Total	5 years, 6 months

(MCM, 1928, par.104c, p.99).

5. The charge sheet shows that accused is 26 years seven months of age and enlisted 28 October 1941 at Sheppard Field, Wichita Falls, Texas, to serve for three years (His service period is governed by the Service Extension Act of 1941). He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification, and so much of the findings of guilty of the Additional Charge and its Specification as involves findings that accused did, at the time and place alleged, wrongfully and unlawfully dispose of 500 gallons of gasoline, military property of the United States, of a value of $80.55 in violation of the 94th Article of War and so much of the sentence as provides for dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, six months.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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

BOARD OF REVIEW NO. 1

13 JUL 1945

CM ETO 11076

U N I T E D S T A T E S	)	IX AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at Headquarters IX Air Force Service Command, APO 149, U. S. Army, 23 April 1945.
Private WILBUR B. WADE (35216857), 1843rd Ordnance Medium Maintenance Company, 1586th Quartermaster Group	)	Sentence: Dishonorable discharge, 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

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

2. a. There is no proof of those facts which would elevate the offense from that denounced by the ninth paragraph of the 94th Article of War to the offense of interfering with the war effort in violation of the 96th Article of War (CM ETO 8234, Young et al; CM ETO 8236, Fleming et al; CM ETO 8599, Hart et al). The absence of such proof (CM ETO 6226, Ealy; CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski; CM ETO 9987, Pipes) does not preclude the treatment of the Specification herein as alleging the lesser included offense of unlawful disposition of Government property furnished and intended for the military service under the ninth paragraph of the 94th Article of War and it will be so considered (CM ETO 9987, Pipes). The fact that it was laid under the 96th Article of War is immaterial (CM ETO 1057, Redmond; CM ETO 3118, Prophet; CM ETO 3740, Sanders et al; CM ETO 6268, Maddox).

b. The phrase contained in the Specification:

> "500 gallons of gasoline, military property of the United States, vitally needed for combat operations"

is equivalent to the averment

> "property of the United States furnished or intended for the military service thereof",

the pertinent phrase in the ninth paragraph of the 94th Article of War. Such conclusion is self-evident.

c. The clause of the Specification which charged that accused

> "did * * * prejudice the success of the United States forces by wrongfully and unlawfully disposing of 500 gallons of gasoline"

in substance charged a wrongful and unlawful disposition of Government gasoline. Reconstructed, the Specification alleged that accused

> "did wrongfully and unlawfully dispose of 500 gallons of gasoline * * * [thereby] prejudicing the success of the United States forces".

d. The Specification as above reformed (b and c, supra) states an offense under the ninth paragraph of the 94th Article of War (CM ETO 9288, Mills).

3. a. By his confession the accused admitted his guilt of the sale and disposition of 500 gallons of Government gasoline furnished and intended for the military service. It is necessary to consider whether the prosecution proved the corpus delicti of the crime - the necessary condition precedent to the admission of the confession (MCM, 1928, par.114a, p.115).

> "This evidence of the corpus delicti need not be sufficient of itself to convince beyond a reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense" (Ibid.).

A careful analytical study of the confused evidence of the prosecution convinces the Board of Review that there was sufficient evidence produced on this point. The evidence showed two deliveries of gasoline by the POL dump at the relevant times to a truck driver named Wade in the amount of 900 (180 cans) and 500 (100 cans) gallons respectively; that accused failed to deliver 100 jerricans (500 gallons) out of the 180 cans to his unit and represented to his commanding officer that there was a shortage of gasoline and that the dump owed the officer's unit 100 cans; that the officer failed to secure the 100 cans when he sent a third soldier to the dump; and when accused was ordered by the officer to secure the 100 cans accused thereafter appeared with 125 cans. The excess of 25 cans was not explained by accused. The inferences from this evidence justified the conclusion that accused disposed of the 100 cans (part of the 180 cans). This showing adequately meets the requirement as to proof of the corpus delicti (CM ETO 2185, Nelson; CM ETO 8234, Young et al; CM ETO 12793, Crump et al).

b. The question whether accused's confession was voluntary, was under the state of the record an issue of fact for resolution by the court. There is competent substantial evidence that it was voluntarily given. The finding of the court will not be disturbed by the Board of Review (CM ETO 1606, Sayre; CM ETO 9418, Gibbs et al).

4. The court and the Board of Review may take judicial notice of the value of the gasoline on 22 December 1944 (CM ETO 5539, Hufendick; CM ETO 9288, Mills, supra). By reference to the quarter-annual report based on the "Lend-Lease" Act (Act March 11, 1941, c.11; 55 Stat. 31; 22 USCA 411-419) of the Quartermaster, European Theater of Operations, to the Quartermaster General for the period 1 October to 31 December 1944, the value of the gasoline is determined to be $80.58 (500 gallons at 16.117 cents per gallon).

5. The record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, at the time and place alleged, wrongfully and unlawfully dispose of 500 gallons of gasoline property of the United States furnished and intended for the military service thereof of a value of $80.58 in violation of the 94th Article of War and legally sufficient to support the sentence.

B. Frank Rote Judge Advocate

Wm. T. Sarrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW NO. 1

19 MAY 1945

CM ETO 11100

U N I T E D S T A T E S	26TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 26, U. S. Army, 17 April, 1945.
Private LEIGHTON R. FROEMMING (37295656), Company I, 101st Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

2. Accused in two specifications was charged with shooting himself in the foot with a rifle on two separate occasions "thereby unfitting himself for the full performance of military service". The evidence showed that the wounds were not of sufficient seriousness to constitute mayhem. Neither was it alleged or proved that either of the wounds was self-inflicted with intent to avoid hazardous duty (Cf: CM NATO 464 (1943), II Bull.JAG 468).

> "However, the present charge does not fall within either of these categories. It is necessary to resort to the 'custom of the service' to determine the appropriate maxi-

mum punishment (MCM, 1928, par.104c). It is the custom of the service, where no limitation is provided, to follow Congressional expression of what constitutes appropriate punishment (CM I99369 (1932), 4 B.R. 37,42). Applying that rule to this case, it appears that the self-inflicted injury more closely resembles the type of injuries described in 18 U.S.C. 462 than it does mayhem, and therefore, that the maximum punishment of 7 years' confinement prescribed in this Federal statute should serve as a guide where the self-inflicted wounds are not of such an extent and nature as to constitute mayhem, and there are no additional elements which may render the offense as charged and established, a more serious one than that contemplated by the form of specification used in the present case" (CM 272944 (1945)).

Therefore the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for 14 years.

B. FRANKLIN RITER
_____ 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

CM ETO 11116

UNITED STATES	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Schinveld, Holland, 13 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class WILLIAM R. PURNELL (34607837), Company I, 313th Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class William R. Purnell, Company "I", 313th Infantry, did, near Seltz, Bas Rhin, France on 14 December 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until his return to military control near Hageneau, Bas Rhin, France on 21 January 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court concurring at the time the vote was taken, 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. The evidence for the prosecution shows that during the afternoon of 13 December 1944 the First Battalion of the 313th Infantry captured the town of Soufflenheim against enemy resistance. That evening or night, Company I of the 313th Infantry, of which accused was a member, moved into the town under sniper fire, and most of accused's platoon slept "sitting up" in a large room inside the town (R6,9). Accused was present with the company that night (R11). On the morning of 14 December the company commander explained the tactical situation to accused's platoon leader. The company was to "jump off" across a bridge which had been blown by the enemy delaying force in almost the center of the town, clean out the remainder of the town on the other side of the river or stream, and then move into the town of Seltz as far as possible (R6-7,9). The company moved out, crossed the wreckage of the bridge and moved into some woods on the other side of the river. When accused's squad leader put his squad in position, accused was missing (R6,9). He was last seen with his squad by one of the members of the company just after crossing the stream in the town (R10). His platoon leader checked the area, including the positions in the woods, as well as through the company. When accused was not found, his absence was reported to the executive officer who reported it to the company commander (R6,9). The company did not encounter the enemy resistance which had been expected in the town of Soufflenheim because the enemy delaying force apparently had left during the night (R6-7). Accused's platoon first encountered the enemy that day at Seltz, France, which was eight kilometres from Soufflenheim (R9).

Accused's company commander and a technical sergeant, who acted as both platoon sergeant and platoon leader, each testified that accused had no permission to be absent from his company on 14 December, and that he remained absent without authority from 14 December 1944 to 21 January 1945 (R6-7,10). A staff sergeant of his company testified that he did not see accused present with the company between 14 December and 21 January (R11-12).

It was expressly stipulated between accused, defense counsel and the prosecution that accused returned to military control at Hagenau, Bas Rhin, France, on 21 January 1945 (R12).

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 (R12-13).

5. The evidence shows that on the morning of 14 December 1944 accused absented himself without leave from his platoon and company at a time when his company was expecting enemy fire momentarily and was moving forward in a town which had been captured from the enemy the preceding day and in which sniper fire had been encountered by accused's company the night before. He remained absent without authority for 38 days, until 21 January 1945. The circumstances surrounding his absence leave no doubt that he was fully aware of the tactical situation of his organization. The evidence fully supports the court's finding that he left his organization with a then

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existing intent to avoid combat with the enemy as charged (CM ETO 7413, Gogol; CM ETO 5953, Ivers; CM ETO 5293, Killen; CM ETO 10443, Mays).

6. The charge sheet shows that accused is 21 years and 11 months of age, and was inducted 27 February 1943 at Camp Croft, South Carolina. No prior service is shown.

7. The court was legally constitutedand 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. L. Levy Judge Advocate

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

BOARD OF REVIEW NO. 5

31 AUG 1945

CM ETO 11151

U N I T E D S T A T E S	)	DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private REGINALD R. BRYANT (32438200), 3068th Quartermaster Salvage Repair Company	)	Trial by GCM, convened at Marseille, France, 9, 10 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. (Place of confinement not designated).

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Reginald Ray Bryant, 3068th Quartermaster Salvage Repair Company, did, at Dijon, France, on or about 7 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one M. ROLAND MARTINOT, a human being, by shooting him with a pistol.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court martial for using profane language and being disorderly in camp and for failing to obey a command of a superior officer, in violation of Article of War 96. Three-fourths of the membersof 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, the Commanding General Delta Base Section approved the sentence and, without designating a place of confinement, forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the evening of 7 November 1945 accused entered the restaurant of Monsieur Roland Martinot at 15 Rue de L'Ile, Dijon, France (R22,33,42). There were about twenty people present in the cafe at this time, including other colored soldiers and French civilians (R37). Accused offered the proprietor and a waitress, Madame Therese Gavoille, a drink, from a bottle of Mousseux, that he carried with him. He then signed the servicemen's food register and asked to be served dinner. After eating, upon being presented with the bill by the waitress, he refused to pay (R22,23). The proprietor, Monsieur Martinot, then approached accused and asked him why he would not pay the bill and said, "If you do not pay, you leave immediately" (R23). He jokingly told Bryant that if he did not pay that he would take his raincoat. They seemed to argue about the bill but to avoid a public scene the proprietor took accused into an adjoining room. They remained there for about five minutes and upon reentering the cafe accused was asked again to pay the bill andhe again refused, whereupon Martinot "took him by the arm and put him out" (R35). Martinot fastened the door inside by a bolt or latch (R24). As accused was ejected he was wearing his raincoat (R34). He remained outside for a few minutes but when a civilian customer was let out by Martinot, accused tried to push his way back inside but was prevented (R24,34). In resisting accused's re-entry into the cafe Martinot was pulled outside. He remained there a few minutes talking with accused. A shot was then heard and Martinot ran inside and exclaimed "Therese, he killed me" (R25,31,36,44). Martinot fell on the floor (R14,25,26,36).

Shortly after this occurrence two civilian doctors examined the body of Roland Martinot and found that he was dead. An autopsy disclosed that a bullet had pierced the abdomen and heart of deceased and was the direct cause of his death (R11-19).

An investigation of the homicide resulted in accused making a voluntary sworn statement, wherein he admitted shooting and killing Martinot. He added, however, that he did so in self-defense, as Martinot pushed him outside, "reached in or towards his pocket", and frightened him. This statement was received in evidence, without objection by defense (R64; Pros.Ex.10).

4. Accused, after his rights as a witness were explained to him, elected to make an unsworn statement, through counsel, in substance as follows: Martinot knew that accused was armed but notwithstanding this fact he pursued him into the street. Deceased was the aggressor. He was a young and vigorous man and a member of the Maquis, an organization of guerilla fighters, which sprang up just prior to the invasion of France. Accused insisted that Martinot possessed superior force (R94,95).

It was stipulated between counsel for the prosecution and defense, the accused consenting thereto, that if available as a witness Madame Odette Martinot, wife of deceased, would testify that about a week previous to the homicide, accused visited the cafe and showed her and her husband a small pistol which he stated he always carried with him (R96).

Private First Class Roosevelt Young, a member of the same organization as accused, testified that following an argument between Martinot and Bryant, the Frenchman grabbed accused by the collar with one hand, put his other hand in his right hip pocket, and pushed Bryant out the door. The Frenchman seemed to be the aggressor and was angry whereas accused did not appear angry (R97-100).

Private Nicholas G. Yarborough, also of the 3068th Quartermaster Salvage Repair Company, corroborated the testimony given by Young. He admitted on cross-examination that at the time he signed a statement regarding the homicide that he did not mention the fact that he observed Martinot put his hand in his pocket and also that he later talked with members of his organization regarding the case. He was a friend of accused (R100-104).

5. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par.148a, p.162). The word "unlawful", as used in the above definition, means without legal justification or excuse. The term "malice", in legal contemplation, does not necessarily mean hatred or personal ill-will towards the person killed, nor an actual intent to take his life (MCM, 1928, supra) and is implied "where no considerable provocation appears, and all the circumstances show an abandoned and malignant heart" (26 Am. Jur. sec.41, p.186).

> "Malice is presumed from the use of a deadly weapon" (MCM, 1928, par.112a, p.110).

In the instant case the evidence conclusively establishes that accused shot and killed Monsieur Roland Martinot at the time and place and under the circumstances alleged. Accused admitted firing the fatal shot. However, the defense attempted to show in justification of his action that the deceased was the aggressor and that accused fired in self-defense. Two of accused's friends and members of his organization testified that they saw Martinot put hishand in his hip pocket, implying thereby that he might be reaching for a pistol or other weapon. However, none of the witnesses for the prosecution testified to seeing deceased make any such threatening motions or gestures. Five of the latter were either eyewitnesses to the shooting or to the events leading up to the killing. Questions concerning the credibility of witnesses and disputes of fact are issues for the sole determination of the court and such determinations, where supported by substantial evidence, may not be disturbed by the Board of Review (CM ETO 1953, Lewis; CM ETO 5561, Holden and Spencer and authorities cited therein). Accused's conviction of the crime of murder is therefore legally sustained CM ETO 4497, DeKeyser; CM ETO 6229 Creech; CM ETO 8691, Heard; CM ETO 9294, McCarter).

5. The charge sheet shows that accused is 24 years and ten months of age and was inducted 26 August 1942, at Fort Jay, New York. He had no prior service.

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

John Trumbull Judge Advocate

J.E.L. Weiss Judge Advocate

Anthony Julian Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887
6 JUL 1945

BOARD OF REVIEW NO. 3

CM ETO 11170

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, 23 February 1945. Sentence: Dismissal and total forfeitures.
Second Lieutenant STANLEY B. TUCKER (O-709861), 432nd Bombardment Squadron (Medium), 17th Bombardment Group (Medium)	

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

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

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

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

Specification 1: In that Second Lieutenant Stanley B. Tucker, 432nd Bombardment Squadron (Medium), 17th Bombardment Group (Medium), did, without proper leave, absent himself from station at Dijon Air Base, near Dijon, France, from about 0900 hours 1 January 1945 to about 1930 hours, 1 January 1945.

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Specification 2: In that * * * did, at Dijon Air Base, near Dijon, France, on or about 1 January 1945, fail to repair at the fixed time to the properly appointed place of Briefing.

Specification 3: In that * * * did, at Dijon Air Base, near Dijon, France on or about 1 January 1945 fail to repair at the fixed time to the properly appointed place for participation in an aerial combat mission.

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

Specification: In that * * * was at Dijon, France, on or about 1 January 1945, drunk in uniform in a public place, to wit, The Allied Officer's Club, Dijon, France.

He pleaded guilty to Charge II and its Specification, not guilty to Charge I and its specifications, and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, XII Tactical Air Command, U. S. Army, approved the sentence but remitted so much thereof as pertains to confinement at hard labor. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, although characterizing it as wholly inadequate punishment for an officer guilty of such grave offenses, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 31 December 1944, accused was a pilot with a bombardment squadron at Dijon Air Base in France, with which he had completed four combat missions. Schedules indicating personnel who were to go on missions, and times of briefing, were posted on the squadron bulletin board, which all officers were required to read at night and mornings. All personnel going on missions were required to attend briefings, and were transported by truck from headquarters to the briefing room. Squadron members who were scheduled for missions could not leave the organization area, and could not stay away overnight without permission from the squadron commander (R6-11,20). If a particular mission of the squadron was canceled, the schedule for that mission became the tentative schedule for the following day. Accused's name did not appear on a mission originally scheduled for 31 December 1944, which was canceled about

11:00 am that day. However, at about 4:00 pm on 31 December his name was added in ink to the schedule on the bulletin board as co-pilot of a plane for a mission on 1 January 1945, and a newly typed schedule showing his name, and regular briefing time at 10:15 am on 1 January, was put on the board about 30 minutes later (R12,15-16,18-19,20-21; Pros.Ex.1).

Accused left the post at about 4:30 or 5:00 pm on 31 December with three other officers. Prior to leaving he mentioned that he was not on a mission the next day and did not have to return to camp early. They arrived at the Allied Officers' Club in Dijon at about 6:00 pm (R25). The club was crowded that evening with French, British and American officers, and civilian guests (R24,31; Pros.Ex.3). Accused drank before and after he had dinner. Sometime between 8:00 and 10:30 pm the operations officer of his squadron talked with him and asked if he knew he was scheduled for a mission the next day. Accused stated that he wished to talk about it, and that he did not want to fly with the pilot with whom he was scheduled to fly. The operations officer advised him that the schedule would stand (R14,16,27). The operations officer testified that at the time of this conversation accused had a drink in his hand and "had the appearance of being drunk", although he recognized the witness (R17). Other witnesses testified that at this time accused was "very drunk" or "awfull drunk", and "did not know much what he was doing and had a starey-eyed look" (R24,26,28). He was not disorderly (R26). By 11:00 pm accused had "passed out" and had been assisted upstairs to bed (R23,25,29). At about 2:00 am some friends tried to get him back to the station and got him in a car, but accused went back into the club (R23,26).

On the morning of 1 January the regular briefing time was set up an hour to 9:15 am. Accused was not present for the briefing, or for the mission, which probably took off about 11:00 am, and his plane did not go on the mission (R7-8,12-13,21). He had no permission to be absent, and was not seen by his commanding officer on 1 January (R7-8,10).

In a sworn statement given by accused on 4 January to the investigating officer, after the 24th Article of War had been read to him, accused stated that before leaving the base on 31 December he examined the bulletin board at about 3:00 pm and saw that he was not on the mission originally scheduled for 31 December, which schedule under the practice of the organization would be carried over until the next day without change. He admitted going to the club at Dijon and drinking cognac after supper until about 8:00 pm, after which he had no recollection of meeting his operations officer or anything else that transpired the balance of the evening. He awoke at about 10:00 am on 1 January, feeling "decidedly ill". He endeavored to contact his squadron by

telephone several times without success. He remained at the "hotel" until late afternoon until he felt able to return, and arrived at his squadron at 7:30 pm on 1 January (R30-31; Pros.Ex.2).

4. After having his rights as a witness explained to him, accused elected to testify under oath (R31). He was 24 years of age and single, and enlisted in the Air Corps 3 January 1942. He was commissioned 8 February 1944, and has been with his present squadron since 20 December 1944. He flew eight missions with another bomb group, besides the four missions with his present squadron. He examined the bulletin board before leaving for Dijon on 31 December and saw that the date on the schedule for 31 December, on which his name did not appear, had been crossed out and changed to make the same tentative schedule for 1 January. He knew that actual mission schedules were not posted generally until very late in the evening, sometimes at 10:00 or 12:00 pm and sometimes as late as 2:00 am. He knew the schedule he read was only tentative, and subject to change, and knew it was his duty to examine the bulletin board "when the combat mission comes in no matter what time it is". At the officers' club he had red wine with his meal, and after dinner he drank cognac and a drink called "B-26" until about 8:20 pm. He had no recollection of meeting the operations officer in the club, and had no criticism of the pilot with whom he was scheduled to fly on 1 January. His next recollection after 8:20 was waking up the next morning with a sick stomach. He could not get a telephone call through to his squadron and assumed he had a day off. He went back to bed and slept until 4:00 or 4:30 pm and then "hitch-hiked" back to camp, arriving about 7:00 or 7:30 in the evening (R32-39).

On behalf of accused, First Lieutenant Richard L. Weisman testified that he thought accused to be a "very swell fellow", of very good character, and a very good pilot (R39-40).

5. The evidence for the prosecution, as supplemented by accused's testimony and his plea of guilty to Charge II and its Specification, leaves no doubt as to accused's guilt of both charges and their specifications. It is clear that accused's failure to read the squadron bulletin board, as he admitted he was required to do, does not excuse his failure to repair for the briefing and mission, as alleged in Specifications 2 and 3, Charge I (CM 248497, III Bull. JAG 233).

6. The defense moved to strike Specifications 2 and 3 of Charge I on the ground that they were an unreasonable multiplication of charges within the meaning of paragraph 27, Manual for Courts-Martial, 1928, page 17, since they allege failures to repair at times within the period of the absence without leave alleged in Specification 1 of Charge I. The court was correct in overruling this motion. A combat bombing mission, and briefing operations preceding it, are not routine scheduled duties within the meaning of the Manual, and these specifications tend to explain the gravity of an absence without leave

of otherwise relatively little seriousness (CM 243535, Gordon, 28 B.R. 1 (1944)). Even if there were a multiplication of charges, the error is harmless since any one of the specifications supports the sentence (CM 249636, III Bull. JAG 234; CM 267382, IV Bull. JAG 53).

7. The charge sheet shows that accused is 24 years and nine months of age, and was commissioned 8 February 1944. Accused has submitted a request for clemency, which is attached to the record of trial.

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

9. Dismissal and total forfeitures are authorized punishments for an officer upon conviction of a violation of Article of War 61 or Article of War 96.

B R Sleeper Judge Advocate

Malcolm C. Sharman Judge Advocate

B C Lacy Jr Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant STANLEY B. TUCKER (O-709861), 432nd Bombardment Squadron (Medium), 17th Bombardment Group (Medium), 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 11170. For convenience of reference, please place that number in brackets at the end of the order (CM ETO 11170).

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

(Sentence ordered executed. GCMO 273, ETO, 17 July 1945).

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

BOARD OF REVIEW NO. 2

18 MAY 1945

CM ETO 11173

U N I T E D S T A T E S	104TH INFANTRY DIVISION
v.	Trial by GCM, convened at Halle, Germany, 29 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private MILTON E. JENKINS (39270341), Headquarters Company, 2nd Battalion, 413th Infantry Regiment	

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 Milton E. Jenkins, Headquarters Company, Second Battalion, Four Hundred Thirteenth Infantry, did, near Chartres, France, on or about 14 October 1944, desert the service of the United States and did remain absent in desertion until on or about 8 March 1945.

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 Specification except the words "14 October 1944", substituting therefor the words "19 October 1944", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. Evidence was introduced of two previous convictions each by special court-

martial, one for absence without leave for 82 days in violation of Article of War 61, and one for breaking parole and for absence without leave for one day in violation of Articles of War 96 and 61 respectively. 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 prosecution's evidence shows that on 14 October 1944, accused was on detached service from his organization as a member of a provisional trucking company set up by the division in the vicinity of Chartres, France (R7) to drive trucks on the Red Ball route (R11, 12). This group consisted of about 220 men (R13). A copy of the division order dated 4 October 1944, placing accused on detached service from Headquarters, 2nd Battalion, 104th Infantry Division, effective "on or about" 29 September 1944, was placed in evidence without objection (R7; Pros.Ex.1). This provisional company was disbanded about 14 October (R7). Accused was not given permission to be absent on that or any subsequent date. No passes were given out except for periods of four to eight hours to two places, Chartres or Dreux (R8,13). The last pass was given out 14 October and the area was abandoned 19 October (R13). Accused was one of some eight members of his unit who were detached for this service and all of whom returned 14 or 15 October except accused who was not seen again until about 8 March 1945 in custody of military police (R9,10). At no time between 14 October 1944 and 8 March 1945 was he given permission to be absent (R9,15). When the provisional company was disbanded about 14 October 1944, notice was placed on the bulletin board to the men returning, to check in at the orderly room where they were told to report back to their organization and an effort was made in their small area, to inform each one that they were disbanding (R11). It was several days before all of the company had checked out and gone back to the division (R12) and the records of the provisional company were then destroyed. When all the trucks had been checked in, the area was searched and disbanded leaving nothing nor anybody (R14). Accused's organization moved from its previous location around 20 October 1944, into Belgium and from there to Aachen, Germany, in the first part of November.

4. The defense called no witnesses and accused advised of his rights as a witness, elected to remain silent (R16).

5. "Desertion is absence without leave accompanied by the intention not to return * * * If the condition of absence without leave is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent" (MCM, 1928, par.130a, pp.142-143).

Accused's duty as a driver with the provisional trucking company, with that of some eight other men from his organization, terminated on or shortly after 14 October 1944 when it was disbanded and they were ordered back to their regular place of duty where all except accused were accounted for. All trucks were checked in, the area searched and nothing nor anybody remained. Accused was not present until some 140 days later. His absence was unauthorized and unexplained. The court could take judicial notice that the surrounding country was dotted with military posts where accused could have surrendered if he had so desired. Under the circumstances his prolonged and unexplained absence shows a clear intention not to return to his place of duty and the court was justified in so finding (CM ETO 1549, Copprue et al; CM ETO 1659, O'Donnell).

6. The charge sheet shows accused is 28 years and seven months of age. He was inducted, without prior service, on 12 December 1942.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 1

8 JUN 1945

CM ETO 11178

U N I T E D S T A T E S	CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private VICTOR ORTIZ (30405077), 3269th Quartermaster Service Company	Trial by GCM, convened at Lille, Nord, France, 1,2 and 3 March 1945. Sentence: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War

Specification: In that Private Victor (NMI) Ortiz, 3269th Quartermaster Service Company, did, at Marquette, France, on or about 28 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Captain Ignacio Bonit, 3269th Quartermaster Service Company, a human being by shooting him with a carbine, M1, .30 caliber.

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, 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 and withheld the order directing execution thereof pursuant to Article of War 50½.

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

Accused, a member of a permanent guard detail (R47) of the 3269th Quartermaster Service Company commanded by Captain Ignacio Bonit (R8), was assigned to Post No. 8 for the watch from 1400 to 1800 hours on 27 January 1945 and from 0200 to 0600 on 28 January (R48). At 0100 hours on 28 January, the sergeant of the guard, Sergeant Ramon Ortiz, awakened accused and directed him to get up as it was time to go on guard again. Accused replied that "he don't go to guard, because he has not taken a sleep yet". Shortly thereafter he told the sergeant that he wanted to talk to the Captain. The sergeant and accused, together with another soldier, went to the company orderly room. Accused wore only his underwear and pants, without a shirt. They knocked on the door and entered the room. Captain Bonit arose from his cot, turned on the lights and returned to his cot. Accused stated he would not do any guard duty because he "had not taken any sleep yesterday". Captain Bonit stood up, pointed his finger at accused, and said "You got to do the guard, because you are in the Army now". Accused answered: "I will not do any guard and I would prefer you prefer charges against me". Captain Bonit then said, "You got to go on guard and the sergeant of the guard is going to put you down to the POL dump". As soon as Captain Bonit finished, accused, at about 0115 hours, left the orderly room without saluting. About five seconds later, the sergeant of the guard left and went to accused's room. When he opened the door of the room, he heard "a 'clutter' like" which "sounded like a bullet in a carbine". Shortly thereafter he heard two shots, followed in two or three seconds by two more shots. He ran to the orderly room and saw Captain Bonit's body with the head toward the door (R39-44).

At about 0120 hours, Second Lieutenant Israel I. Sylvan, who was sleeping in the orderly room on a cot several feet from Captain Bonit's cot, was awakened by a noise. He raised himself in his bed and heard someone feeling on the wall (R8). The lights then went on and he saw accused standing in the door with a carbine in his hand. Accused took several paces inside the room, pointed the carbine towards the floor, discharged several rounds, and then walked out of the orderly room. Lieutenant Sylvan started toward

the door, but on the way saw the body of Captain Bonit on the floor (R13). The shots were fired immediately after the lights went on (R16). About 25 or 30 minutes after the shooting Lieutenant Sylvan examined the desk of Captain Bonit and found that the latter's pistol was in a drawer, just as it had been the previous evening (R11-13). Accused was about three feet from where the body was found when he discharged his carbine (R19).

After the shooting, the first sergeant of the company found accused sitting on his bunk with his carbine at his side, and asked him to hand over his carbine. Accused refused, saying, "the thing I have done is done" (R121).

Around 0300 hours, members of the military police went to accused's room and found him sitting on his bunk holding a carbine at port arms. He was taken to military police headquarters at Lille, France (R55). A cartridge was found in the chamber of the rifle (R59,60), which was a U.S. Carbine .30 caliber (R77).

After his rights were explained to him under Article of War 24 (R70), accused stated to an agent of the Criminal Investigation Division that when he left his guard duty at 1800 hours on 27 January 1945, he had a cup of coffee at a cafe and stayed there until 2030 hours, then went to sleep at 2240 hours. He further stated:

> "Then at one O'clock, Sergeant Ortiz called me, for me to go to the guard. Then I told him that he could go to call some other fellow to go for me and then I will go at 6 a.m., but then he told me that there was nobody, for me to go to guard duty, so then he told me it was the order of a sergeant. Then he told me to go to the captain with him. He called the captain, and the captain got up with a very bad mood and I told the sergeant that I was sick, and that I could not go to guard duty. Then the captain told him, answered to the sergeant, 'take that man by all means' and he said that if I did not go, to take me, to tie me to the truck, and to take me tied to the truck. Then I told him to speak to the sergeant and I went upstairs to my quarters and I looked for my carbine so to prepare myself to go to guard. Then I returned to ask the captain if he had got himself another man and he told me that I had to go by all means, but it was in a very bad mood that he told me and then I saw his impression and his face and I told him to court-martial me. Then he told me, 'go, I told you to go' and then I saw his pistol that was of his use, that was laying on the table and then I saw him moving towards the pistol and with his face in a very bad mood. In my

> mind, I thought he was going to grab the pistol so I put up my carbine and fired. I fired at him four times. Then I saw him when he fell in back of his bed and I moved backwards and I went and sat down on my bed" (R76,92;Pros.Ex.3).

This statement was written in Spanish by a Private Carlos Ortiz, a witness, who translated it for the court after the interpreter for the court stated that he could not translate it because of its incoherency (R92). The witness testified that he read the statement in Spanish to accused before he signed it (R71,92).

Captain Bonit died as the result of the wounds at about 0200 hours on 28 January 1945 (R35,36;Pros.Ex.2).

4. Witnesses for the defense testified substantially as follows:

When accused, together with the sergeant of the guard, appeared before Captain Bonit, the officer spoke in a very harsh voice to accused, saying, "if you don't go on guard, I myself will drag you or the sergeant, or both of us, we will take you on guard anyway". Captain Bonit "feigned as if he was going to strike him" but did not strike him (R106).

The guard on a post about 12 feet from the orderly room first heard about two shots about 0120 hours. After one series of shots the lights went on in the orderly room, then he heard a second series of shots. He did not recognize the soldier who then walked out of the orderly room (R113-115).

The post mortem report of Captain Bonit's death showed the following:

> "Death was due to severe internal haemorrhage from a gunshot wound involving the superior vena cava. The missile causing this had entered just below the right clavicle and had passed through the right lung, downwards and posteriorly, to the right of the mediastinum, had fractured the vertebral end of the twelfth rib, and passed through the right adrenal gland and the upper pole of the right kidney to emerge high in the right loin.
>
> A second missle, fired in a similar direction, had passed subcutaneously through the left chest wall had grazed the left forearm" (R101,103;Def.Ex.2).

Accused, after his rights as a witness were explained to him, elected to make a sworn statement and testified (through the interpreter in Spanish) substantially as follows:

When at about 0100 hours on 28 January he, the sergeant of the guard and the other soldier saw Captain Bonit, the officer stood up and in a very harsh manner said "you are going on guard" and stated to the sergeant, "if he does not go on guard, I myself personally will take him, even if I have to drag him with a truck". Accused then went to his barracks and dressed for guard duty. After putting the clip in his carbine he placed the gun on his shoulder and went downstairs to see Captain Bonit, because in doubt as to whether another man was going to go in his place or whether he was to go. He entered the orderly room, put on the light, and said, "Captain, the man for guard is not here". Captain Bonit replied, "I have already told you you are going on guard". Accused said, "Captain prefer charges against me, because I am not going on guard". Captain Bonit, after saying, "get out of here before I start shooting at you", took a step forward to grab a pistol that was on top of a table in the room. When the step was taken, accused grabbed his carbine and shot at Captain Bonit. At the time Captain Bonit appeared to be starting for his pistol, he was about 15 or 16 feet from it, and accused was about three feet from the door of the orderly room. Accused fired once and then continued firing, but he did not know how many times he pulled the trigger. From 8 to 10 minutes intervened between the first time he saw the Captain and the time he returned to the orderly room. He had never seen or heard of Captain Bonit's threatening anyone in the company with a pistol. He could not see whether the pistol had a clip in it (R133-145).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM 1928, par. 148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed. 1932), sec. 426, pp. 654-655), and an intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life (40 CJS, sec. 44, p. 905, sec. 79b, pp. 943-944). The evidence is clear and undisputed that at about 0120 hours on 28 January 1945 accused killed Captain Ignacio Bonit by shooting him with a carbine. The only question for determination is whether he was guilty of murder, as above defined.

There is strong evidence that accused committed this act with malice aforethought. There was no legitimate reason for accused to return to the orderly room. According to his own testimony, eight to ten minutes before the shooting, Captain Bonit had told him in a very harsh manner, "you are going on guard" and that if he did not go on guard, "I myself personally will take him even if I have to drag him with a truck". Accused's explanation that he then returned

to the orderly room because he was in doubt as to whether he was to go on guard, lacks verisimilitude. Taking his carbine to the orderly room does not seem to have been necessary. He admitted loading his gun before going down and a witness heard a sound "like a bullet in a carbine". Lieutenant Sylvan, asleep in the orderly room was awakened by a noise while the lights were out and saw accused shooting several rounds toward the floor when the lights came on. A witness for the defense, the guard on a post about 12 feet from the orderly room, heard shots before the lights came on.

The question is raised in accused's testimony as to whether he fired his carbine in self-defense. Even accepting his testimony and disregarding the inconsistent and conflicting evidence in the record, his right of self-defense is insufficiently shown. He testified that he shot Captain Bonit while the officer was 15 or 16 feet from the pistol and he, accused, was three feet from the door of the orderly room. He did not indicate in his testimony that he made any effort to retreat. He admitted continuing to fire at Captain Bonit, but did not know how many times he pulled the trigger.

The Manual for Courts-Martial states:

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

The question of whether accused was acting in self-defense was one of fact for the determination of the court (CM ETO 3180,

Porter; CM ETO 4640, Gibbs; CM ETO 9410, Loran; and authorities cited therein), and its determination of this issue against accused is supported even if accused's testimony alone is considered. He had an opportunity to retreat or escape but made no effort to do so, even if his apprehension is assumed to have been reasonable.

Accused's testimony, however, conflicts with other substantial evidence in the case, notably the testimony of a defense witness that shots were fired before the lights went on, and Lieutenant Sylvan's testimony that, after he was awakened by a noise, he saw the lights come on and saw accused immediately firing his carbine in the direction of the floor. The course of the bullets through Captain Bonit's body - from the upper part of his body downwards at a considerable angle - proves that he was in a prone or nearly prone position when struck by the bullets, contrary to accused's version of what happened. Lieutenant Sylvan also testified that shortly after the shooting, he found Captain Bonit's pistol in the desk drawer where it had been the night before. Such evidence makes out a convincing case of unlawful killing with malice aforethought.

Under the circumstances of this case, proven by substantial evidence, the court was fully justified in rejecting the theory of self-defense and finding accused guilty of murder under Article of War 92 (Ibid).

6. The court's receiving in evidence of Private Carlos Ortiz's English translation of the pre-trial confession made before him in Spanish, was without error. "A witness may translate into English, without the intervention of an interpreter, admissions or conversations made to him in a foreign language out of court" (16 CJ, sec. 2054, p.809). In any event, accused's statements in the pre-trial confession were substantially the same as the statements he made under oath at the trial, and his substantial rights were not injuriously affected by the reception of such translation.

7. The charge sheet shows that accused is 31 years of age and was inducted 28 April 1941 at Fort Buchanan, Puerto Rico, his period of service being extended to the duration of the war plus six months (by the Service Extension Act of 1941). He had no prior service.

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

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9. 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 8 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army

1. In the case of Private VICTOR ORTIZ (30405077), 3269th 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 11178. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 11178).

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

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

(Sentence ordered executed. GCMO 213, ETO, 16 June 1945).

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

BOARD OF REVIEW NO. 2

28 MAY 1945

CM ETO 11188

U N I T E D S T A T E S	)	2ND INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Merseburg,
	)	Germany, 21 April 1945. Sentence:
Private HERSCHEL PARKER	)	Dishonorable discharge, total for-
(34528919), Company C, 9th	)	feitures and confinement at hard labor
Infantry Regiment	)	for life. United States Penitentiary,
	)	Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violationof the 92nd Article of War.

Specification: In that Private Herschel Parker, Company C, 9th Infantry, did, at or near Hachelbich, Germany, on or about 12 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Else Schneider.

He pleaded not guilty to the Charge and Specification but guilty in that he did, at the time and place as charged, "wrongfully fraternize with Else Schneider, an inhabitant of Germany, in violation of the policies and orders of the Supreme Headquarters, Allied Expeditionary

Forces, European Theater of Operations", in violation of the 96th Article of War. Four-fifths of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Four-fifths of the members of the court present 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 pursuant to Article of War 50½.

3. The evidence for the prosecution in substance shows that about midday of 12 April 1945, two American soldiers came to the Wensel residence in Hachelbich, Germany, where Else Schneider, a 35 year old married German woman and her two children, a girl 14 and a boy ten years of age, were temporarily staying (R8,9,19,23). She identified accused as one of the two soldiers (R8). He had his pistol in his hand and pointed it at her (R9,20,23) and when the other soldier forced Else to go upstairs with him and she called Wensel for help, accused restrained him from going to her assistance and locked him in the kitchen (R10,20,24). The other soldier was with Else Schneider in an upstairs room for about 45 minutes (R11,20) and before he left her whistled to accused who answered and entered the upstairs room when the other soldier left. Accused then locked the room door (R11), took the panties off the woman who was then engaged in putting them on and forced her to lay on the bed, putting his elbow in her mouth to prevent her outcrys and her hands underneath her back. He then unbuttoned and lowered his trousers (R12) and despite her kicking and struggles, effected a penetration of her, completing the sexual act after about ten minutes (R13). He then dressed and left (R14-15). About 45 minutes later he returned with another soldier and attempted to again force her to go upstairs (R15,25). He then was apparently drunk (R15). That same day about six o'clock, in company with the military police, she picked out accused as the soldier who had molested her, from a group of soldiers sitting on a tank (R16).

4. Accused was sworn as the only defense witness. He admitted going to the house where Else Schneider lived, to loot. The door was open and he entered with his pistol in his hand (R27). He searched the downstairs but did not threaten anyone. The other soldier who was with him, went upstairs with the lady while accused testified he locked the kitchen door to keep the folks (Mr. and Mrs. Wensel and the two children) in (R28). He knew why the other soldier went upstairs and decided to "get some" too when the other had finished. He went in the room when the other soldier came out, and found the woman there. She made no outcry and did not seem frightened (R29). She was putting on her underwear and when she saw him "she put them down * * * lay on the bed and I motioned for her to lay on the bed" (R30). He testified that she removed her pants (R30,32) and he had intercourse withher. She

(341)

did not resist (R30) and had one hand behind his neck and the other along her side. When finished, they got up and she got a towel and his glasses for him. They dressed and went downstairs (R31) where be remained for about 20 minutes before leaving. He returned to the house later, once alone to obtain some eggs. He admitted that he did stop Wensel when Else Schneider called for help and locked all the others in the kitchen to prevent them from going upstairs (R33).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.149b, p.165).

The evidence is plain and convincing that no consent to the act was in fact given by the woman. The soldiers entered the house with drawn pistols, it was necessary to lock the other people in the kitchen to prevent them answering the woman's call for help and he locked the room door when he had entered where she was. Penetration is admitted by accused. The circumstances as shown, fully justify the conclusion that she did not in fact consent but that accused had carnal knowledge of her by force and that any lack or cessation of resistance was attributable to her fear of great bodily harm or death. Such being the fact, rape was committed (Wharton's Criminal Law, (12th Ed., 1932), sec.701, pp.942-944; CM ETO 5870, Schexnyder). It is unnecessary to comment on accused's status in connection with the acts of the other soldier.

6. The charge sheet shows accused is 22 years and eight months of age. He was inducted 6 February 1943, at Camp Forrest, Tennessee. 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. A sentence of death or life imprisonment is mandatory upon a conviction of rape (AW 42) and confinement in a penitentiary is authorized (AW 42; sec.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

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