E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 3880

CM ETO 4490

VOLS. 11-12

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 11 B.R. (ETO)

including

CM ETO 3860 - CM ETO 4127

(1944-1945)

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Office of The Judge Advocate General

Washington : 1946

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

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BOARD OF REVIEW NO. 2

CM ETO 3860

2 NOV 1944

UNITED STATES	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private CLEM JOHNSON (34905390), 3136 Quartermaster Service Company.	Trial by GCM, convened at Depot G-50, Norton Fitzwarren, Somersetshire, England, 29 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

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

Specification 1: In that Private Clem Johnson, 3136th Quartermaster Service Company, did, without proper leave, absent himself from his station at Camp Blagdon, Devon, England, from about 1700 hours 13 August 1944 to about 2100 hours 13 August 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his station at Camp Blagdon, Devon, England, from about 1700 hours 14 August 1944 to about 2045 hours 14 August 1944.

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

Specification: In that * * * did, near Ashwater, Devon, England, on or about 13 August 1944, with intent to commit a felony, viz, rape, commit an assault upon Winifred Annie Ruby by wilfully and feloniously throwing her to the ground, unfastening her clothes, attempting to pull them down and attempting to have sexual intercourse with her.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent evidence establishes the unauthorized absences and the assault described in the specifications and, as to the last, supports the inference of intent to commit rape. Accused's statement to the investigating officer, introduced by the prosecution, admits that, motivated by a desire for sexual intercourse, he assaulted the prosecutrix on the occasion in question, but denies that he went so far as to put his hands under her clothes. No evidence was adduced on behalf of accused who, after his rights were explained to him, elected to remain silent.

4. The charge sheet shows that accused is 19 years one month of age, and that, with no prior service, he was inducted 13 October 1943.

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

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Benjamin R. Cooper Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private CLEM JOHNSON (34905390), 3136 Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3860. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3860).

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

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3862

6 OCT 1944

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ROMIE C. MATTHEWS (35633910), 491st Engineer Base Equipment Company.	Trial by GCM, convened at Rennes, Brittany, France, 13 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

---

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Romie C. Matthews, 491st Engineer Base Equipment Company, did, without proper leave, absent himself from his organization at Thatcham, Berkshire, England from about 10 July 1944 to about 15 August 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions was introduced: one by summary court for being drunk in uniform, in a public place, in violation of Article of War "97" (96), and two by special court-martial for absence without leave for 13 and six days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for

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30 years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The findings of guilty of absence without leave are fully supported by the evidence (R9-13; Pros.Exs.1,2).

4. The charge sheet shows that accused is 34 years of age and that he was inducted 15 March 1943 at Columbus, Ohio, to serve for the duration of the war plus six months. He had no prior service.

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

6. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

Edward H. Orr Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 OCT 1944 TO: Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Private ROMIE C. MATTHEWS (35633910), 491st Engineer Base Equipment 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 3862. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3862).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

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

(9)

BOARD OF REVIEW NO. 1

CM ETO 3869

16 NOV 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Technician Fourth Grade JAMES D. MARCUM (18020864), Headquarters Detachment, Depot O-617	Trial by GCM, convened at Fremington, Devonshire, England, 21 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 96th Article of War.
Specification: In that Technician Fourth Grade James D. Marcum, Headquarters Detachment Depot O-617, did, at Moreton Woods, Bideford, Devon, England, on or about 10 June 1944, wrongfully, unlawfully and feloniously take indecent liberties with Sylvia May Sanders, a female under nine years of age, by fondling her and placing his hands upon her leg and private parts.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations (successor in command),

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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 established that at the time and place alleged accused, while walking in the woods, met Sylvia May Sanders, age eight (R12) and other children, who were picking flowers (R8). After joining the children in a game of hide-and-seek, he picked up Sylvia and carried her further into the woods, where he laid her down, tore her knickers and inserted one of his fingers into her private parts (R9,14-15). He also undid his clothes, exposed himself (R9,15), put his hand over her mouth and got on top of her (R14-15). She screamed (R14). Accused arose and departed. The child then went home and complained to her mother (R11,13), Mrs. Mildred Sanders, 23 Coldharbour, Bideford, who promptly reported the occurrence to the police (R13,16).

4. For the defense, Corporals William S. Norquay and Frederick W. Rouch, both of Depot O-617, stationed at Bideford, testified concerning the good moral character of accused (R17-18). After his rights were explained to him, accused elected to be sworn and to testify in his own behalf (R19). He met the children, including Sylvia, while walking through the woods and talked with them. While he was playing hide-and-seek with them, Sylvia fell down and he picked her up. His hand then touched her private parts, but it was not intentional (R19-20). Cross-examined at some length, accused described her "screaming and screaming" that he had hurt her. He thought

> "it was a pin in her clothes and laid her down behind a bush, fifteen or twenty yards from the base and she was screaming hard and I tried to pet her to keep her from crying" (R21).

He liked children and had a wife and child at home, but Sylvia's screaming scared him, which explained why he ran off and left her (R22,23,29,31).

5. The prosecution's evidence in rebuttal was as follows: Doctor George F. Henderson, Ridgeway, Orchard Hill, Bideford, examined Sylvia the same day. He found no bruises on her body, but her vagina "was rather more open than normally" and contained "a little brownish discharge", a condition "compatible with having a finger inside" (R26).

6. The objection by the defense to testimony as to what Sylvia stated to one of the other children immediately after the assault was improperly sustained by the court (R11). Such statements were, under the circumstances, spontaneous utterances of the victim made while under the emotional influence of her experience and properly admissible (CM ETO 3375, Tarpley; CM ETO 3644, Nelson). No prejudice resulted to the accused, since this error was favorable to his defense.

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7. Both Sylvia, age eight, and Muriel Rose Cawsey, age nine, were subjected to a voir dire examination by the trial judge advocate to determine their competency as witnesses prior to their being sworn. Their voir dire examination and subsequent testimony demonstrated their intelligence and understanding despite their youth and compels the conclusion that each of them possessed "a sufficient knowledge of the nature and consequences of an oath" (Wheeler v. United States, 159 U.S. 523, 524, 525, 40 L.Ed.244,247) to qualify them as witnesses. The Board of Review is of the opinion that the competency of each of the children as a witness was fully established (CM ETO 2195, Shorter; CM ETO 3375, Tarpley; CM ETO 3644, Nelson).

8. The evidence is legally sufficient to sustain the findings of the court that the accused did, at the time and place and in the manner alleged, take indecent liberties with Sylvia May Sanders, a female under nine years of age, an offense under the 96th Article of War (CM ETO 571, Leach; CM ETO 2195, Shorter). The court was fully warranted upon all the evidence in disbelieving the explanation offered by the accused.

9. The charge sheet shows that accused is 28 years two months of age and enlisted 31 August 1940 to serve for three years. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

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

11. The period of confinement adjudged in the sentence is within the authorized maximum (CM ETO 571, Leach; CM ETO 2195, Shorter). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210,WD,14 Sep 1943,sec.VI,as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Judge Advocate

(12) CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 16 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Technician Fourth Grade JAMES D. MARCUM (18020864), Headquarters Detachment, Depot O-617, 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 3869. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3869).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3870

2 NOV 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private CHARLES R. SMITH (38483952), 4177th Quartermaster Service Company.	Trial by GCM, convened at Tauton, Somersetshire, England, 18 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Charles R. Smith, 4177th Quartermaster Service Company, did, at Burnshill Camp, Norton Fitzwarren, Tauton Somerset England, on or about 17 June 1944, with intent to do him bodily harm, commit an assault upon 1st Lt. Vincent F. Corrado, by striking him on the head with a dangerous instrument, to wit, one half brick.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence was introduced of one previous conviction by summary court for absence without leave and breach of restrictions, in violation of Articles of War 61 and 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to be-

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come due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The record of trial shows conclusively the commission by accused of the offense charged. The officer sustained a fracture of the skull, was operated on and was in the hospital about three weeks. There were no extenuating circumstances shown. The accused remained silent and produced no evidence.

4. The charge sheet shows that accused was inducted at Lafayette, Louisiana, 10 March 1943. He had no prior service.

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

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

_____ Judge Advocate

1st Ind. (15)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private CHARLES R. SMITH (38483952), 4177th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3870. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3870).

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

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

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BOARD OF REVIEW NO. 2

CM ETO 3876

1 NOV 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade JOHN C. LINNSTAEDT, Jr. (38078544), 3012th Quartermaster Bakery Company Mobile (Special).	Trial by GCM, convened at General Depot G-50, Taunton, Somersetshire, England, 18 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technician Fifth Grade John C. Linnstaedt, Jr., 3012th Quartermaster Bakery Company, Mobile (Special), did, at Combe St. Nicholas, Somerset, England, on or about 17 May 1944, with intent to commit a felony, viz, rape, commit an assault upon Miss Evelyn May Gratham, by willfully and feloniously striking the said Miss Evelyn May Gratham, on the mouth, eye, and face with his fists, throwing her to the ground and attempting to have sexual intercourse with her.

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

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tenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of three years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The offense charged was established by the uncontradicted testimony of the prosecutrix, corroborated by that of her mother and a British police officer as to various significant attendant circumstances. Prosecutrix' account of accused's words and actions during the assault amply supports the inference of requisite intent. Accused, having elected to testify, denied none of the prosecutrix' evidence as to his words and actions, but insisted that he had imbibed so heavily on the occasion in question, that he had no recollection what occurred.

4. The charge sheet shows that accused is 31 years three months of age and that, with no prior service, he was inducted at Houston, Texas, 2 April 1942.

5. 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.

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Benjamin Brewer Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Technician Fifth Grade JOHN C. LINNSTAEDT, Jr. (38078544), 3012th Quartermaster Bakery Company Mobile (Special), 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 3876. For convenience of reference please place that number in brackets at the end of the ~~order~~ (CM ETO 3876).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3880

1 NOV 1944

UNITED STATES	)	V CORPS
	)	
v.	)	Trial by GCM, convened at Headquarters V Corps, near Malecheid, Belgium, 21 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hardlabor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROBERT L. CLARK (35403893), Company "B", 56th Signal Battalion.	)	

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

---

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

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

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

Specification: In that Private Robert L. Clark, Company "B", 56th Signal Battalion, did, in the vicinity of St. Laurent De Cuves, France, on or about 2000 hours, 15 August 1944, absent himself without proper leave until he was apprehended at Brecey, France, on or about 0830 hours, 16 August 1944.

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

Specification 1: In that * * * was at Brecey, France, on or about 0830 hours, 16 August 1944, drunk in uniform in a public place, to wit, near the town square, Brecey, France.

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Specification 2: In that * * * did, in the vicinity of St. Laurent De Cuves, France, on or about 16 August 1944, while performing duty in a combat situation, behave in an insubordinate manner toward Captain Lester O. Fulcher, his superior officer, who was then in the execution of his office, by saying to the said Captain Lester O. Fulcher, "Go fuck yourself; you won't get me on this; I am going to the infantry", or words to that effect.

Specification 3: In that * * * did, in the vicinity of St. Laurent De Cuves, France, on or about 16 August 1944, while performing duty in a combat situation, use the following threatening language toward Captain Lester O. Fulcher, his superior officer, who was then in the execution of his office: "You had better not let me get you alone or I will beat the shit out of you; I will kill you if I have to go to Louisiana to do it", or words to that effect.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of five previous convictions, three by summary court, for drunkenness and disorder, and wrongfully appearing in fatigues without helmet liner, in violation of Article of War 96, and absence without leave for 14 hours, in violation of Article of War 61; two by special court-martial, each for absence without leave for one day, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent uncontradicted evidence establishes the commission by accused of the offenses charged at the times and places and in the manner specified. The defense introduced no evidence on behalf of the accused, who, after his rights were properly explained to him, elected to remain silent.

4. The charge sheet shows that accused is 32 years three months of age and that, with no prior service, he was inducted at Columbus, Ohio, 13 May 1942, to serve for the duration of the war plus six months.

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

_____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

Benjamin Kaplan Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 NOV 1944 TO: Commanding General, V Corps, APO 305, U. S. Army.

1. In the case of Private ROBERT L. CLARK (35403893), Company "B", 56th Signal 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 3880. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3880).

/s/ E. C. McNEIL,
Brigadier General, United States Army,
Assistant JudgeAdvocate General.

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

BOARD OF REVIEW NO. 2

4 NOV 1944

CM ETO 3884

UNITED STATES	)	XX CORPS
	)	
v.	)	Trial by GCM, convened in the
	)	vicinity of Verdun, France, 18
Private HARRY H. CRAIG (33539666), Headquarters Battery, 943rd Field Artillery Battalion.	)	September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Harry H. Craig, Headquarters Battery, 943rd Field Artillery Battalion, did at or near Gorze, France, on or about 13 September 1944, with intent to commit a felony viz: rape, commit an assault upon Mademoiselle Ann Schaeffer by willfully and feloniously striking said Mademoiselle on the head with a blunt instrument.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but reduced the period of con-

finement to five years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence substantially supports the findings of guilty by the court. The accused testified that he had been drinking and admitted being with the prosecutrix at the time and place charged but denied the assault. The prosecutrix testified accused followed her into the garden and held the bag while she picked beans. When she finished the picking, he grabbed her by the head, dragged her into a small cabin, and threw her down on her back. He tried to pull her pants down while she struggled and screamed, and he hit her on the head both with a stick and with his fist. He tried to open his pants when on top of her but she bit him, got free and ran to the nearby village. Her screams were heard and she was seen running by a witness. A doctor who examined her found several bruises and scratches on her head and body.

4. The charge sheet shows that accused is 21 years and one month of age. He was inducted, without prior service, into the Army of the United States, 28 February 1943, at Charlottesville, Virginia.

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

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

(27)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 NOV 1944 TO: Commanding General, XX Corps, APO 340, U. S. Army.

1. In the case of Private HARRY H. CRAIG (33539666), Headquarters Battery, 943rd 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 3884. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3884).

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

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

(29)

BOARD OF REVIEW NO. 1

CM ETO 3885

23 NOV 1944

UNITED STATES	3D ARMORED DIVISION
v.	Trial by GCM, convened at APO 253, U.S. Army, 9 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private FRANCIS W. O'BRIEN (31161411), Medical Detachment, 36th Armored Infantry Regiment	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Francis W. O'Brien, Medical Detachment, 36th Armored Infantry Regiment, Army Post Office 253, did in the vicinity of Aire, France, on or about 8 thru 10th July 1944, misbehave himself before the enemy, by taking an overdosage of seconal thereby rendering himself unfit for combat duty.

He plead 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 special court-martial for absence without leave for nine 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 25 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Uncontroverted evidence of a competent, substantial and reliable nature, consisting in large part of the testimony of medical officers, established the following:

Accused, a reserve medical aid man charged with the duty of assisting in the treatment of combat casualties (R9,10), and his organization, the medical detachment of the 36th Armored Infantry Regiment (R8,9), were before the enemy (R9,11,13) in the vicinity of Aire, France, during the period 8 through 10 July 1944 (R11-12). Accused was familiar with the various drugs used for medical aid by members of his detachment and the purposes of such drugs (R8). He was likewise familiar with the amount that would constitute an overdosage of seconal (R15), defined by a medical witness as "a barbiturate (barbituric) drug which is used for producing sleep"(R14). Although the normal dosage of seconal is one capsule, containing one and one-half grains (R15), as many as four grains are administered in exhaustion cases in order to insure sleep for the patient (R15,18). From six to eight grains, depending upon the capacity of the particular individual, constitute an overdosage (R18).

On the evening of 7 July accused's detachment was alerted (R9) and shortly thereafter, about 1800 hours, moved into a combat area, arriving about 0200 hours on 8 July (R13,15). About 1900/7 July accused was discovered with a seconal capsule on his tongue which he was about to consume and shortly thereafter he removed another capsule from his pocket (R13; Pros.Ex.B). The next morning he admitted to his commanding officer, the battalion surgeon, that he consumed seven or eight tablets of seconal (R10-11,12). By consuming this overdosage he rendered himself completely incapable of performing his combat duty of assisting in the treatment of casualties (R10-11,12; Pros.Ex.A,B), as well as incapable of controlling or taking care of himself and necessitating the use of other medical personnel to attend and protect him (R11). During the period 8-10 July accused's reactions indicated that he continued to consume seconal (R12) and he continued unfit for duty (R11-12). Heavy combat occurred during this period (R11), and many resultant casualties required treatment (R16).

According to the testimony of the division neuropsychiatrist, who examined him on 14 July 1944, accused was not suffering any nervous mental disorder, was fully cognizant of the difference between right and wrong and the nature and consequences of his acts and in witness's opinion was in such status for a week preceding the examination (R19).

5. The accused elected to remain silent and the defense submitted no evidence (R20).

6. The evidence supports the conclusion that accused deliberately and purposefully consumed an overdosage of a drug which he knew would produce a disabling effect upon him, at a time when he and his organization were before the enemy and about to encounter extremely trying circumstances.

The reasonable and logical inference, which the court was justified in drawing from these circumstances was that accused induced his disablement "for the express purpose of evading" his assigned service and duty at a time the dangers and perils were great (Winthrop's Military Law and Precedents - Reprint - p.623). He was clearly proven guilty of such misbehavior, in the form of misconduct, as constitutes a violation of Article of War 75 (CM ETO 3081, W.I.Smith; CM ETO 3937, Bigrow; and authorities therein cited).

7. In his review of the case the Staff Judge Advocate recommended that "pursuant to authority contained in paragraph 90, Manual for Courts-Martial, and paragraph 5d, Army Regulations 600-373 (375) 17 May 1943 and the provisions of Section 5, War Department Circular 291, 10 November 1943, the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement". Premised on such recommendation, as stated (par.2,supra), the reviewing authority in his action designated the recommended place of confinement. The designation was improper (AW 42); CM NATO 811 (1943); Bull. JAG,VOI II, No.11,Nov.1943,sec.399 (5),p.425). Penitentiary confinement is not authorized specifically by the Articles of War for the offense of which accused was convicted and it is not an offense of a civil nature and so punishable by penitentiary confinement by any statute of the United States of general application within the continental United States nor by the law of the District of Columbia (Cf: CM ETO 902, Barreto and Colitto, respecting use and possession of marijuana), as it must be to warrant penitentiary confinement (Ibid.). The authorities cited by the Staff Judge Advocate have no application unless the offense is punishable by penitentiary confinement either under Article of War 42 itself or under one or more of the laws set forth therein. Accordingly, the proper place of confinement of this accused is the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep.1943,sec.VI, as amended).

8. The charge sheet shows that accused is 27 years of age and was inducted at Boston, Massachusetts, 18 August 1942, to serve for the duration of the war plus six months. He had no prior service.

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

10. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 25 years in a place other than a penitentiary, Federal correctional institution or reformatory.

_____ Judge Advocate

Edmund H. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(32)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 NOV 1944 TO: Commanding General, 3d Armored Division, APO 253, U.S.Army.

1. In the case of Private FRANCIS W. O'BRIEN (31161411), Medical Detachment, 36th Armored Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 25 years in a place other than a penitentiary, Federal correctional institution or reformatory. Such holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. As penitentiary confinement is not authorized punishment for the offense of which accused has been convicted, the designation in your action of the United States Penitentiary, Lewisburg, Pennsylvania, is improper, and should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3885. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3885).

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

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

BOARD OF REVIEW NO. 2

6 NOV 1944

CM ETO 3888

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Fougerolles du Plessis, France, 28 August 1944.
Private First Class TERRENCE S. BURKET (33257459), Battery "A", 266th Field Artillery Battalion.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private First Class Terrence S. Burket, Battery A, Two Hundred Sixty Sixth Field Artillery Battalion, did, at Southampton, England, on or about 5 July 1944, behave himself with disrespect toward First Lieutenant Archibald B. Powell, his superior officer, by saying to him, "I'm getting tired of this rank pulling, as far as I'm concerned, one man is as good as another. There's one thing sure, I'm certain that you're not coming back from combat", or words to that effect.

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

Specification: In that * * * having received a lawful command from Second Lieutenant John P. Michelini,

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his superior officer, to get out of his truck, did, at Southampton, England, on or about 5 July 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentence but reduced the period of confinement to 10 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The uncontradicted evidence clearly establishes commission by accused of the offenses charged. The defense offered no evidence. Accused elected to remain silent.

4. The charge sheet shows that accused is 22 years of age and that, with no prior service, he was inducted 6 November 1942, in the Army of the United States for the duration of the war plus six months.

5. 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.

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Benjamin R. Sleeper Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 3 NOV 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private First Class TERRENCE S. BURKET (33257459), Battery "A", 266th 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 3888. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3888).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3897

16 NOV 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private LINWOOD DIXON (34562649), 4091st Quartermaster Service Company	Trial by GCM, convened at Headquarters, Area "D", Dorchester, Dorsetshire, England, 17, 18 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Linwood Dixon, 4091st Quartermaster Service Company, did, at Martinstown, Dorchester, England, on or about 9 April 1944, with intent to commit a felony, viz, rape, commit an assault upon Gwendoline Doreen Mitchell, a female person, by wilfully and feloniously endeavoring to have carnal knowledge of the said Gwendoline Doreen Mitchell by force and against her will.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for breaking restriction by going off post in violation of the 96th Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations (successor in command), approved the

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

3. Evidence presented by the prosecution established that at 11 p.m. on the evening of 9 April 1944 Mrs. Gwendoline Mitchell, Park House, Martinstown, Dorchester, Dorset, England, and her friend Mrs. Gwendoline Warren, 3 Mayfield Bungalows, Martinstown, were at Martinstown corner, where they stopped to talk while on the way to their respective homes, after attending a moving picture show in Dorchester. A six-wheeled American truck passed them, stopped, backed-up and crowded the women against an embankment. There were two colored American soldiers in the vehicle, one of whom asked the women if they wanted "a lift". The reply was "no, thank you, we only live in the bungalow just down over the hill." The two soldiers got out of the lorry and approached the women (R7,17). Mrs. Warren eluded them by passing beside the vehicle and rolling down the embankment (R17). Mrs. Mitchell tried to run away, but the soldiers seized her and forcibly placed her in the truck. One of the soldiers was tall; the other short. The latter drove the truck (R8) and she distinctly heard the tall one say he could not drive at all (R12). After travelling about two miles "or it might have been more" (R14), the truck was stopped by three haystacks, where she was removed from the truck and the "short" soldier pushed her down into the hay. Both men alternately attempted intercourse with her. Mrs. Mitchell described in detail their respective attacks upon her (R8,9), her resistance (R14) and their inability to penetrate her sexual organ because "there is something wrong with me inside" (R13). The soldiers placed their victim in the truck, entered it themselves and drove to the Weymouth Bridge, where they pushed the woman out, handed her a cigar for her husband and asked her if she wanted a shilling (R9). She identified accused as one of these soldiers (R10,13).

Meanwhile, Mrs. Warren picked herself up from the embankment and went to a nearby house for help. She saw the truck pass down the road and then went to her own home about a half a mile away, returning with her father to see if Mrs. Mitchell "was still there." She went "to the camp" and was just turning in the gate when she saw the truck which had contained the two negroes. She called it to the attention of Staff Sergeant Rex Hopkins and Private Walter McCarson, both of the Anti-Tank Company, 1st U.S. Infantry Division, who at once followed the truck in a jeep, stopped it, took its serial number (R25,29) and got a "good look" at the two negroes in the truck (R26,29) to whom they talked for five minutes (R27). They gave this serial number to a member of the British Constabulary (R26,30). At an identification parade of 12 to 14 men on 10 April 1944 at Kingston Russell Camp, called also D.9 and White Hill Camp, Hopkins and McCarson both identified accused as one of the negroes they had seen in the truck (R36-37). At another identification parade of three soldiers at Martinsdown, Mrs. Mitchell identified accused as one of the negroes who had attacked her (R37). At another time on the same day, Mrs. Warren identified accused as one of the negroes who had accosted her and Mrs. Mitchell (R20,33-34) and also so identified him at the trial (R18). Police

Constable Stanley Moore of the Winterbourne Police Station and Police Sergeant Victor Swatridge of the Dorchester Police, after searching in the woods at White Hill, Little Briddy, located a truck with the same serial number as that given them by Hopkins and McCarson (R32,35). In the truck they found a brown felt hat with green ribbon, which Mrs. Mitchell later identified as one she lost while in the company of accused (R10,32,35).

At two o'clock on the morning of 10 April 1944 Hubert Gosling Harvey, medical practitioner, 14 High West Street, Dorchester, examined Mrs. Mitchell (R22). He did not observe any external bruises but noted particles of straw in her underclothing and around her thighs and abdomen. There was no sign of laceration or abrasion about her vaginal entrance, which was exceedingly small. He found no evidence that there had been any penetration (R23).

4. The evidence for the defense was that at about six o'clock on 9 April 1944 accused was in the supply tent of the 4091st Quartermaster Service Company at D.10 and remained there the whole evening (R41,46,48) and left at 11.30 p.m. (R42,47,48). With others, he was writing letters and talking (R43-44,48). About 2400 the same night accused was in a tent with Staff Sergeant Johnson Leggett, 2nd Platoon, 4091st Quartermaster Service Company, at Area D.10 and played poker for an hour and 45 minutes (R50-51,53).

After his rights were explained to him, accused elected to be sworn and to testify in his own behalf (R54). He affirmed the testimony of defense witnesses, as follows:

> "I worked all day that Sunday till about 5 o'clock. I got off and ate supper and went back to work till about 7 o'clock. When I got off the second time I washed up a little bit and then played ball till about dark. Then we went in the supply tent because it was cold and there was a fire there. We went up there and were laughing and talking in the tent and he told Dixon to write a letter for him and he dictated a letter and I went to the other end of the supply room to sit down at the table and write myself a letter. I stayed there till about 11.30, probably 12 o'clock. I left the supply tent and went to where the boys were playing poker and stayed there till the game broke up" (R54).

5. The first indorsement on the charge sheet shows that the case was referred for trial to a court appointed by paragraph 70, Special Orders No. 192, Headquarters Southern Base Section, Communications Zone, dated 10 July 1944. No reference is shown to the court which tried the case and which was appointed by paragraph 50, Special Orders No.225, Headquarters Southern Base Section, Communications Zone, dated 12 August 1944. No prejudice resulted to accused because of this irregularity. It has been

held that, where a case is tried by a court other than that to which it was originally referred and the reviewing authority approves the sentence, the absence of an order referring the case to the trial court is not fatal (CM 138625, Woodward; CM 198108, Casey).

6. Whether or not there was sufficient identification of accused as perpetrator of the offense alleged was a question which the court after hearing all the evidence was warranted in resolving against accused. Inasmuch as there is substantial evidence to sustain the findings of guilty the same will not be disturbed on appellate review (CM ETO 1621, Leatherberry, and authorities therein cited; CM ETO 2002, Bellot; CM ETO 3200, Price, and authorities therein cited). The evidence supports the findings that accused at the time of the assault upon his victim, Mrs. Gwendoline Mitchell, entertained the specific intent to rape her (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr.; CM ETO 3255, Dove).

7. The charge sheet shows that accused is 22 years two months of age and was inducted at Fort Benning, Georgia, 19 December 1942 to serve for the duration of the war plus six months. He had no prior service.

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

9. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and sec. 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec II, pars. 1b(4),3b).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army.

1. In the case of Private LINWOOD DIXON (34562649), 4091st 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. The publication of the general court-martial order may be accomplished by you as the successor in command to the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, and as officer commanding for the time being as provided in Article of War 46.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3897. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3897).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3910

16 NOV 1944

UNITED STATES v. Technician Fourth Grade SANDERS C. HARTSELL (34282340), 790th Engineer Petroleum Distribution Company.	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Cherbourg, Department of Manche, Normandy, France, 13 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Place of confinement not designated.

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

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification 1: In that Technician Fourth Grade Sanders C. Hartsell, 790th Engineer Petroleum Distribution Company did, at Bricquebec, France, on or about 20 August 1944, forcibly and feloniously, against her will have carnal knowledge of Miss Susanna Navet.

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 was introduced of previous convictions. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but failed to designate any place of confinement. The record of trial was forwarded for action pursuant to Article of War 50½.

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3. The evidence presented at the trial clearly established the fact that Miss Susanna Navet, a French girl 18 years of age, on 20 August 1944, at Bricquebec, Department of Manche, France, was assaulted by a white American soldier who, by virtue of the force and violence visited by him upon the young woman, was able to secure sexual intercourse with her. All of the elements of the crime of rape (MCM, 1928, par.148b,p.165) were proved beyond reasonable doubt (Penetration: CM ETO 3044, Mullaney; CM ETO 3375, Tarpley; CM ETO 3859, Watson and Wimberly; Non-consent of victim and force and violence: CM ETO 3709, Martin and authorities therein cited; CM ETO 3718, Steele).

4. At the trial the accused elected to remain silent, but several witnesses testified for the defense in the effort to establish an alibi for accused. The victim of the rape, Miss Navet, in open court made positive identification of the accused as her assailant (R24-25), and Monsieur Pierre Dison, the victim's employer, in open court identified accused as the man he saw running from the scene of the crime when he came to the succor of the young woman (R29,31). There was, therefore, presented an issue of fact for consideration and determination by the court. It was its duty and within its exclusive province to weigh the evidence submitted, consider the credibility of witnesses, resolve conflicts in the evidence and reach a conclusion on this issue. By its findings it has resolved the same against accused. The Board of Review, upon appellate review, is concerned in this aspect of the case only with the question whether the findings are supported by competent substantial evidence. In its opinion the evidence identifying accused as the rapist is competent, substantial and convincing. Under such circumstances the findings of the court are accepted as binding and conclusive (CM ETO 2686, Brinson and Smith; CM ETO 3200, Price and authorities therein cited; CM ETO 3649, Mitchell).

5. The record of trial reveals certain irregularities and errors in the admission of evidence. However, they were either invited by the defense or reacted favorably to the accused (CM ETO 1366, English) or were manifestly non-prejudicial to his rights (CM ETO 1486, MacDonald and MacCrimmon; AW 37).

6. The charge sheet shows that accused is 25 years one month of age. He was inducted at Fort Oglethorpe, Georgia 4 May 1942, to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for rape is death or life imprisonment (AW 92). Confinement in a penitentiary is authorized for rape by AW 42 and secs.

278, 330, Federal Criminal Code (18 U.S.C.A. 457, 567). Inasmuch as the sentence included confinement at hard labor for more than ten years, i.e. for life, confinement in the United States Penitentiary, Lewisburg, Pennsylvania, would be authorized (Cir. 229, WD, 8 Jun 1944, sec. II, pars. 1b (4) and 3b).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward T. Stevens, Jr. Judge Advocate

(46)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding Officer, Normandy Base Section, Communications Zone, European Theater of Operations, APO 562, U. S. Army.

1. In the case of Technician Fourth Grade SANDERS C. HARTSELL (34282340), 790th Engineer Petroleum Distribution Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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. In your action approving the sentence you should have designated the place of confinement. However, this may now be done by supplemental action which should be forwarded to this office for attachment to the record of trial. The United States Penitentiary, Lewisburg, Pennsylvania, is the authorized place of confinement for this prisoner.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3910. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3910).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3911

8 NOV 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private SIMON JACKSON (34075585), 353rd Replacement Company, 19th Replacement Depot.	Trial by GCM, convened at Kirkby Hostel #1, Lancashire, England, 18 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Simon Jackson, 353 Replacement Company, 19th Replacement Depot, did, at Moss Lane Police Station, Manchester, Lancashire, England, on or about 24 June 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Leo J. Kazmierczak, by willfully and feloniously shooting at the said Private Leo J. Kazmierczak with a dangerous weapon, to wit, a pistol.

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

Specification: In that * * * having been duly placed in arrest at Manchester, Lancashire, England, on

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or about 24 June 1944, did, at Manchester, Lancashire, England, on or about 24 June 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * * did, at Manchester, Lancashire, England, on or about 24 June 1944, violate Section II, Circular 35, Headquarters European Theater of Operations United States Army, dated 29 March 1944, by carrying a concealed weapon while off duty.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court for absence without leave for three days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 24 June 1944, at about 1:30 a.m., Private Leo J. Kazmierczak and another military policeman arrested accused at a dwelling house in Manchester, England (R6-7,15,18). Accompanied by two British constables, the MPs escorted accused to the door of the Moss Lane Police Station, Manchester, where he pushed one of the constables off the steps and fled (R7-8,18-19). Almost immediately Kazmierczak fired his .45 caliber automatic (R8,11-12, 15,19). Accused replied with two shots from a weapon whose report indicated it was of smaller caliber (R8,11-12,19,21). One witness testified that the shots fired by accused appeared to be aimed at Kazmierczak (R8,11-14), while another characterized them as "high and wide", not aimed at the MP but "hurried * * * wild shots" with "no aim taken * * * just a pull of the trigger" (R20). Despite two additional shots fired by Kazmierczak, accused succeeded in making his escape (R9,19). About 2:30 a.m., a British physician administered medical treatment to accused, removing a bullet from the third finger of his right hand. According to the physician accused made a voluntary statement

"while I was operating on him. He said while going to the police station, he had been prodded in the back by a British Civil Policeman. This had made him very angry and annoyed and he made

a breakaway and ran down the street. He then said 'I didn't begin shooting until the M.P. shot at me'" (R16).

The physician observed that accused had a fresh bruise and abrasion on the front of the left side of the chest below the armpit.

"He said the police officer had prodded him, but he didn't say it was that exact place. He said he didn't know how he had come about the bruise".

The bruise could have been caused by a blow from a stick or some blunt object administered as recently as 2 a.m. (R17). Within a few minutes after the shooting, a .38 caliber Smith and Wesson revolver was found in a passage outside the police station where accused escaped. The two mother-of-pearl stocks were broken and separated from the revolver from which two empty cartridge cases and one unspent cartridge were extracted. An examination disclosed that the mainspring had been shattered, "apparently by being struck with a .45 bullet" and the "revolver could not have been fired after being struck - not enough pressure on the main spring to explode a cartridge" (R21-22).

4. The defense introduced no evidence and accused, after his rights were properly explained to him, elected to remain silent (R23-24).

5. Accused was found guilty of assault with intent to murder. The uncontradicted evidence shows that accused did not fire until after Kazmierczak's first shot. One witness testified that accused's shots were apparently aimed at the MP. The only other eyewitness who testified characterized accused's shots as hurried, wild and not aimed at all, "just a pull of the trigger".

"Murder is the unlawful killing of a human being with malice aforethought" (MCM, 1928, par.148a, p.162).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * An 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. (Clark)" (Ibid., pp.163-164).

It thus appears that if accused fired at Kazmierczak, even though Kazmierczak fired at accused first, accused's firing involved the requisite malice aforethought to establish the intent charged. The court evidently believed the eyewitness whose testimony indicated that his shots were directed at the military policeman. Such determination of the issue involved in the conflicting accounts of the prosecution's two eyewitnesses is certainly not inconsistent with the logical inference, reasonably susceptible of being drawn from the surrounding circumstances, that accused, while making his escape, shot at the military policeman who was then firing at him in an attempt to prevent his escape, rather than that he merely fired nervously and at random or with no intention of hitting Kazmierczak. The court's findings in this regard, being supported by competent substantial evidence, will not be disturbed upon appellate review (CM ETO 1953, Lewis). The physician's testimony, elicited by the prosecution, of accused's statement that he was provoked to break away by the constable's prodding, and the same witness' further testimony, elicited by the defense, that accused's chest showed a fresh bruise and abrasion which could have been caused by a blow from a stick or blunt instrument, might have been considered in some degree of extenuation. From the sentence imposed, it evidently was not.

The uncontradicted evidence clearly establishes accused's breach of arrest and his carrying of a concealed weapon while off duty, in violation of Section II, Circular 35, European Theater of Operations, alleged in the specifications, Charges II and III.

6. The charge sheet shows that accused is 23 years nine months of age and that, with no prior service, he was inducted at Camp Livingstone, Louisiana, 22 May 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.

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

(51)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private SIMON JACKSON (34075585), 353rd Replacement Company, 19th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3911. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3911).

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

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

BOARD OF REVIEW NO. 2

30 NOV 1944

CM ETO 3912

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private FREDDY LANE (36863365), Company D, 1317th Engineer General Service Regiment.	Trial by GCM, convened at Wilton, Wiltshire, England, 14 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 93rd Article of War.

Specification: In that Private Freddy Lane, Company D, 1317th Engineer General Service Regiment, then Technician, Fourth Grade, did, near East Baldre, Hants, England, on or about 11 June 1944, with intent to do him bodily harm, commit an assault upon Sergeant William A. Corbin by wilfully and feloniously cutting the said Sergeant Corbin in the back with a knife.

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

Specification: In that * * * did, in conjunction with Staff Sergeant Cluster D. Daugherty, Company D, 1317th Engineer General Service Regiment, Technician fifth grade Frederick D. Young, Company D, 1317th Engineer General Service Regiment, and

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other soldiers whose names are unknown, near East Baldre, Hants, England, on or about 11 June 1944, unlawfully, wrongfully and wilfully engage in and become a part of a disorderly and riotous assembly of soldiers.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority, the Commanding General, United Kingdom Base, European Theater of Operations, (successor in command) 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 the provisions of Article of War 50½.

3. Competent evidence introduced by the prosecution showed that at the time and place alleged in the specification of each of the two charges, Technician Fourth Grade William A. Corbin, at that time a member of Company A, 735th Military Police, accompanied by four or five other military policemen, and while in the performance of his duty, stopped accused, a private in the United States Army, who was walking along the road accompanied by a few other soldiers. Corbin was wearing a white helmet and an "MP" brassard. Corbin questioned this group, of which accused was a member, and not receiving a satisfactory response, ordered them into the truck in which he and the other military policemen were riding. The group on the road refused to obey. Thereupon, the military policemen attempted to force them into the truck. Physical resistance was offered and fighting resulted between the military policemen on one side and accused and his companions on the other. During this fighting accused cut Corbin in the back with a knife, puncturing the right thoraesis cavity (R7-9,11,17,19,20,22,26). Corbin was unable to identify his assailant (R31). However, accused was the only one in his group who wore a field jacket and the soldier who cut or stabbed Corbin was so garbed (R20). A knife was seen in the hand of a soldier who wore a field jacket (R17). Accused voluntarily made and signed a written statement in which he admitted that at the time and place in question he struck at Corbin with a knife (R24-26; Pros.Ex."D").

4. Accused was advised of his rights, after which he made an unsworn statement, the substance of which was a plea to the members of the court, individually, to consider what they would have done had they been in his place, "Being beaten by two MPs across my body with night stick", which was very painful.

5. The evidence offered by the prosecution fully substantiated each allegation of each specification and showed accused guilty as charged. This evidence was not contradicted.

6. Legally constituted courts of the Southern Base Section, Communications Zone, were absorbed by and became an instrumentality of United Kingdom

Base. The jurisdiction of the court before which accused was arraigned and tried is therefore sustained (CM ETO 4054, Carey, et al).

7. Accused is 33 years and ten months of age. He was inducted 28 June 1943, 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 offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. Assault with intent to do bodily harm with a dangerous weapon, in violation of Article of War 93, is punishable by confinement for five years. 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

(56)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 30 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army.

1. In the case of Private FREDDY LANE (36863365), Company D, 1317th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you how 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 3912. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3912).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3919

18 NOV 1944

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private MELVIN WHITE (13036398), 389th Engineer General Service Regiment	Trial by GCM, convened at Plymouth, Devonshire, England, 1 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. The Federal Reformatory, Chillicothe, Ohio

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Melvin White, 389th Engineer General Service Regiment, did, at Torpoint, Cornwall, England, on or about 22 July 1944, with intent to commit a felony, fiz: Rape, commit an assault upon Margaret Mary Collins, by willfully striking, kicking and beating the said Margaret Mary Collins on the face, head and body with his fists and feet.

Specification 2: In that * * * did, at Torpoint, Cornwall, England, on or about 22 July 1944, with intent to do her bodily harm, commit an assault upon Margaret Mary Collins by wilfully and feloniously striking the said Margaret Mary Collins on the face, head and body with his fist.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of two previous convictions: one by special court-martial for absence without leave for 20 days and one by summary court for absence without leave for one day, both in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The court, although appointed by the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations (par. 16, SO 230, Hq, SBS, 17 Aug 1944), whose authority terminated upon dissolution of Southern Base Section at 0001 hours 1 September 1944 (GO 42, 31 August 1944, Communications Zone, European Theater of Operations), became an instrumentality of United Kingdom Base, Communications Zone, European Theater of Operations. Upon authority of CM ETO 4054, Carey, et al, the jurisdiction of the court in the instant case is sustained.

4. (a) The prosecution's evidence showed, in summary, that at the time and place alleged in the specifications accused, a negro, struck Miss Margaret Collins on the head, threw her down, jumped upon her, saying he was "going to get" what he wanted, attempted to raise her skirt, knocked her down when she arose and attempted to tie a handkerchief around her throat. He also kicked her in the head and punched her in the eyes. She screamed, whereupon he ran away from the scene (R8,9). A medical examination on the following day found her in a semi-conscious state and in a very distressed and upset condition with a bruise and blood on her head. Her dress was torn and her clothes disarranged and her nose had been bleeding (R12-13). Accused's helmet liner was found at the scene of the crime (R13-14).

(b) In accused's sworn testimony, given after his rights were explained to him, he stated that he had spent the evening in question in camp (R17) and never saw the alleged victim before the trial (R18).

(c) In rebuttal, the prosecution introduced in evidence, by stipulation, the statement of Corporal Edward M. Snyder, which corroborated the victim's testimony that accused and Snyder conversed near the scene of the assault prior thereto (R20-21).

5. The charge sheet shows that accused is 20 years, seven months of age. He was enlisted in the Army of the United States 6 February 1942 at Richmond, Virginia, to serve for the duration of the war plus six months. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and 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 to assault with intent to commit rape: CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr; CM ETO 3255, Dove. As to assault with intent to do bodily harm: CM ETO 804, Ogletree; CM ETO 1982, Tankard; CM ETO 2782, Jones.

7. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and Sec. 276, Federal Criminal Code (18 USCA 455). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir. 229, WD, 8 June 1944, sec. II, pars. 1a (1) and 3a).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

_____ Judge Advocate

(60)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private MELVIN WHITE (13036398), 389th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3919. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3919).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3920 4 NOV 1944

UNITED STATES	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ARTHUR HANNAH (15088976), Company B, 234th Engineer Combat Battalion.	Trial by GCM, convened at Taunton, Somersetshire, England, 15 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification: In that Private Arthur (NMI) Hannah, Company B, 234th Engineer Combat Battalion, did, without proper leave, absent himself from his station at Crowe Point, Devonshire, England, from about 14 February 1944 to about 16 February 1944.

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

Specification 1: In that * * * did, at Crowe Point, Devonshire, England, on or about 29 February 1944, desert the service of the United States

and did remain absent in desertion until he was apprehended at Swanage, Dorset, England, on or about 26 March 1944.

Specification 2: In that * * * did, at Bournemouth, Dorset, England, on or about 31 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, Warwickshire, England, on or about 24 April 1944.

Specification 3: (Finding of Not Guilty.)

CHARGE III: Violation of the 69th Article of War. (Finding of Not Guilty.)

Specification: (Finding of Not Guilty.)

CHARGE IV: Violation of the 96th Article of War. (Nolle Prosequi)

Specification 1: (Nolle Prosequi)

Specification 2: (Nolle Prosequi)

Specification 3: (Nolle Prosequi)

After the court and personnel of the prosecution were sworn, the prosecution announced that by direction of the appointing authority, it withdrew from consideration at the present trial, Charge IV and its three specifications. Accused pleaded not guilty to the remaining charges and their specifications. He was found of Charge I and its Specification, guilty; of Specifications 1 and 2 of Charge II, guilty, except the words "desert" and "desertion", substituting therefor the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; of Charge II, not guilty, but guilty of a violation of the 61st Article of War; of Specification 3 of Charge II, and of Charge III and its Specification, not guilty. Evidence was introduced of two previous convictions by special court-martial, each for absence without leave, one for six months and one for 22 days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 12 years. The reviewing authority approved the sentence but remitted two years of confinement imposed, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Extract copies of the morning reports of accused's organization for 14 February, 16 February, 29 February, 29 March, 31 March, and 22 May 1944, showing the unauthorized absences of accused as charged in the Specification to Charge I, and in Specifications 1 and 2 of Charge II, were placed in evidence as prosecution exhibits without objection by the defense. No evidence was offered to prove Specification 3, Charge II, or the Specification of Charge III. On being advised of his rights as a witness, accused elected to remain silent and no evidence was introduced in his behalf.

4. The charge sheet shows accused to be 22 years of age. He enlisted, without prior service, at Fort Thomas, Kentucky, 22 January 1942.

5. 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.

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private ARTHUR HANNAH (15088976), Company B, 234th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3920. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3920).

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

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

BOARD OF REVIEW NO. 1

CM ETO 3921

18 NOV 1944

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JAMES H. BYERS (35470794), 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot	Trial by GCM, convened at Whittington Barracks, Lichfield, Staffordshire, England, 14 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James H. Byers, 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 22 May 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, Warwickshire, England, on or about 15 August 1944.

He pleaded to the Specification "guilty of the lesser included offense of absence without leave for the period of time stated in the Specification",

and not guilty to the Charge, but guilty of a violation of the 61st Article of War. He was found guilty of the Specification, except the words "desert the service of the United States" and "did remain absent in desertion" substituting therefor, respectively, the words "without proper leave absent himself from his organization" and "did remain absent without leave," of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge, but guilty of violation of the 61st Article of War. Evidence was introduced of three previous convictions for absences without leave in violation of the 61st Article of War: one by summary court, for 72 days, and two by special court-martial, for 25 days and one day. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, remitted ten years of the confinement imposed, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The undisputed evidence, confirming accused's plea, showed that he was absent without leave from his organization at Whittington Barracks, Lichfield, Staffordshire, England, on 22 May 1944 (R7,10; Pros. Ex. 1) and remained absent until he was apprehended on 15 August 1944 at Birmingham, Warwickshire, England, by Detective Sergeant John McWalter of the Birmingham City Police Force (R8,10; Pros. Ex. 2).

After being warned of his rights (R11) accused elected to testify in his own behalf. He stated that during the entire period of his absence he was at a girl's home in Birmingham. He did not intend to desert. He affirmed as true his statement made the day following his apprehension (Pros. Ex. 2) that he was in Birmingham during the period of his absence and "wore his uniform all the time (R10,12).

4. The absence without leave of the accused in accordance with the findings was shown by competent, substantial evidence.

5. The court before which accused was arraigned and tried was appointed by the Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations, on 5 July 1944 (SO #179, 5 July 1944). Western Base Section was dissolved at 0001 hours, 1 September 1944, and was succeeded by United Kingdom Base, Communications Zone, European Theater of Operations, at 0001 hours, 1 September 1944 (GO #42, 31 August 1944, Communications Zone, European Theater of Operations). The instant trial was held 14 September 1944. Upon the authority of CM ETO 4054, Carey, et al., the court became an instrumentality of United Kingdom Base, and its reviewing authority was the Commanding General thereof. The court was legally constituted and continued to possess all of its judicial powers and functions, notwithstanding the dissolution of its original appointing authority and its absorption by a new command.

6. The charge sheet shows that accused is 24 years, seven months of age and was inducted 24 August 1942 at Cincinnati, Ohio. 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, is authorized (AW 42; Cir. 210, WD, 14 Sept 1943, sec. VI, as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr.
EDWARD L. STEVENS, JR. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, APO 413, U. S. Army

1. In the case of Private JAMES H. BYERS (35470794), 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The evidence would have supported a conviction of the offense of desertion. The court, in my opinion, was unduly lenient. The sentence, while appearing severe in view of the findings, is therefore fully justified. The past record of the soldier also shows that the possibility of his rehabilitation is exceedingly doubtful. His retention in this theater is therefore not practical and his elimination from the military service is desirable.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3921. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3921).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3926

8 NOV 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOEL A. MANUS (20443944), Company "A", 774th Tank Destroyer Battalion.	Trial by GCM, convened at Whittington Barracks, Lichfield, Staffordshire, England, 28 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Joel A. Manus, Company "A", 774th Tank Destroyer Battalion, did at Arbury Park Camp, Warwickshire, England, on or about 1 July 1944, unlawfully attempt to have carnal knowledge of Joyce Baker of 68 Webb Street, Nuneaton, Warwickshire, the said Joyce Baker then and there being a female under the age of consent.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial for absence without leave for eight and five days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as

the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The commission by accused of the offense charged at the time and place specified was established by the testimony of the ten-year-old prosecutrix and three other children, aged 11, 12 and 13 years, respectively, all eyewitnesses of accused's criminal conduct on the occasion in question. The only evidence adduced by the defense was the testimony of the physician whose physical examination of the prosecutrix three days after the offense was committed disclosed no evidence of rape. Her hymen was not broken but intact, indicating that there had been no penetration. On cross-examination he testified that no examination was made for the purpose of ascertaining whether there had been an attempt. Accused, after being duly advised of his rights, elected to remain silent.

4. Accused's sentence includes the maximum period of confinement authorized by the Penal Code of the United States for the offense of carnal knowledge of a female under 16 (18 USC 455). While such an attempt is undoubtedly an offense included in a charge of carnal knowledge of a female under 16, no maximum punishment for the latter offense is listed in the Table of maximum punishments, paragraph 104c, Manual for Courts-Martial, 1928, whose provision that the punishment listed opposite each offense "in the table below" shall be the maximum "for any included offense if not so listed", is, therefore, not applicable. In holding the maximum limit on punishment the same for attempted sodomy as for the consummated offense, a recent opinion of The Judge Advocate General (CM 230666 (1943)) expressly asserts that

> "An attempt which is not separately listed in the table of maximum punishments is subject only to the same limit on punishment as is the offense attempted, if the latter is listed" (BULL. JAG, Vol.II, February 1943, sec.402(1), p.61), underscoring supplied).

Sodomy is listed. Carnal knowledge of a female under 16 is not. Attempted carnal knowledge of a female under 16 is, therefore, not subject to the same maximum punishment as the consummated act but, like the consummated act itself, is one of those "offenses not thus provided for /which/ remain punishable as authorized by statute or by the custom of the service" (MCM, 1928, par.104c, p.96). The Federal Statute last cited makes carnal knowledge of a female under 16 a felony. Section 276 of the Federal Criminal Code (18 USC 455) provides that:

> "Whoever shall assault another with intent to commit any felony, except murder or rape, shall * * * be imprisoned not more than ten years * * *".

The rape, excepted along with murder, from the provisions of the section just quoted, is the offense denounced in section 457 of the Criminal Code in the following language: "Whoever shall commit the crime of rape shall suffer death" (18 USC 457). It does not include the offense commonly referred to as statutory rape which is officially designated merely as "carnal knowledge of a female under 16".

> "An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark.)" (MCM, 1928, par.152c, p.190).

> "An assault is a necessary element of many felonies and is usually an element of an attempt to commit the same crimes" (22 CJS, sec.287a, p.429).

In the case under consideration an attempt was charged but the evidence showed the offense constituted an assault with intent to have carnal knowledge of the infant prosecutrix, and it might appropriately have been so characterized in the specification. The record of trial is, therefore, legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Penitentiary confinement is not authorized, the offense, as charged, not being specifically made punishable by penitentiary confinement for more than one year by any Federal statute or by any law of the District of Columbia (AW 42; Dig.Ops.JAG 399(2), p.246).

5. The charge sheet shows that accused is 25 years of age and that he was inducted at Atlanta, Georgia, 24 February 1941, having enlisted in the National Guard of Georgia 1 May 1940 to serve three years, with prior service from 13 June 1936 to 2 March 1937, from 6 July 1937 to 15 November 1937 and from 11 July 1938 to 25 November 1938, all in the National Guard.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused, other than the imposition of the excessive period of confinement at hard labor noted, were committed during

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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 so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years, at some place other than a penitentiary, federal reformatory or correctional institution.

[illegible] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Benjamin R. Sleeper Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private JOEL A. MANUS (20443944), Company "A", 774th Tank Destroyer Battalion, attention is invited to the foregoing holding by theBoard of Review that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as imposes dishonorable discharge, total forfeitures and confinement at hard labor for ten years, at a place other than a penitentiary, federal reformatory or correctional institution, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I particularly invite your attention to the fact that the period of confinement in the approved sentence is excessive. The maximum period of confinement authorized for the offense is ten years (18 USC 455). Accordingly, by additional action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to ten years. Moreover, as the offense of which accused was convicted is not punishable by penitentiary confinement by either the Federal Criminal Code or the Code of the District of Columbia, penitentiary confinement would be illegal. The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Reduction of the period and redesignation of the place of confinement will be recited in the general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3926. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3926).

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

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

BOARD OF REVIEW NO. 2

14 DEC 1944

CM ETO 3927

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOHNNY L. FLEMING (34528479), 443rd Quartermaster Troop Transport Company	Trial by GCM, convened at Headquarters, Eastern District, United Kingdom Base, 13 September 1944, 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. 2
VAN BENSCHOTEN, HILL and SLEPPER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Johnny L. Fleming, 443rd Quartermaster Troop Transport Company, and Private Walter (NMI) Alexander, 443rd Quartermaster Troop Transport Company, acting jointly and in pursuance of a common intent, did, at Stoke-on-Trent, Staffordshire, England, on or about 1 July 1944 with intent to do them bodily harm, commit an assault upon Private Marvin J. Melszer and Private Walter G. Ritt by stabbing and cutting the said Private Marvin J. Melszer and Private Walter G. Ritt upon their heads and bodies with dangerous weapons, to wit, knives.

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Accused Fleming pleaded not guilty to the Charge and Specification. After the arraignment, the prosecution entered a nolle prosequi as to the accused Private Walter (NMI) Alexander, above named, and amended the Specification to read:

> Specification: In that Private Johnny L. Fleming, 443rd Quartermaster Troop Transport Company, did, in conjunction with Private Walter (NMI) Alexander, 443rd Quartermaster Troop Transport Company, acting jointly and in pursuance of a common intent at Stoke-on-Trent, Staffordshire, England, on or about 1 July 1944, with intent to do them bodily harm commit an assault upon Private Marvin J. Melszer and Private Walter G. Ritt, by stabbing and cutting the said Private Marvin J. Melszer and Private Walter G. Ritt, upon their heads and bodies with dangerous weapons, to wit, knives.

After trial, accused Fleming was found guilty of the Charge and Specification as amended. 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 five years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, successor in command, 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. For the prosecution, Major Holger C. Bach, Corps of Military Police, testified that he was a witness and present at the trial of the accused for the same offense at Lichfield, Staffordshire, England, 3 August 1944 (R7).

The prosecution next offered and the court received, the defense stating it had no objection, the duly authenticated record of trial of this accused so held on 3 August 1944 (R8; Pros.Ex.1). Prosecution's Exhibit 1 shows that accused was so tried on the same Charge and Specification as that on which he was arraigned on this trial. It further shows that Private Marvin J. Melszer, then of Company A, 712th Railway Operation Battalion, Private Walter G. Ritt, then of the same organization and Dr. Robert Arthur Keane, No. 9, King Street, Newcastle, Staffordshire, were sworn and testified for the prosecution and were subject to cross-examination by the defense on the first trial. At the present trial, it was stipulated between prosecution and defense that Melszer and Ritt were now outside the United Kingdom and that the location of Dr. Keane was more than 100 miles distant from the present place of trial (R8; Pros. Ex.2).

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On this stipulation, the court received in evidence the testimony given by these witnesses at the first trial. This testimony showed that at the time and place mentioned in the Specification, Privates Melszer and Ritt were attacked and assaulted. Melszer received two stab wounds, "fairly deep", in the back and a head injury which required eight stitches. He believed he was kicked while on the ground. He had been in no trouble that evening and did not see his assailant (R9,11). With Melszer, at the time, was Private Ritt. They were on their way back to their station (R9,10). Ritt was also attacked, "by some colored troops". The first thing he remembered

> "someone came up behind me and stabbed me in the back and I fell to the ground and was stabbed again and someone kicked me in the side. As I got up they stabbed me a couple of more times" (R10).

Ritt, according to the Doctor, had "two wounds in the right shoulder region and also some injury to his ribs" (R11). Ritt saw one of his assailants and identified him at the trial as accused Fleming. He said he had had no previous trouble with this accused. He saw a knife on the person of accused at the time of the attack (R10).

Major Bach, recalled by the prosecution, testified that on 3 July, accused, after being warned of his rights, made a statement to witness which was reduced to writing and read to accused who thereupon signed it. This statement was offered and received in evidence, "no objection" by the defense (R12; Pros. Ex.3). In this statement accused said that at the time and place in question, he and others attacked two white soldiers. He admitted that during the attack he stabbed each of these two soldiers (R13, Pros. Ex.3).

4. Accused, advised of his rights, remained silent and offered no evidence.

5. The record shows that accused was tried on 3 August 1944 on the same Charge and Specification as that on which he was arraigned on this trial. The sentence imposed in the first trial was exactly the same as that imposed in the second trial, the record of which is the subject of this holding. The reviewing authority disapproved that sentence because of a question as to whether the court was legally constituted and ordered a rehearing before another court. Examination of the record shows that no member of the second court was a member of the first court. The second trial was properly had (MCM, 1928, par.89, p.80; AW 50½). Testimony of the two victims and a medical witness, given at the first trial, was properly received in evidence at the second trial since it was stipulated that two of these witnesses were out of the United Kingdom and the third was more than

100 miles from the place of the second trial (MCM, 1928, par.117b, p.121). This testimony established the corpus delicti of the offense charged and also proved the identity of accused as one of the guilty parties. In addition the prosecution proved a confession by accused of his guilt. The conduct thus alleged and proved constituted a violation of Article of War 93 as charged (MCM, 1928, par.149m, p.180, CM ETO 3494, Martinez).

6. After the arraignment of accused, the prosecution announced the nolle prosequi of one Alexander named in the Specification as a joint accused. The prosecution then attempted to amend the Specification on which this accused was arraigned so as to show that this accused acted "in conjunction" rather than "jointly" with another. The amendment so effected failed to accomplish the purpose in that it also alleges that accused and Alexander were "acting jointly and in pursuance of a common intent". The net result was that this accused was tried singly on a Specification which alleged him to have been a joint offender. This was not prejudicial for a joint offender may be tried singly (MCM, 1928, par.71b, p.55).

7. Legally constituted courts of the Western Base Section, Communications Zone, were absorbed by and became an instrumentality of United Kingdom Base. The legal jurisdiction of the court before which accused was arraigned and tried was unimpaired (CM ETO 4054, Carey, et al).

8. Accused is shown by the record of trial to have been 21 years of age at the time thereof. He was inducted 2 February 1943 at Fort Benning, Georgia (for the duration of the war plus six months). The record discloses no prior military service by accused.

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. Imprisonment for five years is authorized as punishment for assault with intent to do bodily harm with dangerous weapons (MCM, 1928, par.104c, p.99). 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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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private JOHNNY L. FLEMING (34528479), 443rd Quartermaster Troop Transport 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 3927. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3927).

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

Confidential

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

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BOARD OF REVIEW NO. 1

CM ETO 3928

24 NOV 1944

UNITED STATES v. Private ROBERT DAVIS (32438697), 542nd Port Company, 507th Port Battalion.	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Newport, Monmouthshire, England, 5 and 6 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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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 66th Article of War.
Specification: In that Private Robert (NMI) Davis, 542nd Port Company, 507th Port Battalion did, at Camp Seamills, Gloucestershire, England, on or about 12 July 1944 excite a mutiny in the 545th Port Company, 507th Port Battalion, by urging the members of said company concertedly to refuse to obey the lawful orders of Captain Edgar K. Sewall, their Commanding Officer and First Lieutenant Milton R. Morrow, their superior officer, to fall out for reveille and do duty with the intent to subvert and override for the time being, lawful military 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 the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The court before which accused was arraigned and tried on 5 and 6 September 1944 was appointed by the Commanding General, Western Base Section, Communications Zone, European Theater of Operations, on 27 August 1944. Western Base Section was dissolved as of 0001 hours, 1 September 1944, and United Kingdom Base, Communications Zone, European Theater of Operations, was activated at the same time on the same date (GO 42, 31 Aug. 1942, Communications Zone, European Theater of Operations). United Kingdom Base is the successor of Western Base Section and the court became an instrumentality of the former. Upon the authority of CM ETO 4054, Carey, et al; CM ETO 3921, Byers, and CM ETO 4055, Ackerman, the function and jurisdiction of the court is sustained.

4. Preliminary to consideration of the merits of the case, there are procedural and evidentiary matters which require comment and discussion:

(a) It is obvious from a reading of his testimony that the witness, Ellis, was not only an unwilling witness but was definitely antagonistic to the prosecution. His testimony was highly relevant to the issues of the case, inasmuch as he was one of the two soldiers who accompanied the accused upon the latter's visit to the barracks of the 545th Port Company (R6,31). Ellis' written statement given by him on the investigation of the case to a representative of the Criminal Investigation Section of the Provost Marshal General's Department (R43; Pros.Ex.2) conflicts in vital particulars with his testimony in chief (R5,6). After the defense rested its case, the trial judge advocate claimed surprise:

> "The prosecution has been taken by surprise by this witness in his refusal to testify as was expected, as we were led to expect, from the statements which were submitted to us as being what he could be expected to testify to, and the prosecution at this time is about to lay the

necessary foundation to impeach the testimony of this witness as he has testified in this trial" (R35).

The prosecution, therefore, avowedly attempted to impeach its own witness. Upon direct examination of Ellis when the prosecution submitted its case in chief, the trial judge advocate evidently missed the import of Ellis' testimony as a prosecution's witness and did not attempt an impeachment of him at that time. However, upon the conclusion of the evidence for the defense, he sensed the situation and upon rebuttal claimed the right to impeach Ellis by recalling him to the stand and presenting to him and interrogating him upon his prior statement. The court permitted this practice and the defense offered no objection (R35). While it would have more completely comported with established and generally recognized practice and orderly procedure if the impeachment had occurred during the examination in chief of Ellis, the matter was largely within the discretion of the court (MCM, 1928, par.121a, p.126). The Board of Review can discover no abuse of this discretion and no prejudice to the rights of accused in this practice. The impeachment of Ellis by presenting to him and interrogating him upon his prior conflicting statement proceeded in due and proper form and was in accord and agreement with the practice heretofore approved by the Board of Review (CM ETO 438, Harold Adolphus Smith; Cf: MCM, 1928, par.124b, p.133).

Upon admission of the statement in evidence (R43; Pros.Ex.2), the court should have been instructed that it was received only for the purpose of impeaching Ellis and was not original evidence against accused (CM ETO 438, Smith, supra). However, even though the defense remained silent and made no request for such instruction, it must be presumed that the court was fully cognizant of its restriction in the use of the statement.

(b) The witness, Ellis, when confronted with his prior written statement which contradicted his testimony in chief as to certain relevant and vital facts, adopted the course of denying that the statement correctly set forth his oral recitals to Second Lieutenant Roger A. Pendery, the officer of the Criminal Investigation Section, who interviewed him and who prepared the statement for his signature. In order to support the verity of the statement, Lieutenant Pendery was produced as a prosecution witness (R46). He testified that the statement truthfully reproduced Ellis' narrative to him; that Ellis gave his oral statement freely and voluntarily and signed the written statement voluntarily after he had read it (R47). Captain Harry H. Hagopian, the summary court officer, also testified as a prosecution witness that he questioned Ellis as to his signatures appearing on his written statement and whether or not it was his statement and upon receiving affirmative answers from Ellis, he (Hagopian) affixed his jurat and signature thereto (R49-50). Ines-

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much as Ellis upon his impeachment examination by the trial judge advocate attacked the verity of certain important recitals in his written statement (Pros.Ex.2), it was entirely proper for the prosecution to introduce evidence contradicting Ellis and sustaining the truthfulness and authenticity of the statement (70 CJ, secs.1240, 1243, pp.1053-1054, 1059-1060).

(c) Prosecution's witness, Bellman, in his examination in chief testified that he did not know accused (R10) and he could not identify accused as the soldier who came into the barracks of the 545th Port Company on the night of 12 July 1944 and

> "* * * asked for our attention. * * * and he says something about we was not treated right, and not to fall out for work or nothing until we gets some consideration" (R11-12).

When asked if accused was this man the witness replied:

> "I do not believe he is, Sir, because when I seen him he had his back turned and he seemed to be a little lighter than that fellow" (R12).

At the conclusion of defense evidence on rebuttal, the court called Bellman to the stand as its own witness (R51). Bellman then made positive identification of accused as the man who came to his barracks on the night of 12 July 1944 and declared that accused stated:

> "'Could I have your attention down there?' * * * 'Don't fall out until we get some consideration about the tents they have the boys in at Seamills'" (R51).

Upon cross-examination, Bellman declared

> "I did not recognize him [accused] until he put on the garrison cap and he looked over there and put his hands on his hips the same way he was in there, and I thought it was my duty to come back and tell them I recognized him. As soon as I recognized him I asked the 1st sergeant could I speak to the lieutenant" [trial judge advocate] (R52).

He further declared that he came back to testify voluntarily after he had seen accused, at the recess of the court,

"put on the garrison cap in the same way as when he walked down the aisle /of the barracks/, and the way he walked and the way he talked" (R53).

The practice followed in this instance is approved as a salutory process of arriving at the truth. Bellman's conduct is worthy of commendation. The Manual for Courts-Martial contemplates situations similar to the instant one and authorizes the procedure adopted (MCM, 1928, par.75, p.58; par.121a, p.126).

5. The evidence for the prosecution is substantial and convincing that accused on the night of 12 July 1944 at Seamill Camp, although only a private, masqueraded as a Technician Fourth Grade (R7, 11,19). Late that evening in company with two other soldiers (R8,19, 51-53), he entered one of the barracks occupied by the 545th Port Company and after asking for the attention of the soldiers therein, addressed them, in substance, as follows:

"he began to talk about the fellows in his barracks. He said they would not fall out for reveille; he said the only way to get any action was not to fall out for reveille, and he says that a major hit one of the boys on the head with a flashlight, and also he says he wanted to know why the boys could not get passes to go down to Avonmouth, and he also says that the paratroopers was running the boys out of Bristol. * * * He says something about the Guardhouse boys sleeping on the ground, that they would catch their death of pneumonia sleeping on the ground in those tents. * * * He says he would not tell them not to fall out, but he knows his company was not going to fall out, and he was not going to fall out himself" (R19-20).

The above harangue, as related by the witness Horton received substantial corroboration by other witnesses (R8,10-13,19,51-52).

On the morning of 13 July 1944, the men of the 545th Port Company (except the First Sergeant, the Staff Sergeant and three or four platoon sergeants) did not respond to reveille call. First Sergeant Carl R. Offord entered the barracks and gave a direct order to the men to "fall out for reveille". They refused to obey the order (R17). He thereafter repeated his order several times but he was met with jeers. The men turned their backs on him and walked away. In one barracks the men not only declared they were not going to obey the order, but also that "if it meant their necks they did not give a hang" (R18). Thereafter the company commander, Captain Edgar K. Sewall, and

Lieutenant Harris appeared in the companyarea (R17,23). When Captain discovered the men were not "falling out" for reveille, he entered one of the barracks and gave a direct order to the men to "fall out" (R23). The men did not obey the order (R17,24). Lieutenant Harris gave them similar orders, which were not obeyed (R18). Thereafter Captain Sewall was joined by his officers, First Lieutenant Milton R. Morrow and Lieutenant Rudnicki and they entered all of the barracks and ordered reveille formation but obedience was refused (R17,18,22,24).

> "They just met a cold silence, as far as I can remember, and a turning away of the eyes and shifting of the body" (R18).

At about 11:45 a.m., the officers attempted to organize a work detail and gave orders to that effect (R17,18,22,24). Only four or five men responded (R18). Lieutenant Morrow succeeded in assembling a small group in order to read to them Articles of War 66 and 67, but before all were in formation some of the original men "drifted away". The men did not go to noon mess in proper formation (R22). At 2 p.m., orders were given to fall in for a road march, but there was no response (R17,22,24). It was about 6:30 p.m. before a formation was accomplished and the march was conducted (R17,18,22-23).

6. The testimony for the defense summarizes as follows:

Private Olando G. Curry, 542nd Port Company, testified that accused and Private Willie C. Jackson of the 545th Port Company, prior to 12 July 1944 had engaged in a fight at Bristol "over a young lady". Davis hit Jackson (R25). (Jackson was a prosecution witness who positively identified accused as being the soldier who appeared at the 545th Port Company Barracks on the night of 12 July 1944 and delivered inciting and inflammatory remarks (R7-10)).

Private James Green, 542nd Port Company, declared that he was not in the barracks of the 545th Company on the night of 12 July 1944, but that about 11 p.m. two men came to his barracks and suggested to the men that they not "fall out" for reveille the next morning, but that accused was not one of them (R26-27).

Private First Class Harvey L. Brewington, 542nd Port Company, testified that on the afternoonof 12 July four men came to the barracks of his company and said, "'Don't fall out in the morning; we aren't falling out'", but accused was not one of them (R27-28). Later in the evening witness and accused were in the barracks of the 543rd Company. There was a discussion among the men but accused did not ask any of them not to "fall out". Witness was not at the barracks of the 545th Company (R28,29).

Captain Leonard L. Kern, 542nd Port Company, testified that accused was a member of his company, that His character was excellent and that he had assisted in quelling a disturbance "in town" (R29).

After his rights were explained to him, accused elected to be sworn as a witness on his own behalf (R30). He described at length the fight he had in Bristol with Jackson, a witness for the prosecution. He asserted that he knocked Jackson down and "pulled" a knife on him but did not cut him. He surrendered the knife to another soldier upon demand (R32-33).

He asserted that on the night of 12 July 1944 he with Privates Ellis and Harrison visited two of the barracks of the battalion in the "545th area" where the men were discussing the idea of not "falling out" for reveille the next morning. On return to his own barracks a group of newly arrived soldiers were discussing the same subject (R31). He denied that he wore Technician Fourth Grade stripes; denied that he joined in the discussion (R33), and particularly denied that he had urged any of the men not to fall out for reveille the next morning.

> "No, Sir; I have never tried to tell anybody nothing since I have been in the service" (R34).

7. Accused is charged with the crime of "exciting" a mutiny. The Specification is based on form 33, page 242, Manual for Courts-Martial, 1928. The 66th Article of War, in part, declares:

> "Any person subject to military law who * * * excites * * * any mutiny * * * in any company * * * shall suffer death or such other punishment as a court martial may direct".

With respect to the offense the following quotations from the Manual for Courts-Martial are relevant:

> "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. * * *
>
> The concert of insubordination contemplated in mutiny * * * need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent.
>
> An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of, its con-

summation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt while material in extenuation is not a defense.

The intent which distinguishes mutiny * * * is the intent to resist lawful authority in combination with others. The intent to create a mutiny * * * may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny * * * and so be guilty of an attempt to create a mutiny * * * alike whether he was joined by others or not, or whether a mutiny * * * actually followed or not.

* * *

no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities.

PROOF. - (a) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States; and (b) acts of the accused tending to cause or excite the certain collective insubordination" (MCM, 1928, pars.136a,c, pp.150-151).

Winthrop's comments are as follows:

"the exciting * * * of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to the stimulating of others to the resistance, etc., actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them. * * *

The Article, in designating as offenses the beginning, etc., and joining in, a mutiny evidently contemplates that a mutiny shall have been consummated. A mutiny complete in law must actually have existed to authorize the bringing to trial of an accused for an offense of this class" (Winthrop's Military Law and Precedents - Reprint - pp.582-583) (Underscoring supplied).

The evidence is clear and positive that accused appeared at one of the barracks of the 545th Port Company on the night of 12 July 1944 and delivered an inflammatory harangue, wherein he sought to stimulate the men to resist the regularly established military authority by not responding to the reveille call the next morning. That such appeal proximately caused the confederated and joint disobedience by the soldiers on the next morning is an irrefragable inference from the evidence; no other reasonable conclusion is possible.

The soldiers on the following day not only refused to stand reveille formation but also persisted in their defiant conduct by disobeying further orders of their superior officers. Throughout the day they deliberately pursued a course of recalcitrancy and revolt that was not only intended to usurp, subvert, set aside, and override military authority for the time being, but in fact, did succeed temporarily in its purpose. The conduct of the soldiers constituted a mutiny (CM ETO 895, Fred A. Davis, et al; CM ETO 3147, Gayles, et al; CM ETO 3803, Gaddis, et al).

Accused's culpability is found in the fact that he excited the men to this insubordination and temporary overthrow of the superior military authority of the company officers. Acting singly and alone, he could and did commit this offense and the proof of his personal participation in the mutiny which followed was not necessary to convict him of the offense of "exciting" a mutiny. It is highly significant that he wore Technician Fourth Grade stripes, wrongfully and without authority, when he made his demagogic appeal to the ignorance, passions and prejudices of his fellow soldiers. The evidence exhibits him as an undisciplined, recalcitrant soldier who assumed the role of an agitator and who succeeded in exciting the company to defiance and disobedience of such nature as cannot and should not be tolerated in the Army of the United States. Accused was rightly found guilty of the crime with which he was charged (CM ETO 2729, McCurdy).

8. The charge sheet shows that accused is 34 years two months of age and was inducted at Fort Jay, New York, 27 August 1942, to serve for the duration of the war plus six months. He had no prior service.

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

10. The penalty for exciting a mutiny is death or such other punishment as a court-martial may direct (A7 66). Confinement in a penitentiary is authorized upon conviction of the crime of mutiny in its several aspects by Article of War 42 and by Act of June 28, 1940, c.439, Title I, section 5 (54 Stat. 671, 18 USCA 13). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), and 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 24 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private ROBERT DAVIS (32438697), 542nd Port Company, 507th Port Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I recognize the fact that accused's conduct, as shown by the evidence in this case, was particularly destructive of military order and discipline. The inference is definite and certain that by his agitation on the night of 12 July 1944, he was largely responsible for the crystalization of the mutinous intentions of the personnel of the 545th Port Company into actual overt acts of mutiny. He therefore deserves drastic punishment. However, in view of precedents established in this theater in mutiny cases, I experience difficulty in justifying the sentence which includes confinement at hard labor for life. I inclose for your consideration copies of the published orders in CM ETO 895, Davis, et al, and CM ETO 3147, Gayles, et al, which are indicative of the severity of approved sentences in this theater imposed upon conviction of offenses connected with the crime of mutiny. (Please return the copies of said orders to me when they have served your purpose.) The sentences of prisoners returned to the United States to serve imprisonment should be of such nature as may be defended upon review of their cases by the War Department. In addition the Commanding General of this theater has charged me with the duty of supervision to secure some uniformity of sentences for identical offenses. In view of the foregoing, I suggest for your consideration the question whether accused's period of confinement should be reduced. Any reduction in the sentence should be evidenced by supplemental action to be returned to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3928. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3928).

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

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

BOARD OF REVIEW NO. 2

8 DEC 1944

CM ETO 3929

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Privates MICHAEL SARCINELLI (32487736) and FRANK F. TERSIGNI (12042116), 316th Replacement Company, 10th Replacement Depot	Trial by GCM, convened at Lichfield, Staffordshire, England, 11 September 1944. 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. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

SARCINELLI

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Michael (NMI) Sarcinelli, 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, without proper leave, absent himself from his organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 9 June 1944 to on or about 13 August 1944.

3929

(94)

TERSIGNI

CHARGE: Violation of the 61st Article of War.

Specification: In that Private Frank F. Tersigni, 316th Replacement Company, 44th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, without proper leave absent himself from his organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 9 June 1944 to on or about 13 August.

3. This was a common trial, to which each accused expressly consented. Each was accorded the right of one peremptory challenge. Each pleaded guilty to and was found guilty of his respective Charge and Specification. Evidence was introduced of five previous convictions of Sarcinelli: three by special court-martial, the first involving also a breach of parole in violation of Article of War 96, all for absence without leave on three occasions, for 28, for about 99 days, and for about 11 days, respectively, in violation of Article of War 61, and two by summary court for absence without leave on two occasions, for 6 days and for 7 days, respectively, in violation of Article of War 61. Evidence was introduced of three previous convictions of Tersigni: one by summary court for absence without leave for 28 days and two by special court-martial for absence without leave for 99 days and 23 days, respectively, all in violation of Article of War 61. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority may direct for 20 years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, successor in command, approved each sentence but remitted 10 years of the confinement imposed, in each case, 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.

4. Accused were both members of the 316th Replacement Company, 10th Replacement Depot. As shown by duly authenticated extract copies of the morning reports of their organization, each accused absented himself, without leave from his organization, at Army Post Office 874, on 9 June 1944. It was further shown that such absence was terminated by the arrest of both accused by military police in Birmingham, England, on 13 August 1944.

5. Advised of his rights, each accused elected to remain silent. Neither called any witnesses.

6. Each allegation of the Specification in each case was established. It is alleged that the initial absence of each accused oc-

curred at a named location. The proof was that the initial absence occurred at a place identified only by an Army Post Office number. It will be presumed that the court took judicial notice of the fact that the allegation and the proof was the same with respect to that location.

7. Legally constituted courts of the Western Base Section, Communications Zone, were absorbed by and became an instrumentality of United Kingdom Base. The jurisdiction of the court before which accused were arraigned and tried remained legally unimpaired (CM ETO/Carey, et al).

8. Accused Sarcinelli is 23 years old. He was inducted at Camden, New Jersey, 16 January 1943, for the duration of the war plus six months. He had no prior service.

Accused Tersigni is 22 years old. He enlisted at New York City, New York, 13 January 1942, for the duration of the war plus six months. He had no prior service.

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

10. The punishment for absence without leave in violation of Article of War 61 is as a court-martial may direct, except death. 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

(96)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Privates MICHAEL SARCINELLI (32487736) and FRANK F. TERSIGNI (12042116), 316th Replacement Company, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3929. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3929).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3930

U N I T E D S T A T E S	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOSEPH J. PEREZ (36316307), 156th General Hospital	Trial by GCM, convened at Newport, Monmouthsire, South Wales, 7 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Joseph J. Perez, 156th General Hospital, Hereford, Herefordshire, England, did, on or about 31 July 1944, at Ivers Brook, Mansell Lacy, Herefordshire, England, wrongfully and unlawfully attempt to have carnal knowledge of Margaret Elizabeth Humphries of Ivers Brook, Mansell Lacy, Herefordshire, England, the said Margaret Elizabeth Humphries then being a female under the age of consent.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and

allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence but reduced the period of confinement to 15 years, designated the Federal Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. For the prosecution, Mrs. Doris Humphries testified that on Sunday, 30 July 1944, her eight-year old daughter, Margaret Elizabeth, "went away on an errand to the neighbors" and returned home in company with the accused. He stayed at the Humphries' home for "a few seconds" and then left. After his departure, Mrs. Humphries learned that he had arranged to meet her daughter "at this particular place" on the following day. The actions of accused aroused Mrs. Humphries' suspicions and the incident was reported to the police (R6,7). On the following day, at about 1750 hours, accused came to the Humphries' home and "inquired for some tools to mend his bicycle". Mrs. Humphries replied that she had none but "suggested where he could get some, but he said he didn't know the way * * * and could my girl go with him to show him the way" (R6). After consulting the police constable who was then present in her home as a result of the previous report, Mrs. Humphries permitted her daughter to accompany the accused (R6,7). She next saw the accused after he had been arrested (R6).

Police Constable William John Lines testified that on 30 July 1944 he had been informed by his superiors that, as the result of a complaint, he would be required to report for special duty on the following day in plain clothes. On 31 July 1944 he reported to the Humphries' home and "was having a cup of tea with Mrs. Humphries when the accused came to the back door" and requested Mrs. Humphries to lend him some bicycle tools. Mrs. Humphries said she had none but suggested that accused might be able to borrow some from one of the neighbors. Accused stated that he did not know where the neighbor lived and asked Mrs. Humphries to permit her daughter to accompany him to show him the way. After consultation with the witness, Mrs. Humphries consented. When the accused and Margaret left the house, the witness followed them. Accused and the girl proceeded down the road for about fifty yards at which time accused turned off the road into a field. Margaret, after hesitating for "a few moments", followed him. Accused removed his coat, placed it on the grass, "pressed the little girl down on his coat and kissed her". He then began to remove the child's knickers (R8). At this time Margaret said "I don't want my knickers off" and kicked and struggled but "accused moderately restrained her, he held her down. He kept on removing her knickers" (R8,9). Accused then unbuttoned his trousers, dropped them down, "he was well exposed", "spread the child's legs open and began to descend on the child". At this time accused "was within a few inches of her person". Her private parts were exposed. The witness then "closed with the accused", knocked him down and handcuffed him. The witness

later released accused to the custody of the "U.S. Police" (R9).

Margaret Elizabeth Humphries, eight years of age, after being examined as to her competency, was sworn and testified that she first saw accused "at our road * * * on a Sunday morning". At that time, accused asked her to meet him "on the Monday night at six o'clock" (R12). She met him on that night and walked with him "inside the gate * * * not very far" from the house. She stated that after their arrival accused "sat me down" and, although she kicked at him and tried to prevent him from so doing, removed her knickers (R12,13). When accused was removing her knickers, her dress was "thrown up over my knees" but accused did not pull her dress up above her waist. Accused then started to unbutton his trousers and got "to the bottom of his buttons" when the police came. When interrupted, accused had not let his trousers down and no part of his body was exposed to Margaret's view. After accused had taken her knickers off, he did not make "any other motion" toward her before the arrival of the police (R13).

The prosecution introduced an unsworn statement made by accused to the investigating officer, after having been advised of his rights, in which he stated that on Sunday, 30 July 1944, while on his way to keep a date with one Edna Lowe, he met Margaret and stopped to talk with her. At that time he arranged to meet her the following day at 1800 hours. He then proceeded on his way, met Miss Lowe, and "tried to get better acquainted with her, but couldn't make any headway". He then left Miss Lowe to keep another date with a Ruby Lewis. She failed to keep the date but accused saw her later that evening and made another date with her for 1700 hours on the following day. On 31 July 1944, she again failed to keep the date whereupon accused got on his bicycle to ride "towards Ruby's house to find out why she didn't keep the date". He stated that he "was all swollen up with emotion and had no means of satisfying myself, and had found none since I'd been in England". He had "tried very very hard" to find some girls to satisfy his desires but "no matter how hard I tried I couldn't do it". While en route to the home of Miss Lewis, as he passed the Humphries' house, he had a flat tire. He accordingly went into the house and asked Mrs. Humphries for some tools to repair the tire. As Mrs. Humphries had no such tools, she suggested that he try to secure some from one of her neighbors. He did not know the way so he asked if Margaret might accompany him. He and Margaret started to walk up the road "when Margaret asked that we should go into the cornfield, and something came over me for the first time and before I knew it I was handcuffed". Accused stated that "I wasn't going to put it in her, but was just going to play. I was getting ready to put the rubber on so I wouldn't get her dirty when I was handcuffed" (Pros. Ex.B).

4. Accused, after being advised of his rights as a witness, made an unsworn statement in which he said that he was abnormally oversexed

and had attempted to secure a release from the army so that he could "reduce my nature by getting married". However, he was "turned down by Section Eight". He stated that he had tried to control himself but felt that the only solution was a release from the army so that he could "find me a decent woman". Accused closed his statement with the remark "I want to have a woman lawfully and live according to the way the good book tells. * * * Unfortunately my sex got the best of me. That is all I have to say" (R19).

5. An attempt to commit a crime is an act done with intent to commit that particular crime and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission (MCM, 1928, par.152b, p.190). Accused, by his own admission, was highly sexed and had sought unsuccessfully and was then seeking to find a woman with whom he could satisfy his desires. He made arrangements to meet Margaret Elizabeth Humphries at a place specified by him. While this meeting apparently did not take place exactly as planned, it was shown that the accused, shortly before the time previously set for the meeting, appeared at the Humphries' home and, upon being directed to a neighbor's house to secure some bicycle tools requested by him, asked if the child might accompany him in order to show him the way. The testimony of the child indicates that he then went with her into a field, caused her to sit down, lifted her dress, removed her knickers and unbuttoned his trousers. This testimony was corroborated by that of the British constable. From the evidence adduced, the court was clearly warranted in finding that the acts of accused were done with an intent carnally to know the victim, a child eight years of age, and formed part of a series of acts which apparently would have resulted in the commission of that offense had accused not been interrupted by the interference of the constable. The evidence was thus sufficient to support the finding of guilty of the Charge and its Specification.

6. The court before which accused was arraigned and tried on 7 September 1944 was appointed by the Commanding General, Western Base Section, Communications Zone, European Theater of Operations, on 27 August 1944. Western Base Section was dissolved as of 0001 hours, 1 September, 1944, and United Kingdom Base, Communications Zone, European Theater of Operations, was activated at the same time and on the same date (GO 42, 31 August 1944, Communications Zone, European Theater of Operations). United Kingdom Base absorbed Western Base Section and the court became an instrumentality of the former command with its functions and jurisdiction legally unimpaired (CM ETO 4054, Carey et al).

7. The sentence, as approved by the reviewing authority, includes confinement at hard labor for 15 years and a Federal penitentiary was designated as the place of confinement. This Board has recently held that for the commission of the offense of attempted carnal knowledge of a female under 16, the maximum period of confinement which

may be imposed is ten years (CM ETO 3926, Manus). So much of the sentence in the instant case as provides for confinement at hard labor in excess of ten years is therefore illegal. Furthermore, pentitentiary confinement is not authorized for this offense (CM ETO, 3926, Manus).

8. The charge sheet shows that accused is twenty-four years of age and was inducted on 6 February 1942. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused, other than the imposition of the excessive period of confinement above noted, were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for ten years, at some place other than a pentitentiary, federal reformatory or correctional institution.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

3936

(102)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations 14 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private JOSEPH J. PEREZ (36316307), 156th General Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as imposes dishonorable discharge, total forfeitures and confinement at hard labor for ten years, at a place other than a penitentiary, federal reformatory or correctional institution, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I particularly invite your attention to the fact that the period of confinement in the approved sentence is excessive. The maximum period of confinement authorized for the offense is ten years (18 USCA 455). Accordingly, by additional action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to ten years. The offense of which accused was convicted is not punishable by penitentiary confinement by either the Federal Criminal Code or the Code of the District of Columbia, therefor, confinement in a pentitentiary is not authorized. The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Reduction of the period and redesignation of the place of confinement will be recited in the general court-martial order.

3. Attention is invited to the testimony of the mother and the British police officer which shows that this accused was practically invited to commit an offense with the child. While the facts do not make out a case of entrapment, they do show that the mother was suspicious, and notified the police, that a police officer in plain clothes came to the house, that the eight year old child was permitted to go out with the accused followed by the police officer who arrested him in the act of making indecent advances toward the child. Such conduct by the parent and the police is certainly unusual. The child could have been protected and the crime prevented by not allowing the child to go with the accused. There is no suggestion that accused had behaved improperly before although he had asked the child to meet him. This is reported to you for your consideration in fixing the sentence. The record of trial is returned.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3930

3930. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3930).

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

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

BOARD OF REVIEW NO. 1

24 NOV 1944

CM ETO 3931

U N I T E D S T A T E S	)	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	)	
Private First Class JUAN G. MARQUEZ (38340484), 129th Signal Radio Intelligence Company	)	Trial by GCM, convened at Eastbourne, Sussex, England, 4 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Juan G. Marquez, 129th Signal Radio Intelligence Company, did, at Old Town, Eastbourne, Sussex, England, on or about 1 July 1944 wilfully, feloniously and unlawfully kill Guardsman Edward Fox by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations (successor in command), approved the sentence,

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designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

Shortly after 10:30 p.m. 1 July 1944, accused and three other American soldiers went to Snappy Snacks, a small restaurant in Old Town, and sat down to eat at one of the tables (R17). At about 11 p.m. five British soldiers, including the deceased, Edward Fox, all of them Grenadier Guardsmen, entered the restaurant (R9,10). The Americans had had something to drink about three hours previously and the Guardsmen had come from a public house, but there is no evidence that any of the soldiers in either group was under the influence of liquor (R11,17).

Guardsman Scarlett, one of the British soldiers, testified that on their way out of the restaurant one of the four Americans made a remark to Guardsman White, who was standing near the door. White asked them what they said and accused grabbed him by the coat, saying, "Come outside and we will show you." White pushed his hand away. Another American said, "Come on, we don't want any trouble," and all four left the restaurant. Fox, who was standing in line at the counter, saw the incident and went after them. All of the Guardsmen, including the witness, followed him (R10,11). Outside he saw one of the Americans near Fox, another farther away and two standing to the right. Two Guardsmen approached these two in a threatening manner. They ran away. It was rather dark and features could not be clearly discerned (R13). An American soldier whom he could not identify struck a blow at Fox. Upon receiving the blow the latter dropped into a half-crouched position, and said, "I have been stabbed, get a doctor, quick. He's got me." He was carried into the restaurant. His left side was covered with blood. The witness removed his clothing, bandaged the wound, and cared for him until the ambulance arrived (R10,11). The witness saw no knife or other object in the hand of the soldier who struck Fox (R10). He did not hear accused say anything to Fox at any time (R12).

Guardsman Beech testified that he and Fox were in line at the counter for their suppers when Fox suddenly rushed past him with both arms stretched out and pushed at least two American soldiers out the door (R14, 15). Beech followed him outside and there saw Fox and an American soldier at the edge of the sidewalk. The American took an upward stroke and Fox, holding his stomach, came over to the witness saying "he has knifed me. Get him" (R14). Beech then saw the American standing in the middle of the road with his hands before him as if wiping a knife or sheathing it. But he was not sure he saw a knife, and could not tell its length or otherwise describe it. Beech chased him but he was a fast runner and got away (R14, 16). Beech saw no provocation for Fox rushing after the Americans. He heard no argument between them and Fox (R15). The witness was not sure if

[illegible] of the Americans who were at the Snappy Snacks on the night 1 July were present in the court room (R14).

Private Clemente, who was one of the soldiers with accused, testified that on the way to the restaurant both accused and Private Caro displayed knives, did some swearing, and referred to some trouble or argument that had occurred in the restaurant on the preceding night. The knife shown by accused was similar to the one subsequently received in evidence (R17,18,20; Pros. Ex. 6). As they filed out of the restaurant a Guardsman at the door grabbed accused. When the witness tried to separate them, he himself was seized by four other Guardsmen and pushed out the door. On the sidewalk a Guardsman menaced accused. The witness saw accused take a swing with his right hand at a Guardsman and the latter "folded up" and groaned. It looked as if the blow landed on the leg. The witness thereupon took hold of Caro and both ran from the scene, eluding some Guardsmen who chased them, and leaving accused and the other American behind. He saw no knife in accused's hand at any time during the fight (R17-20).

Private Perez, who slept in the same billet as accused, testified that sometime after 10 p.m., 1 July, he saw accused come into the billet with Caro, and heard him tell Caro that he had gotten into trouble, that a group of men had "jumped on him" and that in order to defend himself he had pulled out a knife and cut one of them. Caro said nothing (R23,24).

Dr. Arthur Jeffery Shera, a duly qualified physician, testified that he saw the body of Guardsman Edward Fox on 3 July and that he made a post-mortem examination at the request of the police. He found the subject to be six feet and one inch in length, very muscular and well-developed. An elliptical wound in the right groin, two inches by one inch, penetrated to a depth of seven inches from a point on the rim of the pelvic bone in a downward and inward direction to the vessels which lie on the surface of the spinal column, piercing both the artery and vein and causing a fatal internal hemorrhage. Death was the result of this deep stabbing wound which could have been inflicted by a knife like the one in evidence (R22; Pros. Ex. 6).

Edmund P. Crovo, Agent of the Criminal Investigation Division, testified that he was called by the civilian police to investigate "a knifing case" (R24,25). He saw accused on the night of 2 July and questioned him before his rights were explained to him. Nothing was taken down in writing at that time. Accused admitted he had been at the Snappy Snacks restaurant but denied any knowledge of the knifing. As a result of what accused stated, the agent interviewed other witnesses. Accused spent that night in a barred cell at the police station. On the following day, 3 July, at 11 a.m., the witness saw accused again, explained to him Article of War 24, and told him that he could remain silent if he wished, and that anything he did say would be put down in writing and could be used either for or against him. He took the statement from accused in the presence of another agent and the superintendent of police (R25). Accused

made no admission or confession prior to the warning (R26). It was developed from this witness in a series of leading questions on direct examination that no coercion, hope of reward or fear of punishment was employed as a means of obtaining the statement, and that the statement was voluntarily given (R25).

On pages 26 and 27 of the record of trial the following colloquy appears:

> "Defense: The accused wishes to take the stand and testify only to the manner in which the statement was taken.
>
> "Law Member: * * * Let the accused take the stand. This testimony will be confined merely to the taking of that statement. This is entirely confined to the one statement. This is not on the issue of the crime at all."

Accused was thereupon sworn and testified that when he was interviewed on 3 July the first thing agent Crovo said to him was "You killed him. You know you killed him." Accused asked him, "How do you know I killed him?" and the agent replied that

> "he just knew he did. What's the use of lying? You know you killed him * * *. You might as well tell me you killed him and get it over with * * * What's the use of having other boys in trouble when you know you did it?"

The agent asked questions and then wrote the answers. There were two men questioning him. He thought a lieutenant was there also, but he was not sure. Accused was sitting in a chair, one of the agents was at a table and the other was standing. They did not lay hands on him. The agent talked "pretty rough" and accused was afraid of him and felt intimidated. His rights were explained to him after the agent had written the statement. He was not told that anything would happen to him if he did not sign it. He signed the statement after he had read it and after he had been told of Article of War 24 (R27,28).

Accused was asked but one question by the Trial Judge Advocate on cross-examination (R27):

> "Q. Was the statement you made true?
>
> A. Yes, sir."

No objection was offered to this question. The Law Member admitted the statement in evidence (R28; Pros. Ex. 5). A warning at the top of the

first page of the statement was subscribed by accused. It informed him that it was his privilege to remain silent and that anything he said might be used for or against him in the event the investigation resulted in a trial. The statement (Pros. Ex. 5) reads as follows:

> "I hereby make the following statement of my own free will without threat or promise. On 30 June 1944, at about 2300 hours I was in the Snappy Snax Cafe. Pvts Caro, Garza and Perez were with me. A group of British Guardsmen tried to start trouble by calling us "Dirty Yankees" and saying other things against us. I avoided any arguments by reasoning with them. We left the Cafe that night without any fighting being done.
>
> "On 1 July 1944, at about 1330 hours I left my billet at 19 Le Brun Rd, Eastbourne, in company with Pvt Caro. I took a knife along and so did Caro. We took them for protection for we had heard of fellows being beaten up. The knife I took belonged to Arthur Ramos. It has his first two initials and name on it. We attended the movies and at about 1800 hrs we went to the Snappy Snax and ate. After eating we went across the street to a pub and drank until 2000 hrs. From there we went to the Lamb Hotel. We went upstairs to the dance. When the dance ended at 2230 hrs we met Pvts Clemente and Garza and we all went to the Snappy Snax to eat. In the cafe there were about 15 Guardsmen and some civilians. There were no other American soldiers but us. We had a meal and when we were finished at 2310 or 2315 hours we started to go out. The first one of us to go was Pvt Caro, Clemente was next, then me, then Garza. Garza had some trouble getting out. When he finally came out he was followed by a group of Guardsmen. They said, "We'll get em," they tried to get Garza and I. They threatened to kill us. Garza started running and they piled on me. I pulled out my knife and cut one of them. I heard him groan and I ran with a Guardsman chasing me. I caught up with Garza and I told him I cut one but didn't know if I hurt him or not. I left Garza before I got to my billet. I put my knife in the bushes of our lawn. I then went in the house and saw Caro and Perez. We talked a bit about the fight and I told them I thought I had cut one of them. I then told Caro where I hid the knife.

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"I recognize the knife that I took from Ramos's room and it is the one that was shown to me by Agent Lyler. It is the one I used on the night of 1 July 1944."

Agent Crovo was recalled to the stand and identified the knife referred to as Prosecution Identification Exhibit (R17,22) as the knife that was given to his fellow-agent by Private Caro on the lawn at 15 Le Brun Road. The knife was found before the statement was obtained from accused. He also identified the sheath for the knife by the initials A.D.R. written thereon (R29). The knife and sheath were both received in evidence without objection (R29; Pros. Exs. 6,7). The knife (Pros. Ex. 6) was tested and showed presence of human blood on the blade (R29).

4. The defense called Captain Edward Grubin, Signal Corps, who testified that the accused had joined his company shortly after its activation in December, 1942, and had remained with it ever since. His character during all that time was excellent. Not long after he came into the company he was promoted to private first class (R30). The defense introduced no other evidence. Accused upon being advised of his rights, elected to remain silent (R31).

5. The written statement received in evidence (Pros. Ex. 5) constituted a confession (CM ETO 292, Mickles; CM ETO 2625, Pridgen; 2 Wharton's Criminal Evidence, secs. 579, 580, pp. 953-954). On the preliminary question of the admissibility of the confession the testimony of accused to show undue influence was properly offered and received (Id, sec. 594, p. 986) Since accused became a witness on his own behalf for an expressly limited purpose which excluded inquiry into the issue of his guilt or innocence of the offense charged, the prosecution's question - "Was the statement you made true?" - was highly improper. The question and the affirmative answer by accused, in view of the fact that the statement was subsequently received in evidence, were substantially a confession of his guilt in open court and constituted an invasion of his privilege to remain silent on the issue of his guilt, which privilege he significantly elected to assert both at the time he appeared as a witness for the limited purpose and later when his rights were explained to him. The failure of accused to insist upon his privilege, and of his counsel to object when the question was asked, do not constitute waiver under the circumstances.) The improper question and the answer elicited, may well have influenced the law member in ruling that the confession was voluntary, and the court in finding that accused committed the offense charged. Testimonial worthlessness and unreliability constitute one of the underlying and fundamental principles on which involuntary confessions are rejected (2 Wharton's Criminal Evidence, sec. 603, p. 1006). The testimony of accused that his statement was true may have lead the law member to conclude that any improper methods used to secure the statement in this case did not in fact so influence the mind of accused as to induce him to make a false confession,

and that therefore the statement was voluntary. It cannot be said that the testimony of the Agent Crovo and accused, independently of the latter's admission of the truth of his statement, contain legal evidence of such quantity and quality as practically to compel a finding that the statement was voluntarily given (see CM ETO 1201, Pheil; CM ETO 1693, Allen). The law member could reasonably have come to the opposite conclusion by rejecting Crovo's testimony and believing accused. The admission of the confession was therefore an error and the sufficiency of the evidence to support the finding of guilty by the court independently of the evidence illegally received must be determined in accordance with principles applied in the Pheil and Allen cases, supra."

If the confession and the improper question with accused's answer thereto are eliminated from the record, the evidence which remains is of sufficient probative force as virtually to compel a finding of guilty. The evidence remaining points clearly to accused, and to no other, as the man who struck the blow that killed Fox at the time and place alleged. The evidence likewise leaves no doubt that the weapon he wielded was the knife he had displayed on the way to the restaurant. The dimensions of the wound attest to the size of the knife. The violence of the blow, the depth of the penetration, and the part of the body struck bespeak the requisite intent to kill or to inflict serious bodily harm which makes the slaying willful and voluntary. The evidence is inadequate to sustain a claim that the killing 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 prevent great bodily harm to himself. There is no evidence that accused made any attempt to retreat as far as he safely could until after he had dealt the fatal blow (MCM, 1928, par. 148a, p. 163; CM ETO 2103, Kern). The elements necessary to establish the offense of voluntary manslaughter are present (MCM, 1928, par. 149a, pp. 165-167; CM ETO 3362, Shackleford; CM ETO 3937, Bigrow). The Board of Review is of the opinion that the legal evidence introduced by the prosecution substantially compelled a finding of guilty; hence the error above discussed was non-prejudicial to the substantial rights of accused (AW 37).

6. The charge sheet shows that accused is 21 years of age and was inducted 28 December 1942 to serve for the duration of the war and six months. He had no prior service.

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

8. Confinement in a penitentiary is authorized, upon conviction of the offense of voluntary manslaughter, by AW 42 and Section 275, Federal Criminal Code (18 USCA 454). Prisoners, however, under 31 years of age

and under sentence of not more than ten years, will be confined in a Federal correctional institution or reformatory. The place of confinement herein designated is therefore proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1a(1) and 3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 24 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army.

1. In the case of Private First Class JUAN G. MARQUEZ (38340484), 129th Signal Radio Intelligence 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 the indorsement. The file number of the record in this office is CM ETO 3931. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3931).

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

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3932 12 OCT 1944

U N I T E D S T A T E S)	V CORPS
)	
v.)	Trial by GCM, convened at Headquarters V Corps, Rear Echelon Command Post, Moussy le Vieux, France, 4 September 1944. Sentence: To be hanged by the neck until dead.
Private First Class PAUL M. KLUXDAL (36395076), Headquarters Battery, 200th Field Artillery Battalion.)	

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

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

CHARGE: Violation of the 92d Article of War.
Specification: In that Private First Class Paul M. Kluxdal, Headquarters Battery, 200th Field Artillery Battalion, did, in the vicinity of Vire, France, on or about 12 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one First Sergeant Loyce M. Robertson, Headquarters Battery, 200th Field Artillery Battalion, a human being, by shooting him with 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 Charge and Specification. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority, the Commanding General, V Corps, approved the sentence, withheld the order directing execution thereof pursuant to Articles of War 48 and 50½ and forwarded the record of trial for further action thereunder. (The record of trial is treated by the Board of Review as though forwarded under Article of War 48). The confirming authority, the Commanding General, European Theater of Operations, confirmed only so much of the sentence as provided that accused be hanged by the neck until dead, and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution showed that on 12 August 1944 accused was a member of Headquarters Battery, 200th Field Artillery Battalion, and was a radio operator. Deceased, Loyce M. Robertson, was the first sergeant of the battery and was known as "Robbie" (R7,22,24). During the early afternoon of 12 August, accused and Staff Sergeant Leroy Reber of the same organization were riding in a truck. Accused slapped Reber on the head a few times and upon several occasions attempted to converse with the sergeant who

> "In order to answer the questions, * * * answered, yes or no, in order to keep him quiet" (R31).

Accused offered Reber a drink from the former's canteen but the offer was refused. He then offered the canteen to other men in the vehicle, some of whom accepted (R32). He said to Reber "It's a good thing you are not the first sergeant". Reber replied "Yes", whereupon accused said something which Reber did not hear because of the noise made by the truck (R33). At 6:30 p.m. the battery arrived in a bivouac area in the vicinity of Vire, France (R8,12). About 8:15 p.m. that evening accused "had his radio set up". He told Sergeant James E. Jones of his battery that he had "lost his bottle to the first sergeant" (deceased) and asked Jones to get it. Jones replied that "it was best for him not to have the bottle, he had a job to do". Accused then

said that he (accused) was going to get the bottle, and Jones left (R33-34).

Captain Horace L. Hall, commanding officer of accused's battery, testified that about 9:30 p.m. deceased told witness that he took a bottle from accused. Hall told deceased to secure witness' permission before the bottle was returned. Accused then approached, armed with a carbine, and Captain Hall asked if he (Hall) could do anything for him. Accused replied "No, just walking around the area". At the time they were standing about 12 feet from the guard post at the gateway to the area, and it was "just dusk - getting dark" (R8-9). Captain Hall left deceased standing with accused, and walked to the kitchen truck about 50 yards away. He picked up a cup and then heard a shot. Witness did not know the direction of the shot, went to the guard post (at the gate) and then noticed a crowd around the tree where witness had been talking with deceased. There he observed a Major Stoops standing over deceased. Stoops ordered a soldier to go for the medical officer. Accused was sitting with his back against a tree, watched by a Sergeant Peters and a soldier named Moore. Not more than three minutes elapsed from the time Captain Hall left deceased until he heard the shot (R9). Shown a United States Carbine, M-1, serial number 394916, Hall testified that his supply sergeant issued WD AGO Form 32

> "of which I have a copy in my pocket with that equipment. It has the number bearing /accused's/ initial and my own" (R10).

The number of the carbine referred to in Form 32 and the number on the carbine shown to witness were identical (R9-10). The carbine produced in court had been in the care of witness' supply sergeant since the evening of 12 August and had been cleaned after that date (R10). A battalion standing order, issued about two weeks prior to 12 August and in effect at the time of trial, provided that "no cartridge would be carried in the chamber of any weapon". The order was not read to the men on a roster but was posted on the bulletin board (R11).

Major Charles D. Stoops, Headquarters 200th Field Artillery Battalion, testified that on the evening in question, when it was becoming dark, he was walking through the battalion area. After he passed the sentry at the gate he heard someone say "I'll shoot you", and observed two men about ten paces away. He then heard someone remark "Never do that". Instantly witness heard a shot, saw a flash and saw one of the two men fall to the ground. Immediately a third man "made a dive from the left", tackled the other man who remained standing and, after a slight scuffle, threw him "across in front of me to my right". Witness went to the scene and saw a Private Noble holding accused

down on the ground on his back. Witness made certain that accused was disarmed and then went to the other fallen man whom he found to be deceased. Stoops "called for the medics" who arrived about two or three minutes after the shooting. As the "light was bad at ten paces", witness could not identify the two men whom he first saw standing together until he went to them where they were down on the ground (R11-15). The ground there was smooth and grassy and there was a driveway "the grass went over". This road was also smooth, had no ruts and was on a level plane. The area was a field which was used for a pasture and orchard (R14). Witness further testified that there was a rifle on the ground which he saw fall from accused's hand. He saw the shot fired but could not say who fired it (R14-15). At the trial he identified accused, whom he had known about a year (R14).

Private Roland J. Noble of accused's organization, testified that about 10:00 p.m. 12 August (R21), he was digging a "foxhole" beside a hedgerow with a Private Trunick about five yards from the sentry (at the gate) (R17,22). Although it was getting dark it "was light enough to see" (R19). Noble heard "a lot of loud talking" (R17) and observed accused about five or seven yards away, face to face with deceased, who was about two yards from accused. Part of accused's body was visible and part of it was behind a tree (R18-19,21). He was holding a carbine with the stock under his right arm and the barrel in a horizontal position, pointed forward (R19,20). Accused said "I'll shoot you Robbie" or "I'll kill you Robbie", and then Noble saw a shot fired (R17-19). Witness first observed accused about ten seconds before the firing of the shot (R21). Noble, who was excited (R19), said "Don't do that again, Kluxdal" (R22), "took after" accused and seized him by the arms. Accused lost his grip on the weapon and then "recaught it back in the forward position" with one hand. Noble pulled the gun "around from the other side", wrested it from accused's possession and threw it on the road. He then threw accused on the ground. The gun was a carbine, United States Army issue. Noble then "got off" accused, went over to help deceased and, when Major Stoops arrived on the scene, went for medical assistance(R19-20). Noble further testified that he did not see accused's finger actually on the trigger, and that after the shot was fired the trigger guard was down (R21). Witness did not hear the words "Give it to me Robbie" (R22).

Private John L. Trunick, Jr. of accused's organization, testified that when he was digging the"foxhole" with

Noble (R23) deceased passed by, gave Noble and witness a piece of candy and then went over to a tree and talked to Captain Hall (R24). Trunick continued to dig and then went to get a pick. He passed two men and thought he heard someone say "Give it to me Robbie". Witness walked on about ten paces, heard a shot, turned and saw Noble running after accused shouting "Don't do that again, Kluxdal". Noble knocked the rifle from accused's hand and "started hollering for the medics". Witness seized accused by his arms and "set him down by the tree". Accused offered no resistance. Deceased was on the ground by the little apple tree five or six yards away (R23-26).

Private William A. Moore of accused's organization, testified that he was standing about 30 yards from the hedgerow, heard a shot and heard Noble, in a "sort of a scared voice" say "Don't do that again, Kluxdal". Moore ran to the road and saw accused and Trunick seemingly in a tussle on the ground and deceased lying on his back. Witness picked up a rifle from the road, pointed it at accused who was then sitting down, and told him not to rise. About ten minutes later accused said that "he was certainly in a fix now" and asked if he could smoke. As it was getting dark witness replied "You had better not" (R27-29).

On the evening in question Captain George W. Marsh, Medical Corps, 200th Field Artillery Battalion, heard a voice calling from the direction of Headquarters Battery that someone was shot. Marsh went to the scene and about 10:30 p.m. examined Robertson, who was having difficulty in breathing. Marsh could not feel his pulse, and found a slightly bleeding wound in front of the heart. Robertson breathed about six times and then ceased. A stethoscope was applied but no heart sounds could be detected. Marsh then pronounced Robertson dead (R29). There was a round hole immediately below "the nipple" and the wound of exit "on the left side was behind just below the right shoulder". It was a bullet wound. Although Captain Marsh did not have the opportunity to perform a post-mortem examination, it was his opinion that the bullet went through the heart and stopped it. Marsh then went over to accused, observed his speech and detected an odor of alcohol on his breath. Witness caused accused to walk 30-40 feet away and to return, and was satisfied that the latter was "coherent in his speech and his locomotion in walking". Accused remarked that he heard a shot but did not know what happened (R30). Marsh further testified that he had sent accused to the hospital on several occasions because the latter had a knee with a ligament that "fluctuates". Because of this condition the knee did not provide good support and would buckle (R31). The terrain in the area where deceased was lying was fairly smooth and was under an apple orchard. The grass was cut fairly short (R30-31).

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On 13 August Corporal John A. Walters, Jr. Battery B, 200th Field Artillery Battalion, typed a statement made by accused, who read the statement and then signed it. Walters, who witnessed the statement and saw accused sign it, identified the document at the trial. The defense waived "the foundation for the statement" and affirmatively stated that there was no objection to its introduction in evidence. It was admitted in evidence as Exhibit B (R15-16). It was, in pertinent part, as follows:

> "About 2230 hours, 12 August 1944, my outfit was in Bivouac approximately three and one-half (3½) miles south west of Vire, France. I was over at my foxhole and 1st Sgt Loyce M. Robertson came over there, and I had a bottle of Calvados or some other alcoholic drink and it was laying there. Then Sgt Robertson said, 'I'm going to take this bottle with me, you don't need anymore, you have to finish digging your foxhole.' I finished digging my foxhole after removing my undershirt and shirt, and when I had completed digging I put on my field jacket, helmet, and took my .30 Cal Carbine and went over to find Sgt Robertson. I walked over and found him then talking to Captain Hall. I came up and a few words were said about work and the likes of that, and Captain Hall walked away. Then I asked Sgt Robertson if he would give me the bottle he had taken away from me, as I had finished my work. He said, 'You have had enough Kluxdal, but if you get Captain Halls' permission I will turn it over to you.' I said I would, and he said, 'No I don't think you need anymore,' so I said then I would go over and see the Captain. I started to turn from Sgt Robertson to walk over to where Captain Hall was. I sort of stumbled and my Carbine came into my hands as I proceeded to fall, and it went off. I got scared and I started to run when Sgt Robertson hollered, and Trunick grabbed me. How

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my rifle got chamber loaded I don't know. I had been drinking earlier in the evening but was not drunk at 2230 hours when the incident occured.

I, the undersigned accused, have read and understand everything I say above."

Private Louis P. Viviani of accused's organization testified that in March or April 1944 accused

"didn't receive a pass to go out on liberty, and he said he would get even with the first sergeant" (R36).

Witness testified that in the spring of 1944 (R38), accused went to Bath, England, and deceased failed to give him his ration card before he left. The card was sent to him but it arrived late. Accused remarked upon his return to his barracks in Torrington that

"We were soon going to combat and things would be different" (R38-39).

Technician Fourth Grade James N. Carroll of accused's organization testified that at Torrington, England, in April 1944 accused said that he would "get even" with deceased because the latter would not give accused a pass (R40-41).

4. For the defense, Captain Hall, recalled as a witness, testified that he had been in the battery for at least two years and knew accused during this period. He did not know of any animosity between accused and deceased. Accused "was in line for promotion" on 12 August but no recommendation for his promotion had been made (R41-42). Sergeant Reber, recalled as a witness, also testified that he had been in the battery for over two years, and became acquainted with accused during this time. He never noticed any animosity between accused and deceased, whose relationship "seemed friendly enough". Witness never knew accused to have any argument with deceased (R42-43).

After being advised of his rights, accused elected to remain silent (R43-44).

5. Certain procedural questions require consideration.

(a) At the close of its case, the defense moved for a finding of not guilty on the ground that the prosecution had not proved the offense charged. The court denied the motion (R39). As will be later shown herein, the Board of Review is of the opinion that sufficient evidence of a competent and substantial nature had been presented to the court which fully supported the findings of guilty. Therefore, the Board is of the opinion that the denial of the motion was justified.

(b) The prosecution stated that it would call two witnesses (Viviani and Carroll) to testify as to statements made by accused with reference to deceased for the purpose of showing that accused harbored malice against him. The defense objected, stating that the statements to be introduced occurred four or five months prior to the commission of the offense alleged and were too remote in point of time. The objection was overruled (R34-35), and Viviani and Carroll testified as previously set forth herein over repeated objections by the defense (R36-39). The defense also objected to the admission in evidence of Reber's testimony that accused said to him on the truck during the afternoon of 12 August "It's a good thing you are not the first sergeant". This objection was also overruled (R32-33).

> "Various facts may be considered in determining the existence of malice. Evidence of ill-feeling, unfriendly relations, and trouble between accused and the victim of an offense, and evidence concerning the conduct and sayings of the accused shortly after the offense was committed, are admissible for such purpose" (I Wharton's Criminal Evidence, 11th Ed., sec.245, p.288).

> "In prosecutions for homicide, as in criminal prosecutions generally, evidence to show motive is competent, and considerable latitude is allowed in its introduction. When proof has been made of the corpus delicti, all facts and circumstances that tend to show motive on the part of the accused are relevant. The conduct, attitude, relations, and feelings of the parties toward each other, in connection with the other facts and circumstances surrounding the act, may be shown" (Ibid, sec.253, pp.302-303).

"Such evidence is relevant even though the threats are general in their nature, and no specific mention is made of any one person against whom they are directed. Thus, it is relevant to show that the accused threatened to kill somebody before night, to kill a man before sundown, or to 'get even' with somebody, * * * The length of time elapsing between the threat and the act does not affect the relevancy of the testimony, but merely its weight, which is always a question for the jury" (Ibid., sec. 261, pp.319-321) (Underscoring supplied).

"Declarations of the accused, previous to a homicide, are relevant to the issue where they tend to explain his conduct, or form a part of the transaction, although they are not shown to have any direct connection with the homicide. * * * But where the declarations of accused are merely general in their character, or have no apparent relation to the homicide that follows them, they are irrelevant" (Ibid., sec.279, p.357) (Underscoring supplied).

"The relevancy of the threats is not affected by the fact that they are impersonal or conditional, where the circumstances show that they were directed towards or included the deceased" (Ibid., sec.281, p.361).

"While the general question of whether relevant evidence is too remote to be material is often regarded as a question for the court in its discretion to determine, it is frequently said that the remoteness of threats does not affect their admissibility in evidence, and that the length of time which has intervened is merely a circumstance affecting the weight and

credibility of such evidence"(Ibid., sec.284, p.365) (Underscoring supplied).

The general rule is that circumstances showing previous difficulties or encounters between the accused and the deceased are relevant where such circumstances have an obvious connection with, or serve to explain, the facts and circumstances of the homicide charge on trial. The length of time intervening is only material as affecting the credibility and weight to be given to such evidence" (Ibid., sec. 287, p.375)(Underscoring supplied).

Four or five months prior to the commission of the offense alleged accused threatened to "get even" with deceased because the latter refused to give him a pass. Also, about the same time accused went on leave and deceased failed to give him his ration card before accused departed. The card was sent to him but it arrived late. Upon his return accused remarked that they were soon to be going into combat and that "things would be different". In view of the foregoing authorities, the Board of Review is of the opinion that the admissibility of the foregoing evidence, together with accused's remark to Reber, and the remoteness, relevancy, weight and credibility thereof were matters for the determination of the court. The Board of Review is also of the opinion that even had such evidence been erroneously admitted, other competent, substantial evidence so convincingly established accused's guilt of the offense alleged, that his substantial rights would not have been injuriously affected.

Certain irregularities contained in the record of trial are commented upon in the review of the assistant judge advocate, European Theater of Operations, and further consideration thereon is deemed unnecessary.

6. "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.

* * * * * *

Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even

to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed: It is sufficient that it exist at the time the act is committed. (Clark).

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (MCM, 1928, par.148a, pp.163-164) (Underscoring supplied).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its (sic) existence of malice must be determined as a fact from all the evidence.

* * * * * *

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> In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life" (29 C.J., sec.74, pp.1099-1101) (Underscoring supplied).

The evidence shows that accused was drinking during the afternoon preceding the shooting, that he was on duty as a radio operator that evening and that deceased took a bottle of intoxicating liquor from his possession. Accused tried to persuade Reber to secure the bottle from deceased and, when the latter refused, announced that he was going to get it himself. Armed with a carbine he approached deceased. After Captain Hall left, loud talking was heard and accused said "Give it to me, Robbie". It is not shown, aside from accused's statement, what reply was made by Robertson, but accused's ensuing threats to kill him were plainly heard by both Major Stoops and Noble. Accused fired almost immediately thereafter and deceased fell to the ground. Noble and Trunick immediately dashed over, disarmed and overpowered accused, who a few minutes later remarked that he "was certainly in a fix now." Robertson died within a few minutes after the shooting and the entire incident occurred within a few minutes. There was no evidence whatsoever that accused acted in self defense or that his intent to kill was formed under the influence of an uncontrollable passion aroused by adequate provocation. The evidence plainly indicated that accused, angered by the fact that deceased had his bottle, deliberately and without the slightest excuse shot him in cold blood. The findings of guilty were fully supported by substantial, competent evidence of the most convincing character (CM ETO 3180, Porter; CM ETO 1901, Miranda; CM ETO 1161, Waters; CM ETO 438, Smith).

Although accused was drinking during the afternoon there was no evidence that he was drunk when he shot Robertson. The only evidence concerning the question of intoxication at that time was the testimony of Captain Marsh that he smelled alcohol on accused's breath shortly after the shooting. He

immediately made accused walk several yards and observed his speech. He walked without difficulty and his speech was coherent. The evidence is clear that accused recognized his victim and his remark that he "was certainly in a fix now" demonstrated that he fully realized the seriousness of his act and predicament. He admitted in his statement that he was not drunk when deceased was shot. The issue of intoxication was not seriously raised by the defense. In any event, the issue as to whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder was one of fact for the determination of the court. In the absence of substantial, competent evidence that he was so intoxicated, the findings of the court were fully justified (CM ETO 2007, Harris, Jr.; CM ETO 3180, Porter).

Similarly a question of fact for the decision of the court arose from the claim of the defense that when he left deceased, accused stumbled and the shooting was purely accidental. In view of the convincing and substantial nature of the evidence establishing accused's guilt of the offense alleged, the determination of the court in this respect will not be disturbed upon appellate review (CM 232400, Thomas, 19 B.R.67).

7. The charge sheet shows that accused is 37 years of age and was inducted 17 March 1942 at Chicago, Illinois, to serve for the duration of the war plus six months. He had prior service in the Wisconsin National Guard from 19 November 1924 to 14 July 1927.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 OCT 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private First Class PAUL M. KLUXDAL (36395076), Headquarters Battery, 200th 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. For such further action as you may deem necessary under the circumstances, your attention is invited to paragraph 3 of that part of the review of the Staff Judge Advocate, V Corps, entitled "PERSONAL DATA ON ACCUSED," regarding the claim of accused that he is in the possession of newly discovered evidence.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial which is delivered to you herewith. The file number of the record in this office is CM ETO 3932. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3932).

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

B. Franklin Riter

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

1 Incl.:
Record of Trial.

(Sentence ordered executed. GCMO 94, ETO, 26 Oct 1944)

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

BOARD OF REVIEW NO. 1

2 DEC 1944

CM ETO 3933

UNITED STATES	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at Bricquebec, Department of Manche, France, 24 July 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Privates GEORGE W. FERGUSON (34749241), and HENRY D. RORIE (14111025), both of 582nd Ordnance Ammunition Company.	

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Henry D. Rorie, 582nd Ordnance Ammunition Company, and Private George W. Ferguson, 582nd Ordnance Ammunition Company, acting jointly, and in pursuance of a common intent, did, at Bricquebec, France, on or about 23 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Denise Quoniam.

Each accused pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification. No evidence was introduced of previous convictions of either accused. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, First United States Army, approved each of the sentences and forwarded the

record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed each of the sentences, but due to special circumstances in this case commuted each sentence to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the natural life of each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused and withheld the order directing execution of each of the sentences pursuant to Article of War 50½.

3. Prosecution's evidence presented substantial proof of the following facts:

Accused on 23 June 1944 were members of a detachment of 26 men from the 582nd Ordnance Ammunition Company which was on special duty at ASP #702 located approximately two miles from Bricquebec, Department of Manche, France (R6,31).

Mademoiselle Denise Quoniam, age 22 years (hereinafter designated Denise) of Nouainville (near Cherbourg), Manche, France (R7) and Monsieur Jules Lelouey (hereinafter designated Jules) of 82 Rue Emile Zola, Cherbourg, France (R25) were war refugees and were returning to their homes in or near Cherbourg after it had been freed from the enemy (R28). On the night of 23 June 1944 Denise and Jules were guests at a farmhouse near Bricquebec (R8,26).

At about 7:00 pm the two accused armed with rifles approached the gate of the farmyard, called to Denise and Jules and demanded cider (R7-8,16,26). The soldiers and Jules entered a stable where Jules, upon demand of the soldiers opened a box which belonged to Denise (R9,26, 29). Then the soldiers ordered Denise and Jules to accompany them. They reached a footpath where accused aimed their guns at Denise and Jules and required them to proceed about 100 kilometers along the path to a field gate. At that point Ferguson "obliged" Jules, by threatening him with his gun, to lie on the ground, immediately inside of the gate. Rorie directed Denise further into the field (R9,26). The girl screamed and shouted (R27). Rorie then proceeded, by menace of firearms, to overpower Denise and secured sexual intercourse with her (R10,15,20,27). While Rorie was engaged in the sexual act with Denise, Ferguson forced Jules to move to a point about one and one-half meters distant from the young woman who was prone on the ground. At the conclusion of the copulation by Rorie, he menaced Jules with his gun and stood guard over him. Ferguson drew his bayonet from its scabbard (R22,27), threatened Denise's "head or throat" with it and finally stuck it in the ground near her head as he laid on her body. She resisted his advances and in the struggle which followed Ferguson disrobed her entirely. When she was nude he engaged in sexual intercourse with her (R11,15,20,27). When he completed the act, Rorie took

his place on the girl's body and for the second time copulated with her. Following this attack Rorie stood guard over Jules and Ferguson returned to the girl and for the second time engaged in sexual intercourse with her (R12,15,16,20,27). Jules, recalled as a witness by the court, testified that he witnessed an actual penetration of the body of Denise by the male organs of both accused (R43).

When Rorie concluded his second copulation he gave Denise 100 francs which she accepted under menace of his gun and upon the advice of Jules (R12,17,18). At the same time Rorie handed to Jules 100 francs (R13,19,28) which he accepted also under threat of Rorie's gun (R28). At the conclusion of the orgy, Rorie directed Denise to stand. He pointed to her clothes and handed her 500 francs which she also accepted after Jules told her that it was to pay for the damaged clothing (R13). (The girl's clothing, in a damaged condition, was admitted in evidence (R15; Pros.Ex.1)). Before the soldiers departed, Rorie produced a bottle of "Calvados" (R30) and offered it to Jules who accepted two drinks of same. The soldiers consumed the remainder of the liquor. The girl did not imbibe (R20,29).

When Denise returned to the farmhouse about 10 minutes later she reported to the farm maid that she had merely been disrobed, "because we wouldn't let the people in the country know of this act". However, a young man who lived on the farm was informed by the maid that Denise had been raped by colored soldiers. He in turn made report of the incident to a French gendarme who advised him to place the matter before the American military police (R19-20).

Dr. Henry Lechevalier, of Bricquebec, France, examined Denise on 24 June 1944 (R22-23). He reported his findings as follows:

> "The girl wore only a bruise on her shoulder and I think she was bitten but that is all I can say for the outside. * * * When I examined the girl with my finger I do not see the stem with hairs at all. When I put my finger in the back the organ was ripped. * * * I think there was penetration there with fecundation" (R23,24).

He expressed the opinion that the girl had been raped,

> "Because the membrane was broken, gone. It is just a little hole in the middle that holds the blood and it was broken. I am sure the man put his part in there. I don't know the name of it but I am sure his organ was sunk in" (R24),

but he also admitted that the torn condition of the hymen might have resulted from normal intercourse (R25).

There were also introduced in evidence statements signed respectively by Ferguson (R35; Pros.Ex.2) and Rorie (R35; Pros.Ex.3). The relevant and material part of Ferguson's statement is as follows:

> "We left the MP station and walked along the road, heading back towards the bivouac area. White left us at the intersection saying he was going back to camp. We walked a bit further and saw a man and a girl. We stopped to talk with them. Rorie offered them a drink. They accepted. Rorie gave the girl one hundred (100) francs and they went into the field together. I stayed and talked with the man. When Rorie came back, he said I could go up. I went up. She had all her clothes on. I tore her sweater off. Her dress slipped off. I tore her slip off, and her underwear was already off. She was absolutely naked. When I finished, Rorie went back, and then I went back a second time. We were in the field about an hour. Rorie gave the girl five hundred (500) francs and the man one hundred (100) francs after it was over.
>
> "We returned to the bivouac area about 2200 hours. We got on the trucks. Sgt Stanton reported to Capt Regan that we had been missing. About then, the MP officer came up and took Rorie, White, Pvt Webster Roach, Pfc Lonnie Smith and myself back into town. He said we had raped some lady and was going back to try to find her. We rode around the town awhile, but couldn't find her. We were taken back to the trucks, and returned to the company area" (Pros.Ex.2).

Material excerpts from Rorie's statement are:

> "We started back in the direction of the bivouac area. When we reached the intersection, White left us. We continued on the same way we had come into town. Ferguson and I met some French men and a girl on the road. As I remember, there was one man and a girl. I offered them a drink which they took. We tried to talk with her, trying to make a date with her. I gave her one hundred (100) francs. The four of us went into the field nearby. I had the first date with her while Ferguson

stayed and talked with the man at a little distance away. She had all her clothes on when I had my date with her. After I had finished, I came back to where Ferguson and the man were, and Ferguson went over and had a date with her. When he had finished I went back for a second date. She had nothing but her coat on at this time. Ferguson went back for a seconddate with her after I had my second date with her. I did not see Ferguson or the girl take her clothes off, but when I went back the second time they were all lying in a pile. I don't know what she was wearing. I pulled her underwear down the first date I had with her.

"When Ferguson came back I gave her five hundred (500) more francs. I gave the man one hundred (100) francs the second time Ferguson was having a date. We were in the field about forty-five minutes. We returned to the bivouac area; it was about 2200 hours then. An MP officer came up to the area and took White, Ferguson, Pvt Webster Roach, Pfc Lonnie Smith, and myself into town. He said he was taking us into town for further investigation in connection with a rape. He seemed to think we were involved. We rode around the town but couldn't find the party the officer was looking for, so we came back to the bivouac area. We then returned to the company area after Capt. Regan had given the MP officer our names, that is, Ferguson and myself" (Pros.Ex.3).

4. The accused Rorie elected to remain silent (R42) but accused Ferguson elected to be sworn as a witness in his own behalf. He testified that:

"We left to go back to the bivouac area and we get in a field. There is a little path road in the field. We were going to walk on slow. A girl beckoned and he said, 'Come on, George.' We walked over there and there was a fellow behind the gate. She called him out and he came and we sat in the field and talked a pretty good lot. We walked over to another field and started drinking cognac. Then Rorie was talking to the girl, he gave her

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> 100 francs and went and had her. Then I went over and had her, came back again. I talked to Rorie and some way I tore the girl's clothes and then Rorie went and had the girl again while I talked to the man. The last time I went over Rorie gave the man 100 francs while I was on the girl and when we got up he gave her 500 francs, that was for the clothes. We then drank the cognac and they went their way and we went ours" (R37).

He further asserted that he gave Denise 500 francs

> "Because I tore the clothes. Rorie had his money in his hand and I snatched 500 francs from him and gave it to her" (R37).

He further asserted that Denise submitted to the acts of intercourse without screaming (R37); that she did not seem to mind having intercourse with him (R40) and that she spread her legs apart "willingly, sir, no force" (R41); while he admitted that both he and Rorie had their guns with them (R40), he asserted that both his and Rorie's rifles were on the ground near Jules, and that his bayonet was in camp. Rorie wore his bayonet on his belt and did not stick it in the ground (R37,38,40). He admitted he removed Denise's sweater and dress on the occasion of his first act of intercourse with her (R40), but not her underclothes (R41), but likewise admitted that she was nude when both he and Rorie each indulged in their second acts of intercourse (R41). He further testified that Denise, Jules and Rorie drank cognac when they reached the field before the first act of intercourse (R37,38) and at the conclusion of the orgy further cognac was consumed by all of them.

> "All of us was standing up with the last cognac, this fellow drinking first then the girl next and Rorie and I drank the next" (R38).

5. The situation disclosed by the evidence in this case is governed by the following well settled legal principles:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

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

"Where the act of intercourse is accomplished after the female yields through fear caused by threats of great bodily injury, there is constructive force, and the act is rape, actual physical force or actual physical resistance not being required in such cases, even where the female is capable of consenting. It has been held that, where the female yields through fear, the offense is rape, whether or not the apprehension of bodily harm is reasonable, although there is also authority that the threats must create a reasonable apprehension of great bodily harm, and that the threat must be accompanied by a demonstration of brutal force or a dangerous weapon, or by an apparent power of execution" (52 CJ, sec.32, p.1024) (Underscoring supplied).

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. * * * Nor is it necessary that there should be force enough to create 'reasonable apprehension of death.' But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance" (1 Wharton's Criminal Law, 12th Ed., sec.701, pp.942-943) (Underscoring supplied).

The record is replete with proof that in each of the four acts of intercourse (two by Rorie and two by Ferguson) penetration of Denise's body occurred. The testimony of Denise, of Dr. Lechevalier and of Jules fully supports such finding. In addition, each accused in his extra-judicial statement and Ferguson in his testimony in open court admitted completed acts of intercourse. The first element of the crime of rape, viz carnal knowledge of Denise by each accused was established beyond contradiction or doubt (CM ETO 3044 Mullaney; CM ETO 3375, Tarpley; CM ETO 3859, Watson and Wimberly; CM ETO 3910, Hartsell).

The guilt of each accused of the crime of rape therefore depends in the ultimate analysis upon the answer to the question whether the admitted acts of intercourse of the accused with Denise were with her consent and as a result of her voluntary cooperation or whether they were accomplished either by means of force and violence visited upon her by each of the accused whereby her resistance was overcome, or as a result of fear for her life and safety engendered in her by the threats of death or great bodily harm offered by the accused. There was therefore presented an issue of fact for determination by the court (CM ETO 2472, Blevins; CM ETO 3197, Colson and Brown; CM ETO 4194, Scott, and authorities therein cited).

The extra-judicial statements of each of the accused (Pros. Exs.2 and 3) were obviously not confessions but were admissions against interest. In them each accused admitted his acts of intercourse with the girl but asserted that they were favors conferred upon him by her freely and voluntarily. Therefore, there was no admission of legal guilt of the crimes charged (CM ETO 3649, Mitchell, CM ETO 3644, Nelson;

CM ETO 3803, Gaddis et al). Ferguson's testimony as a witness in his own behalf was not only consistent with his extra-judicial statement but was also in elaboration of it.

Opposed to the contention of accused is the prosecution's evidence which shows that the accused, armed American colored soldiers, accosted Denise and Jules, French refugee citizens, at a farmhouse where they were guests. The negroes menaced the man and girl with their firearms and by threats compelled them to go to a enighboring field where the sexual orgy occurred. Jules was kept under guard alternately by each accused as the other sustained sexual relations with Denise. The girl was taken a distance into the field, compelled by Rorie to lie down, and with his rifle at his side he engaged in the first act of intercourse. Thereafter, the negroes alternately had carnal knowledge of Denise until each accused had twice secured sexual satisfaction from the body of the girl. On the occasion of Ferguson's first attack he tore her clothes from her body and thereafter she was in a nude condition. Denise and Jules asserted that both of the accused threatened the girl with their rifles and that Ferguson in addition put his bayonet at her head or throat and finally stuck it in the ground near her head as he engaged in intercourse with her. There is evidence that Denise screamed and protested when Rorie first made evident his intentions. In the course of her examination Denise asserted that she permitted each accused to have intercourse with her because

> "I was threatened by the soldiers * * * only by force. They had guns * * * The soldiers were saying to me that if I was not in agreement with them they would kill me" (R13).

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Jules testified:

> "Ferguson took his knife and threatened the girl, put the knife in the ground by her head and because the girl was not willing he tore the clothing of the girl" (R27).

He further asserted that the accused had intercourse with Denise against her will (R28).

The evidence in this case presents a pattern which has made its unwelcome appearance with increasing frequency since the invasion of the continent of Europe by American military forces in cases wherein colored American soldiers are charged with the heinous crime of rape of French female citizens. Cases of this type show the victim in an apparently passive, non-resistant attitude at the time of the actual intercourse, or at least exhibiting only a minimum of resistance. However, such non-inculpatory evidence is but one small facet of the complete evidentiary matrix, which cogently reveals that the woman has been reduced to a state of submission by accused's threatening and menacing use of firearms and other lethal weapons, has often suffered personal violence and physical injury and has been placed in fear of her life or great bodily harm. Under such influence she has submitted to intercourse (CM ETO 3141, Whitfield, CM ETO 3709, Martin; CM ETO 3740, Sanders et al; CM ETO 3859, Watson and Wimberly; CM ETO 4017, Pennyfeather; CM ETO 4194, Scott). Of such situation the Board of Review has commented thus:

> "It is apparent from the foregoing that an accused may be guilty of accomplishing rape by mere threats of bodily harm as distinguished from rape by means of actual force and violence. In each instance the offense must be consummated without the voluntary consent of the victim. Rape accomplished through force and violence ordinarily

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requires proof that the victim exercised all of her powers of resistance, consistent with the surrounding circumstances. Such offense assumes that the victim does resist and her opposition is overcome by physical force of her assailant. Rape accomplished by threats of bodily harm assumes that she does not resist but upon the contrary that she is prevented from doing so through fear caused by the assailant's threats to inflict upon her great bodily harm (People v. Battilana, ---Cal. App. (2nd) ---, 128 Pac.(2nd) 923)" (CM ETO 3740, Sanders et al).

The Board of Review is entirely satisfied that there is an abundance of competent evidence in the instant case that supports the findings not only that did Denise not consent to the acts of intercourse, but also that she resisted as vigorously as the limits and nature of her captivity would permit and that she was prevented from greater or more effective resistance "through fear caused by the assailant's threats to inflict upon her great bodily harm". It was exclusively within the province of the court to accept or reject the evidence offered by the defense; to evaluate and weigh all of the evidence before it; to judge of the credibility of witnesses and from its analysis of the evidence to make its findings on the issue of fact which was crucial in this case. Being satisfied that the evidence in support of the court's findings adverse to accused is competent and substantial, the Board of Review has no hesitancy in concluding that guilt of each accused was established beyond reasonable doubt.

6. The charge sheet shows that accused Ferguson is 21 years nine months of age and was inducted at Fort Benning, Georgia, 28 April 1943 to serve for the duration of the war plus six months. Accused

Rorie is 26 years of age and enlisted at Charlotte, North Carolina, 1 May 1942 to serve for the duration of the war plus six months. Neither accused had prior service.

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

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for rape by AW 42 and Secs. 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 authorized (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4) and 3b).

B. Franklin Riley, Judge Advocate

Edward H. Sargent, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private GEORGE W. FERGUSON (34749241) and Private HENRY D. RORIE (14111025), both of 582nd Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

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 3933. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3933).

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

(Sentences as commuted ordered executed. GCMO 120, ETO, 10 Dec 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

CM ETO 3937

7 OCT 1944

U N I T E D S T A T E S	4TH ARMORED DIVISION.
v.	Trial by GCM, convened at Houdelaincourt, France, 8 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private WILLIAM F. BIGROW (6700686), Company "A", 35th Tank Battalion.	

HOLDING BY BOARD OF REVIEW NO. 1
SARGENT, SHERMAN and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private William F. Bigrow, Company "A", 35th Tank Battalion, did, in the vicinity of Vannes, France, on or about 9 August 1944, willfully, feloniously, and unlawfully kill Tec 5 Walter J. LaSavage, by shooting him in the neck with a submachine gun.

CHARGE II: Violation of the 75th Article of War.
Specification: In that * * *, was, at Caudin, France, on or about 9 August 1944, drunk on duty as cannoneer in a tank enroute between Caudin, France, and St. Ave, France, in the presence of the enemy.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of both charges and the specifications thereunder. 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 30 years. The reviewing authority approved the sentence, reduced the period of confinement to 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, directed that the prisoner be confined in the Stockade of Base Section III pending further orders and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution established the following: On the evening of 9 August 1944 accused's tank platoon was proceeding, under enemy artillery fire, en route between Lorient and Vannes, Department of Morbihan, France (R4,9,10,12). Accused had been drinking cider and cognac and his condition was such, when the movement commenced that the noncommissioned officer in charge of the rear tank "for my own protection" shifted him from his normal position in the turret as loader to the "bog" seat in the front to the right of the driver (R4,6,7,9). While the tank was in motion two shots were fired from the inside thereof. Both shots struck the driver, Technician Fifth Grade Walter J. LaSavage, in the neck, causing his death almost immediately (R5,6,9,11). The evidence indicated that the shots were fired from a .45 calibre Thompson M-3 submachine gun, which was in the "bog" seat at the time accused was there (R5-7,12). Accused's drunken condition while on duty in the tank was evidenced by direct testimony of eye witnesses (R4, 6,7), by his leaving the scene of the shooting and talking to civilians (R5,9), and his loud cursing, shouting and demands for hand grenades (R10,11,12). Even following the shooting he was belligerent and uncontrollable (R12).

4. No evidence was introduced for the defense. After his rights were explained to him, accused elected to remain silent (R13).

5. (a) As to Charge II and its Specification, the evidence is clear that at the time alleged accused and his unit were before the enemy and that accused was drunk on duty in the rear tank. The failure of the prosecution to establish that accused's duty was as cannoneer and that the tank was en route specifically between Caudin and St. Ave at the time of his drunkenness, as alleged, was not fatal. The essence of his offense, of which he was adequately notified, was his misconduct before the enemy at the time alleged. The record fully supports the findings of guilty (CM ETO 1109, Armstrong; CM ETO 3081, W.I. Smith; CM ETO 3301, Stohlmann; and authorities therein cited).

(b) The circumstantial evidence adduced in support of Charge I and its Specification indicates very strongly that it was accused who fired the fatal shots and that he did so without justification, and

with malice aforethought, as evidenced by his cold-blooded and belligerent demeanor following the shooting, or at least in reckless disregard of human life and with knowledge that his act would probably cause the death or grievous bodily harm of his victim. The evidence would have justified a charge and conviction of murder, in violation of Article of War 92 (CM ETO 3362, Shackleford; CM ETO 3200, Price; CM ETO 2007, Harris Jr.,; CM ETO 2899, Reeves). It was therefore legally sufficient to support the findings of guilty of voluntary manslaughter, which offense is included in murder (CM ETO 3362, Shackleford and authorities therein cited; CM NATO 581, Grant).

6. The findings that accused was so drunk as to be guilty of misbehavior, in the form of misconduct, before the enemy, in violation of Article of War 75 (Charge II and Specification) were perfectly consistent with the implied finding that accused's drunkenness was not such as to negative the inference of the criminal intent necessary to sustain the conviction of Charge I and its Specification. The misconduct contemplated by Article of War 75 may consist in negligence, inefficiency or a culpable failure by the soldier to do his whole duty before the enemy, which may result from a state of drunkenness far short of that sufficient to affect mental capacity to entertain the necessary intent (authorities cited in par.5g, supra). The determination of the questions in this regard was the peculiar prerogative of the court, which resolved them against accused. Its findings of guilty are supported by competent and substantial evidence and will therefore not be disturbed upon appellate review (CM ETO 2007, Harris, Jr.,; CM ETO 2672, Brooks; CM ETO 3475, Blackwell et al; and authorities therein cited).

7. The record shows (2) that the trial took place one day after the charges were served on accused. The review by the Staff Judge Advocate states that "thirty days elapsed between the time of the offense and the trial and the accused was given every opportunity to have counsel of his own choosing and to prepare any defense he might have had." No objection to trial on said day was made by or on behalf of accused, and there is no indication in the record that any of his substantial rights were prejudiced within the contemplation of Article of War 37. The irregularity, if such it were, was harmless (CM ETO 3475, Blackwell et al).

8. The charge sheet shows that accused is 34 years of age and enlisted 17 March 1942 to serve for the duration of the war plus six months. He had prior service with Company "B", 28th Infantry from 26 February 1929 to 27 February 1930.

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

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

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period of confinement imposable in a sentence for voluntary manslaughter is ten years (MCM, 1928, par.104c, p.99). As confinement in a United States penitentiary is authorized upon conviction of the latter offense by Article of War 42 and Section 275, Federal Criminal Code (18 USCA 454), the entire sentence of confinement, as approved (15 years), may be executed in such penitentiary (AW 42; MCM, 1928, par.90,p.80). 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).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 7 OCT 1944 TO: Commanding General, 4th Armored Division, APO 254, U.S. Army.

1. In the case of Private WILLIAM F. BIGROW (6700686), Company "A", 35th Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3937. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3937).

B. Franklin Ritter

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General.

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

BOARD OF REVIEW NO. 2

CM ETO 3947

13 NOV 1944

UNITED STATES	)	THIRD UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened at St. Sabine,
	)	France, 27 August 1944, and L'Epine,
Privates CHARLIE WHITEHEAD,	)	France, 7 September 1944. Sentence:
Jr. (33789492); JERRY KEY	)	As to each accused, Dishonorable dis-
(34840765); and HARRY L.	)	charge, total forfeitures, and con-
WILSON (33644345), all of	)	finement at hard labor for life.
900th Quartermaster Laundry	)	United States Penitentiary, Lewisburg,
Company.	)	Pennsylvania.

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

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

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

WHITEHEAD

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

Specification: In that Private Charlie (NMI) Whitehead, 900th Quartermaster Laundry Company, did, without proper leave, absent himself from his company at Cheville, Normandie, France, from about 1930 hours 18 August 1944, to about 0800 hours 19 August 1944.

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

Specification: In that * * * did, at Cheville, Normandie, France, on or about, 18 August 1944, attempt to commit the crime of rape by forcibly and feloniously, against

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her will, attempting to have carnal knowledge of Mlle. Therese Delhommois, a French woman.

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

Specification: In that * * * did, at Cheville, Normandie, France, on or about 18 August 1944, in the nighttime feloniously and burglariously break and enter the dwelling house of M. Constant Delhommis, with intent to commit a felony, viz larceny therein.

KEY

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

Specification: In that Private Jerry (NMI) Key, 900th Quartermaster Laundry Company, did, without proper leave, absent himself from his company at Cheville, Normandie, France, from about 1930 hours 18 August 1944 to about 0800 hours 19 August 1944.

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

Specification: In that * * * did, at Cheville, Normandie, France, on or about, 18 August 1944, attempt to commit the crime of rape by forcibly and feloniously, against her will, attempting to have carnal knowledge of Mlle. Therese Delhommois, a French woman.

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

Specification: In that * * * did, at Cheville, Normandie, France, on or about 18 August 1944, in the nighttime feloniously and burglariously break and enter the dwelling house of M. Constant Delhommois, with intent to commit a felony, viz larceny therein.

WILSON

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

Specification: In that Private Harry L. Wilson, 900th Quartermaster Laundry Company did, without proper leave, absent himself from his company at Cheville, Normandie, France, from about 1930 hours 18 August 1944 to about 0800 hours 19 August 1944.

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CHARGE II: Violation of the 93 Article of War.

Specification 1: In that * * * did, at Cheville, Normandie, France, on or about 18 August 1944, in the nighttime, feloniously and burglariously break and enter the dwelling house of M. Constant Delhommois with intent to commit a felony, viz larcency therein.

Specification 2: In that * * * did, at Cheville, Normandie, France, on or about 18 August 1944, with intent to commit a felony, viz rape, commit an assault upon Mlle Therese Delhommois, by willfully and feloniously pointing a deadly weapon, to wit, a rifle, at the said Mlle Therese Delhommois.

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

3. The evidence shows that on the date and at the place specified, at about ten o'clock in the evening, the three accused, armed with rifles which they discharged outside, broke into the farmhome of M. Constant Delhommois, in the nighttime, and there demanded and received cognac, for which they neither paid nor offered to pay (R9-11,13,15,19,21,31-33,37). While all three were imbibing in the presence of the terrified family, at whom, from time to time, they pointed their guns, two of the accused forced 17 year old Theresa Delhommois to sit between them (R11, 20,23). She testified that these two, without her consent, began and continued to touch and to kiss her until Whitehead "forced her with the gun pointed in her back to go up to the attic" (R11), where he opened his pants and "wanted to violate me standing up. * * * And then he put me down on the ground. * * * And then he tried to violate me again". He did not at any time put his hands on her private parts but placed himself on top of her as she lay on the floor. Shortly thereafter he called Key (R11,23). Key and Whitehead remained with her, together, for from half to three-quarters of an hour (R11,24). They hit her "here and there, and on my cheeks", pulled her ear and placed their hands on her mouth. Key opened his pants, got on top of her and, with

the help of his hands, also molested her private parts. She tried always to struggle and repeatedly "cried out for papa". She had never had anything to do with a man in this manner before and did not know whether the male organ of either Whitehead or Key penetrated her female organ (R24). Finally, "they made me go downstairs into the kitchen", where the third soldier, Wilson, "was seated with his gun in front of my father". She was permitted to sit on the bench beside her father for one or two minutes, then Wilson forced her to go upstairs

> "with his gun in my back * * * Halfway up the stairs he fell. * * * So I escaped down the ladder from the attic to the outside * * * I went over through the fields and then down the road over to my brother's house" (R25).

Her shirt and dressing gown were torn while she was struggling on the stone floor. The next day there were bruises in the small of her back, on her knee and elbows, with perhaps a little bleeding from the abrasions on her back and knee (R25-26).

M. Delhommois testified that after Whitehead forced Theresa to precede him to the attic, she called "Help" and "Papa, papa", while the other two accused kept him and his 24-year old son at the kitchen table at the point of their guns (R11). The son, Daniel Delhommois, testified that, while his sister was in the attic,

> "The only thing she did do was to call us continuously. And if we made the slightest move while we were sitting at the table, the third one [Wilson], who had the knife, menaced me with it and stuck it up to my throat" (R33).

After Theresa's escape, the three accused forced her father and brother to assist in the search for her. They

> "made us light a little lamp, and they made us go up into the attic in front of them, lighting up all the corners of the attic. Not finding her, we succeeded in making them understand that she had gone down by the ladder. We went down in front of them, down the ladder. At the time that they were getting ready to go down in their turn, down the ladder, we let the lamp loose and threw it down on the ground and we profitted by the darkness to escape" (R34-35).

Accused were clearly identified as the intruders (R28, 32,36). Each, moreover, made a statement admitting his presence at the Delhommois' home at the time and place in question, the breaking of the door, the obtaining of the cognac and their unsuccessful attempt to have intercourse with the girl (Pros.Exs. 1,2 & 3). It was stipulated that First Lieutenant Benjamin Bletchman, Medical Corps, would have testified, if present in court, that an examination of Mlle. Delhommois at her home, the next day, disclosed that -

"1. There were multiple contusions and areas of ecchymosis on the lower two-thirds of the back.

2. There was an area about three inches in diameter on the posterior surface of the left arm just above the elbow showing subcutaneous hemmorrhage.

3. The labia majoris were edematous; the hyman was intact except for a small abrasion in the lower left quadrant showing evidence of fresh bleeding" (Pros.Ex.5).

Accused remained in the Delhommois' home until the following morning when the family returned with American officers (R35,43). Accuseds' presence was not detected and they departed surreptitiously without being apprehended; but shortly thereafter, between 8:30 and 9:00 o'clock, Wilson and Whitehead were found lying in a ditch by a hedgerow about a quarter of a mile away (R35,48,50). In Whitehead's pocket was found a bread knife which had been taken without permission or authority from the Delhommois' home. A little later that same morning, Key voluntarily returned to camp (R44). Two hundred francs, a watch and photograph which had been in the Delhommois' home the previous night were missing when the family returned (R15,27,36).

Accused were absent from camp without leave from the evening of 18 August 1944 to the hour of Whitehead's and Wilson's apprehension and of Key's return the following morning (R44,62).

4. No evidence was introduced on behalf of the accused, each of whom elected to remain silent, after their rights were properly explained to them (R64-66).

5. Competent uncontradicted evidence establishes commission by each accused of the three offenses with which each was charged. The absence from camp without leave and breaking into the Delhommois' home during the nighttime are admitted. Obtaining the cognac as ac-

cused did involved actual larceny, and the proof established as well their actual theft of the Delhommois' bread knife. Although not shown to have been found upon any of the accused, the proof, under the circumstances, may well be regarded as also establishing the theft by them of the money, watch and photograph which disappeared from the Delhommois' home on the night in question. Evidence of an actual larceny is competent as tending to prove an intent to steal (9 Am. Jur. par.63, p.272, "BURGLARY").

The evidence also establishes, as to Whitehead and Key, an attempt by each to rape Mlle. Theresa Delhommois. The intent was shown by their words and conduct; their respective assaults upon her constituted the requisite overt acts. In this instance, they might as well have been charged with assault with intent to rape as with attempted rape, the proof being adequate to establish either offense.

Accused Wilson was charged with assault with intent to rape. In his case, the proof shows that he was marching Mlle. Delhommois upstairs at the point of his gun, following his companion's attempts to rape her, when he fell down and she escaped. From these circumstances alone, the intent charged might well have been inferred. Moreover, Wilson's statement to the investigating officer in effect admits his intent to rape prosecutrix as the motive prompting the assault.

6. The maximum penalty for attempted rape is the maximum for the most closely related offense listed in the table of maximum punishments (MCM, 1928, par.104c), viz, assault with intent to commit rape (CM 229156, Bradford (1943, 17 B.R. p.61)). It thus appears that, for each of the accused, the maximum period of confinement at hard labor authorized for the two offenses of burglary and attempted - or, in Wilson's case, assault with intent to commit - rape, of which each was convicted, was thirty years. Each accused was also convicted of absence without leave for twelve and a half hours. Since the limit of maximum punishment has been lifted for the offense of absence without leave, the record legally sustains the sentence of life imprisonment imposed by the court on each accused.

7. The charge sheets show that accused Whitehead is 27 years of age and that, with no prior service, he was inducted at Philadelphia, Pennsylvania, 9 July 1943; that accused Key is 21 years of age and that, with no prior service, he was inducted at Fort Jackson, South Carolina, 30 July 1943; and that accused Wilson is 19 years nine months of age and that, with no prior service, he was inducted at Richmond, Virginia, 26 July 1943.

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

rights of any of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences.

9. Penitentiary confinement is authorized under Article of War 42 upon conviction of burglary, in violation of Article of War 93 (D.C. Code, sec.22-1801) and of assault with intent to commit rape, in violation of the same article (18 USC 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is authorized (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(156) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 NOV 1944 TO: Commanding General, Third United States Army, APO 403, U. S. Army.

1. In the case of Privates CHARLIE WHITEHEAD, Jr. (33789492); JERRY KEY (34840765); and HARRY L. WILSON (33644345), all of 900th Quartermaster Laundry 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 to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. Accuseds' conviction of offenses, other than absence without leave, supports 30 years of confinement at hard labor in each case. In comparison with sentences recently approved in similar cases, the difference between 30 years and life imprisonment appears excessive punishment for twelve and a half hours' absence without leave, the maximum punishment having already been imposed for the criminal conduct whereby it was aggravated. This case will be re-examined in Washington and the sentence, I believe, reduced from life imprisonment to a term of years not exceeding 35. In order to comply with instructions from the Commanding General, European Theater of Operations, with reference to uniformity of sentences, directing me to take action to forestall criticism of this theater for returning prisoners to the United States under sentences deemed there to require the exercise of immediate clemency action by the War Department, I recommend that you reconsider the sentence with a view to changing the period of confinement imposed from life to a term of years. If this be done, the signed action should be returned to this office to be filed with the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3947. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3947).

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

Confidential
~~SECRET~~

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

BOARD OF REVIEW NO. 1

4 DEC 1944

CM ETO 3948

U N I T E D S T A T E S	83D INFANTRY DIVISION
v.	Trial by GCM, convened at APO 83, U. S. Army, 25 August 1944.
Private First Class PETER PAULERCIO (42008684), Company I, 331st Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private First Class Peter Paulercio, Company I, 331st Infantry, did, at or near La Varde Peninsula, France, on or about 19 July 1944, while before the enemy, shamefully run away from his company, and did not return until apprehended by the military police.

He pleaded 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 by musketry. The reviewing authority, the Commanding General, 83d Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding

General, European Theater of Operations, confirmed the sentence, but due to unusual circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, but did not order execution of the sentence, pending action pursuant to Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. Accused's pleas of guilty to the Charge and Specification, the meaning and effect of which were explained to him by the law member (R5-6), are supported by the following clear and undisputed evidence: Early on the morning of 19 July 1944 accused was with his company during its attack upon enemy-occupied La Varde Peninsula, France (R7,14,15). Enemy counter-attacks, supported by tank, machine gun and "88" fire, forced the company to withdraw from the peninsula. Many men and all but one officer were casulties as a result of the counter-attacks, and a count revealed only 34 men left in the company (R7,9,10,13). Accused was not among these 34 men (R8,10) and was not seen following the counter-attacks until later in the day when he and another soldier named Krasula were seen walking toward the rear near the battalion aid station, about 1000 yards to the rear of the company (R11-12,13,15). Asked by the company communications sergeant what they were doing back there, they shrugged their shoulders and continued walking (R16). Accused's unauthorized absence from his company (R9) continued until on or about 1 August (R12, 16,17; Pros.Ex.1), at which time he was apprehended by military police near Normandy Beach and returned (R17,18).

Accused's prior character was good (R8-9, as was his conduct when in contact with the enemy (R9-10). He was a good soldier, a "regular fellow" and was popular (R12). His physical condition was apparently normal (R17).

4. After his rights were explained to him, accused elected to remain silent and no evidence was introduced for the defense (R18).

5. The pleas of guilty were fully supported by evidence that accused at the time and place alleged, while before the enemy, shamefully ran away from his company and did not return until his apprehension almost two weeks later. Both elements of the offense in violation of Article of War 75 were established (CM ETO 3196, Puleio, and authorities there cited; CM ETO 4095, Delre).

6. (a) The trial judge advocate was appointed by order of the appointing authority (par.1, SO 165, Hq. 83d Inf. Div.) dated 23 August 1944, on which day the former served a copy of the charges on accused. The charges were not referred to him for trial, however, until 24 August 1944. There is no mandatory requirement, either in Article of War 70 or Manual for Courts-Martial, 1928 (par.41e), p.32), that the service of

charges upon an accused be accomplished by a trial judge advocate to whom the charges have previously been referred for trial. The irregularity was not jurisdictional and in fact operated in accused's favor in that it afforded him an additional day in which to prepare his defense. Under the circumstances, it cannot be deemed to have injuriously affected his substantial rights within the purview of Article of War 37.

(b) The record shows (R2) that the trial took place only two days after the charges were served on accused. In the absence of objection and of indication that any of accused's substantial rights were prejudiced, the irregularity, if any, may be regarded as harmless (CM ETO 4095, Delre, and authorities there cited).

(c) Major Norman P. Cowden, Assistant Adjutant General of the 83d Infantry Division, by command of the division commander, referred the case to the trial judge advocate for trial. Major Cowden was appointed and sat as a member of the court herein. This was an administrative act and in the absence of challenge (R3) and of indication of injury to any of accused's substantial rights, this irregularity also may be regarded as harmless (Ibid.).

7. The charge sheet shows that accused is 19 years three months of age and was inducted 7 August 1943 at Newark, New Jersey. No prior service is shown.

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

9. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

(150) ~~SECRET~~

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class PETER PAULERCIO (42008684), Company I, 331st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support 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 such 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 3948. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3948).

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

(Sentence as commuted ordered executed. GCMO 126, ETO, 11 Dec 1944)

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

BOARD OF REVIEW NO. 1

8 DEC 1944

CM ETO 3957

U N I T E D S T A T E S v. Private First Class CHARLES C. BARNECLO (15060095), Headquarters Detachment, Army Exchange Service	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Plymouth, Devonshire, England, 28 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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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 Charles C. Barneclo, Headquarters Detachment, Army Exchange Service, Southern Base Section, did, at Torpoint, Cornwall, England, on or about 16 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private William G. Ledbetter, a human being by shooting him with a pistol.

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

at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, successor in command, 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. Prosecution's evidence summarizes as follows:

On and prior to 16 June 1944 there was located at Torpoint, Cornwall, England, a large warehouse of the Army Exchange Service (R13; Pros.Ex.H). The accused and the deceased, Private William G. Ledbetter, were at that time members of the military detail serving at said warehouse (R9,19).

William Richard Ackland, an English civilian whose address was 42 West Street, Millbrook, Cornwall, England, was on said date employed as a stationary fireman at the installation (R7). After identifying accused and stating that he saw him on the evening of 16 June 1944, Ackland testified as follows:

> "The first thing that happened, a fellow that we call 'Bill', the deceased, and I was sitting at the table having a cup of tea just after 4:00 o'clock and he came around the corner with a handfull of money, so he said, first when he came in, he said, 'Will you count this out, for me.' So, I counted it out. He had eight (8) pounds in his hand. He snatched it up again and he went off in a temper, the man was drunk I think myself. He snatched it up with his hand, and I said, 'You have eight (8) pounds.' I said, 'Eight (8) pounds.' He said 'the dirty swine' or something like that. He passed out of the room; I didn't see any more of the man after that, not until I had heard some crying, someone was crying and sobbing, so I heard this crying and sobbing, so I looked out of the window, there was no glass there, but it was what we call a window and I seen this young gentlemen here, (Indicating the accused) and Bill sitting down together, and both went into the canteen and that is all I know about that. But, when I was just going to tend to my boiler, at the same time I tended my boiler I heard a report, I took it to be a back report from an engine or a motor

bike. Just as I got back in my dining hall again I seen this young gentlemen (Indicating the accused) come out of the canteen and I didn't see any more of the gentlemen again for about an hour afterwards when I was ready to go off my watch and ready for my relief to come. I heard some groaning in the canteen so I went towards the door and I seen the man that got killed; I seen his hat and his pipe lighter on the ground, so I picked that up and put it on the table in my boiler room. And, I said to my relief, 'Will you give that to Bill, cause he will be looking for them.' I left the items with my relief. Shortly after that, about a couple of seconds or so, I still heard these groans in the canteen so I just took a walk inside the door and I went to the man that was lying down. I said, 'Bill what is the matter.' I didn't get no answer. All of his trousers were down and he made a terrible mess. I walked out and left him. That is all" (R7).

When accused came out of the canteen he looked at the witness

"and he motioned me to be still, to keep quiet".

(Ackland held his finger over his mouth as the sign of silence) (R8). The money which deceased brought to Ackland was in the form of three complete notes and the remaining notes were torn in two pieces. About five minutes elapsed between the time accused and deceased went into the canteen and the noise which witness believed was the "back fire" of a motor. Ackland entered the canteen about an hour later (R8). He saw the deceased on the floor of the canteen immediately prior to 7:00 pm. Accused appeared and motioned to Ackland about three minutes after the "back fire" sound was heard (R9).

First Lieutenant Christopher A. Doose, Corps of Military Police and Commanding Officer of 4th C.I.S. (R9), questioned accused on 17 June 1944 and after warning him of his rights obtained from him a written statement of which the following excerpt is pertinent:

"On June 16, 1944, at approximately 1200 noon, Cpl. Grady, PVT Ledbetter and I went to G75 to unload a truck of empty cookie tins.

We stopped at a Pub in Plymouth and drank 10 or 12 Gins apiece. I bought two quarts of scotch and some small bottles of brandy. We left the pub at two oclock, as it closed at this time.

We then went to G75, emptied the cookie tins and returned to H.M.S. Raleigh. About 4 PM I was so drunk I dont remember the time, nor do I remember the return trip to H.M.S. Raleigh.

I then entered the P.X. with PVT Ledbetter and Cpl Grady. We had some Whiskey and I offered it to some of the boys.

I next remember starting to shoot dice with PVT. Bill Ledbetter. We were having a misunderstanding about the way the game was running. I remember losing $6 or approximately that much to PVT Ledbetter in approximately 30 minutes time. I do not remember shooting any longer than that. I do not remember what time this was.

The whole time that we were shooting we were arguing. PVT Ledbetter at the end of this time got mad and took after me and said if he caught me he would kill me. I ran back to the club room in the P.X. and he ran after me. He had told me once before he was going to kill me or cut me up with a knife. I ran over by the big sliding doors in the club room turned around and shot him. I shot him once and he fell. I then walked outside and put the gun in a bush. I dont rember what I did with the ammunition and empty cartridge.

I then came back in and I saw PVT. Ledbetter lying on the floor and my senses started to coming back to me. I walked up and asked him what he wanted. He said you get a doctor. I started after a Doctor got sick and went in the back room of the P.X. laid down and passed out.

I was shown a 32 automatic on the afternoon of June 17, 1944 and identified it as my gun" (R10; Pros.Ex.A).

Lieutenant Doose testified that he made no promises of reward or immunity to accused nor did he threaten him prior to obtaining the statement which was admitted in evidence without objection by defense (R10).

On the morning of 17 June witness found a revolver in the middle of bushes immediately outside of the door of the "PX" where the body of

deceased was found. The revolver was shown by witness to the accused who

> "identified the pistol as the gun that he had bought from the soldier from the First Army that returned from Italy, and he also stated that that was the gun with which he killed Private Ledbetter" (R10).

The revolver, described as "an Italian Revolver, P.Baretta, .32 caliber", was without objection admitted in evidence as Pros.Ex.B (R10-11). Lieutenant Doose also identified an empty shell which would fit Pros.Ex.B which was found at daylight on 17 June by witness "against the curb stone" across the street from the doorway of the "PX". Without objection it was admitted in evidence as Pros.Ex.C (R11). Pros.Ex.D, a photograph taken under direction of the witness, showing the exterior of the post exchange building was admitted in evidence without objection (R11-12). Pros.Ex.E, a loaded .32 cartridge found outside of the "PX" approximately 10 yards from the empty cartridge case (Pros.Ex.C), and Pros.Ex.F, a loaded .32 caliber cartridge found against the curb five feet from the "PX" door, were also admitted in evidence without objection (R12). The locations of Pros.Exs.C, E and F when found were marked on Pros.Ex.D by the witness (R12).

Pros.Ex.G was a photograph of the Italian pistol (Pros.Ex.B) as it lay in the bushes upon discovery and before being touched. The photograph was admitted in evidence without objection (R12-13). Pros. Ex.H was also a photograph of the exterior of the "PX" wherein Ledbetter was found dead. The witness marked thereon the letter "A" to indicate the section of the building in which deceased's body was found and the letter "B" to indicate where the Italian pistol (Pros.Ex.B) was discovered. Pros.Ex.H was admitted in evidence without objection (R13). All of the photographs were taken by or under the direction of Lieutenant Doose and identified by him (R11-13).

Captain Joseph M. Gannon, Medical Corps, 141st General Hospital, performed an autopsy upon the body of deceased on 17 June. Based on this post-morten examination, Captain Gannon testified:

> "Private Ledbetter had been killed by a through and through bullet wound of the abdomen. The missile had passed through his abdomen and through his mesentery; with a result that Private Ledbetter had bled to death. That is the cause of death, internal hemorrhage as the result of a through and through wound of the abdomen. * * * The wound, the entrance and exit was such to give the impression that it was caused by a bullet of such caliber /.32 caliber/" (R15).

(1tc)

4. For the defense the following evidence was submitted:

(a) It was stipulated by and between the Prosecution and Defense, accused consenting, that if Private Edwin J. Greene, Headquarters Detachment, Army Exchange Service, were present in court he would testify as set forth in the stipulation. Pertinent parts of his statement are as follows:

"On 16 June 1944, at about 1600 at the PX H.M.S. Raleigh, I saw Barneclo, Ledbetter and Grady come in the back, come in the back door. Barneclo and Ledbetter were very drunk and stumbling. * * * Ledbetter had a quart of whiskey in his hand about 2/3 full and he asked me to have a drink. I took a drink.

* * * * * * * * * *

At about 1630, Ledbetter borrowed £2 from T/5 Ryan and turned around to Barneclo and said, 'Let's shoot dice.' Barneclo got a pair of dice from Fillicaro and they started shooting. Ledbetter started shooting laying down £1 and two torn pieces. Barneclo covered it with £3. They were so drunk they couldn't stand.

They immediately started arguing in drunken talk. Barneclo told Ledbetter he owed him £11 which he had previously borrowed. It looked as though Barneclo was fading his own money but was so drunk he could not count.

I could not figure out how they were shooting. I only saw Barneclo shoot once and he lost £2. During the rest of the time Ledbetter had the dice shooting. There were a lot of torn bills on the floor and there looked to be £8 or £10 but it was hard to tell because there were so many torn pieces. During all this time they were arguing. Ledbetter would forget his point and claim it was one number and pick up the money and Barneclo would say it wasn't, it was another.

At 1655, Ryan, Higby, Stolinski, Fillicaro and I went to eat. Ledbetter and Barneclo were still shooting dice in the front room of the P.X. leaning against the counter and shooting on the floor.

While Ledbetter was accusing Simmons of being a mother's boy, Barneclo drew his gun, and Italian make, size.32 and pointed it at Simmons and told

him that he squealed on him and if he got up out of the chair, he would let him have it. Ledbetter turned around and jerked the gun out of Barneclo's hand and said he wanted to shoot it. Barneclo ran out of the room then came back. Ledbetter walked 10 feet to the corner and pointed it at the corner and tried to shoot it. The safety was on and he couldn't get it off. He ejected several shells trying to shoot it by pulling the slide back. It looked like 5 or 6 shells fell out and the slide stayed open. Barneclo put the rounds in his pocket and the gun in his hip pocket. Barneclo pulled the gun out of his pocket 3 or 4 times trying to get the slide back.

After they started shooting dice, Ledbetter got a six for a point and 3 or 4 rolls later made the six. Barneclo said 9 was his point. I said, 'No' 6 was.' He pulled the gun and pointed it at me and said, 'You lied to me you dirty son of a bitch.' The gun was empty at the time.

I returned from chow at 1730. Between 1730 and 1735. I heard Ledbetter in the large room adjoining, groaning, moaning and talking. I couldn't understand what he was saying but I recognized his voice. I didn't pay any attention I thought he was sick.

About 1850, Sergeant Lekki came in and said, 'You should see Bill in the next room, he has shit all over his self.' I then went back after a pack of cigarettes and I thought I would take a look at him. I didn't know he was dead. I went back to the store and told the men to go take a look at him. Stokinski and Ryan started back and as they started to go Sergeant Lekki came in and said Ledbetter was dead.

The first time I looked at Ledbetter when I went for my cigarettes I decided to see about Barneclo. I went outside and looked in his truck. I then went on the outside and went in the back door and found Barneclo asleep on the davenport in the writing room. He had vomitted on the floor and I didn't bother him. I then went back outside and went up front.

* * * * * * * * * *

I next saw the O.D. and some guards bring Barneclo from the next room as he came by where Ledbetter was lying, he kind of stopped and looked and then went on" (R16-17).

(168)

(b) It was stipulated between Prosecution and Defense, accused consenting, that if Second Lieutenant William C. Nabors, Headquarters Detachment, Army Exchange Service, were present in court (R17) he would testify as follows (only pertinent parts of the statement are given):

"At about 1600, 16 June 1944, I saw the two men, Private Ledbetter and Private First Class Barneclo. They both came into the front room of the P.X. intoxicated and I went and told Sergeant Lekki to restrict both of them to the barracks. I then went to the front of the room, and Private Ledbetter wanted a pass to go to Penzance, and I refused him the pass because of his intoxicated condition. Pfc. Barneclo offered me a drink from a small nip bottle, and I refused it at first, but he was insistent and in order to calm him down, I took a nip. He talked and talked nonsense, and since he was intoxicated I told him he had better go to bed and I would see him in the morning. Then I walked out the door and locked it as I went out. It was between 1600 and 1630 at that time.

* * * * * * * * *

At about 2130 or 2145, I returned to the Post with two M.P's who had instructions to look for me. At that time the only information I had was that one of my men had been killed.

I came to the Provost Marshall's office, but due to the fact that no officer was there, I went to the P.X. where I found two M.P. Officers questioning my men. I saw Private Ledbetter's body lying on the floor in the big room behind the P.X.

I positively identify an automatic piston (P. Beretta Caliber .9 CCRTC-MO 1934-Brevoato GARDCNE V.T 1938-XVI) shown to me, as the property of Pfc. Barneclo. About two or three weeks ago, here on this post, I walked in unexpectedly into my orderly room and saw Pfc. Barneclo cleaning and trying to repair the weapon. As far as I could see he had it dismantled. I asked him who the gun belonged to, and he replied 'It belongs to me.' He told me he had bought it. I told him he was going to get into trouble with the gun and to get rid of it. I did not stay to get an answer, and walked out. That was the last I heard about Pfc. Barneclo's gun until after the body was discovered" (R18).

(c) It was stipulated between Prosecution and Defense, accused consenting, that if Technician Fifth Grade Patrick E. Grady, Headquarters Detachment, Army Exchange Service, were present in court (R18) he would testify as follows:

"Sergeant Lekki assigned Pfc. Barneclo and myself to go to G-75 with some empty Cookie cans (PEG), at about 11:45 AM, on 16 June 1944. Private Ledbetter asked if he could come along with us. We told him to see the Sergeant. At about 12:15 PM, Ledbetter, Barneclo and myself left for G-75 in the Mobile Canteen 6x6 truck, driven by Barneclo. We stopped at the Oporto Pub in Plymouth and Ledbetter and I had 2 gins and a bottle of Bass Ale, apiece. While we were at the bar, Ledbetter said, 'My bear is raising hell, today.' I went out after we had drunk and got Barneclo to come in. He did and each of us drank six or eight gins apiece. Pfc. Barneclo bought 2 qts of Scotch and 2 small nips of brandy. We left the pub about 2 PM. We went to G-75 and stopped either coming or going around Drake's Circus to see Ledbetter's girl. She was busy and we left immediately.

We returned home about 4 PM. I went in and went to sleep. I didn't know any more until Private Green woke me about 7:30 PM and told me Ledbetter was dead.

There was no argument between them while I was along and I saw no gun.

We drank one quart of Scotch on the way to and from G-75. Barneclo paid for the drinks. He won quite a lot of money in the past, about £70 or £80. Pvt. Ledbetter was not the type to let another guy pay for his drinks" (R19).

(d) Accused elected to be sworn and testified in his own behalf (R19) as follows:

"Around the 16th of June, Corporal Grady and I was detailed to take the Cookie cans to G-75. As we was getting ready to go, Bill said, he was going along with us. We started out for G-75 and on the way to G-75 we stopped at a pub and Corporal Grady and Private Ledbetter went into the pub and returned. They later returned, came back for me and wanted me to get a few nips, and a little brandy.

* * * * * * * * *

* * * * * * * * *

For the boys back in the P.X.

* * * * * * * * *

Because they were allowed only two (2) to a person. I drank a beer and then had a couple of gins and stayed there and drank 10 to 12 gins. Then I bought two (2) quarts of Whiskey and a couple of nips of brandy, and we started to go on to G-75. And, on the way we stopped at a beauty parlor where Ledbetter's girl works. We was only there a minute and then went on to G-75 to unload the cookie tins. We were right at G-75 and unloaded the cookie tins. And, that is all about I remember. I don't remember coming back to camp at all.

* * * * * * * * *

Yes, I remember Bill Ledbetter and me was gambling; there seemed to be some argument about the game, some way or the other. I can't remember.

* * * * * * * * *

I was just so drunk, I don't remember what was going on.

* * * * * * * * *

Yes, Bill seemed like he was very angry about something. He jumped at me and told me he was going to kill me and I started to run from him and ran out through the long hall. He continued to chase me and hollering all the time. Then the gun went off, I don't remember much more than that.

* * * * * * * * *

The next thing I remember, was seeing Bill lying on the floor and I said, 'Bill, whats the matter, what can I do for you.' He said, 'Get me a doctor.'

* * * * * * * * *

Seems like I started out for the doctor, that is all I remember until somebody came and woke me up" (R20-21).

Accused further testified that he did not take the gun to "G-75"; that he kept it unloaded under the pillow on his bed or in his ditty bag or trunk locker. He did not remember how or when he came into possession of the gun on 16 June 1944. When deceased chased accused in the "PX", he did not know whether deceased had a weapon or not, nor did he remember how close deceased was to him when he shot him (R21). Deceased ran after accused down the hall. Accused was afraid of him

"Because he has always been a fighting man. Once he came in drunk and he was mad and he seemed to be mad at everybody * * * He told me he would cut me up, once" (R22).

Deceased made the threat "to cut me up" about a week prior to the shooting (R22). It was a direct threat made by deceased to accused alone (R23). When accused ran down the hall the threat

"did seem to pop into my head. Something like that" (R22).

5. At the time accused's statement (Pros.Ex.A) was admitted in evidence the prosecution had not made proof of the corpus delicti. Ackland's oblique statements as to "the man that got killed" did not constitute such proof. The following quotation from the Manual for Courts-Martial is applicable:

"An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. Usually such evidence is introduced before evidence of the confession; but a court may, in its discretion, admit the confession in evidence upon condition that it will be stricken out and disregarded in the event that the above requirement as to evidence of the corpus delicti is not met later. This evidence of the corpus delicti need not be sufficient of itself to convince beyond 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. Examples: If unlawful homicide is charged, evidence of the death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession if otherwise admissible" (MCM, 1928, par.114, p.115).

Subsequently to the admission of the statement the prosecution produced proof that Ledbetter had died as a result of a "through and through" abdominal wound inflicted by a foreign object which might have been a .32 caliber bullet; that accused owned a revolver which fired such bullet;

and that the revolver was found the morning following the shooting of deceased hidden in bushes immediately exterior to the "PX" warehouse. This evidence when taken with Ackland's testimony to the effect that accused and deceased were together at the scene of the homicide immediately preceding the discharge of a fire-arm, that soon thereafter accused was seen by Ackland leaving the warehouse, that accused made a sign of silence to Ackland as he left and that about an hour later Ackland saw deceased on the floor of the warehouse in a wounded condition established Ledbetter's death and was evidence which fully supported the inference that his death was caused by unlawful means. The use of accused's statement (Pros.Ex.A) was therefore proper (Cf: CM ETO 2185, Nelson). The prosecution supplied the preliminary proof necessary for the admission of the statement before it closed its case in chief. Hence any irregularities in order of proof were cured (16 CJ, sec.1514, p.737).

6. The homicide and the fact that accused caused the same were proved beyond reasonable doubt. The problem for solution is whether the homicide was unlawful and if so the grade of the offense. Accused was convicted of the crime of murder. The important element of murder, to wit, "malice aforethought" has been analyzed by authorities as follows:

> "The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent essential to the commission of crime. When used, however, in connection with the word 'aforethought' or 'prepense', in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, 'a heart regardless of social duty, and fatally bent upon mischief'. The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either 'express' or 'implied'; express, where the intent, - as manifested by previous enmity thereto, the absence of any or of sufficient provocation, etc.--is to take the life of the particular person killed, or, since a specific purpose to kill is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death; implied, where the intent is to commit a felonious or

unlawful act but not to kill or injure the particular person * * *" (Winthrop's Military Law and Precedents - Reprint, sec.1041; pp.672-673).

"Malice or malice aforethought is the element which distinguishes murder at common law and, commonly, under the statutes defining murder, from other grades of homicides * * *" (29 CJ, sec.60, p.1084).

The distinction between murder and voluntary manslaughter is stated as follows:

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law, 12th Ed., sec.423, p.640).

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary " (MCM, 1928, sec.149, p.165).

"At common law a killing ensuing from sudden transport of passion or heat of blood, if upon sudden combat, was also manslaughter, and the statutory definition of voluntary manslaughter has in some jurisdictions been made expressly to include a killing without malice in a sudden affray. However, a sudden combat is ordinarily considered upon the same footing as other provocations operating to create such passion as temporarily to unseat the judgment" (29 CJ, sec.115b, p.1128).

"The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which

> separates the two crimes of murder and manslaughter" (Stevenson v. United States, 162 U.S. 313,320; 40 L.Ed., 980,983) (Cf: Wallace v. United States, 162 U.S. 466, 40 L.Ed., 1039; Brown v. United States, 159 U.S. 100, 40 L.Ed. 90).

This case is unique in that the proof of the specific circumstances surrounding the homicide is almost entirely dependent upon accused's own testimony and extra-judicial statement. There was no eye witness to the events immediately preceding the shooting nor to the killing. Accused's extra-judicial statement contains this pertinent recital:

> "The whole time that we were shooting /dice/ we were arguing. Pvt. Ledbetter at the end of this time got mad and took after me and said if he caught me he would kill me. * * * I ran over by the big sliding doors in the Club room turned around and shot him. I shot him once and he fell. I then walked outside and put the gun in the bush" (Pros.Ex.A).

As a witness in his own behalf accused testified:

> "Yes, I remember Bill Ledbetter and me was gambling. There seemed to be some argument about the game, some way or other. I can't remember * * * I was just so drunk, I don't remember what was going on * * * Yes, Bill seemed like he was very angry about something. He jumped at me and told me he was going to kill me and I started to run from him and ran out through the long hall. He continued to chase me and hollering all the time. Then the gun went off. I don't remember more than that * * * The next thing I remember, was seeing Bill lying on the floor and I said, 'Bill, whats the matter, what can I do for you.' He said, 'Get me a doctor.' * * * Seems like I started out for the doctor, that is all I remember until somebody came and woke me up" (R20,21).

Accused further testified as a witness in his own behalf that when deceased chased him down the hall he was afraid deceased was going to hurt him

> "Because he has always been a fighting man. Once he came in drunk and he was mad and he seemed to be mad at everybody * * * He told me he would cut me up, once * * * About a week before" (R22).

Further accused asserted that as deceased chased him down the hall the remembrance of this threat "did seem to pop into my head. Something like that" (R22).

Accused's assertion that the dice game resulted in a dispute between him and deceased appears to be corroborated by Ackland's testimony that deceased came to him and asked him to count some English currency he held in his hand and upon being informed he had eight pounds "he snatched it up again and he went off in a temper * * * and * * * said 'the dirty swine' or something like that". Thereafter Ackland saw accused and deceased "sit down together" and there was "crying and sobbing". They soon went into the canteen and about five minutes later Ackland heard the "back fire" - which was undoubtedly the revolver shot. The evidence is clear and decisive on the point that both men were at this time intoxicated to a deplorable degree. They were obviously "crying drunk". The amount of alcohol consumed by them during the afternoon is in itself cogent evidence of their extreme inebriation. All witnesses who saw them after their return to the warehouse and in the early stages of the dice game are unanimous in declaring both of them intoxicated to the extent that their physical and mental powers and faculties were clouded and impaired and that they were in a maudlin condition.

The foregoing is relevant and material in determining whether accused was motivated by "malice aforethought" when he shot Ledbetter. The determination of this ultimate fact involves the pertinent question whether the overall evidence justified the court in concluding that such malice existed or whether the evidence and all legitimate inferences therefrom lead to the conclusion that accused's deliberative faculties and powers of reasoning (e.g.: his ability to premeditate Ledbetter's death) had been dethroned and replaced by fear or passion when he fired the fatal shot.

Accused's version of the homicide stands uncontradicted. There was no other eye witness. Considering his extreme intoxication, with resultant unbalanced physical and mental powers, it is almost impossible to conceive accused at the time he discharged the revolver as a cold-blooded killer. Rather a fair and just conclusion is that he acted in a frantic, hysterical and wholly erratic manner under the heat of passion and fear and that no deliberation or premeditation were involved in his mental process.

However this determination alone will not serve to reduce the homicide from murder to manslaughter.

> "Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been adequate provocation" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.655-656).

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Here again accused's version of the homicide is the only evidence:

> "He jumped at me and told me he was going to kill me and I started to run from him * * * He continued to chase me and hollering all the time".

Accused's extra-judicial statement (Pros.Ex.A) is wholly consistent with the above testimony given by accused on the witness stand. In the statement accused said:

> "Ledbetter at the end of this time got mad and took after me and said if he caught me he would kill me".

This evidence when considered in connection with the prior threat of deceased to "cut up" accused and the fact that deceased had "always been a fighting man" (Cf: 1 Wharton's Criminal Evidence, 11th Ed., sec.286, p.373) supplied the necessary element of provocation (Jerry Wallace v. United States, 162 U.S. 466, 40 L.Ed.1039).

The prosecution introduced no evidence either in denial or qualification of accused's evidence as to the facts and circumstances surrounding the actual homicide. The Board of Review acts upon the record as presented to it. It neither weighs the evidence nor reconciles conflicts therein. Where the uncontradicted evidence supports but one legal conclusion the Board is exercising its proper powers and functions and is only performing its duty in declaring such fact (CM 212505, Tipton, 10 B.R. 237; CM ETO 82, McKenzie; CM ETO 1414, Ellis). The instant case requires such determination. The Board of Review is of the opinion that accused was guilty of the crime of voluntary manslaughter and not murder (CM ETO 72, Jacobs and Farley; CM ETO 82, McKenzie, supra; CM ETO 506, Bryson; CM ETO 3639, McAbee).

7. An ancillary question arises whether accused killed deceased in self defense.

> "A man may oppose force to force in defense of himself * * * Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defense of the person will be justified where the circumstances are such as to warrant the conviction that danger to life or severe bodily harm is threatened and immediately impending" (Winthrop's Military Law and Precedents - Reprint, p.674).

The evidence justifies the conclusion that accused was activated by fear of violence when he ran from deceased, but there is a complete hiatus in

the evidence as to the position of the two men when accused discharged the fatal shot.

> "I ran over by the big sliding doors in the Club room turned around and shot him" (Pros.Ex.A).

This is the only evidence as to deceased's position. It implies he was distant from accused. There is nothing in the evidence that supports the inference that accused was attacked by deceased or in danger or that accused was not in a position to retreat further. Under such condition of the evidence the Board of Review is unable to discover the necessity for accused's use of violence to protect himself and hence the court was justified in finding against accused on this issue (Cf: CM ETO 1941, Battles; CM ETO 3180, Porter; CM ETO 3932, Kluxdal).

8. The charge sheet shows accused to be 25 years of age. He enlisted at Fort Benjamin Harrison, Indiana, 22 October 1940 to serve for three years. His service is governed by the Service Extension Act, 1941. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. 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 only so much of the findings of guilty as finds the accused guilty of voluntary manslaughter in violation of Article of War 93 and only so much of the sentence as includes dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

10. Confinement in a penitentiary is authorized upon conviction of the crime of voluntary manslaughter by Article of War 42 and Sec.275, Federal Criminal Code (18 USCA 454). Inasmuch as the sentence included confinement at hard labor for ten years and accused is under the age of 31 years, the proper place of confinement is the Federal Reformatory, Chillicothe, Ohio (Cir.229, WD, 8 June 1944, sec.II, par.1a(1),3a).

_____ Judge Advocate

Ellwood W. Seegers Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 DEC 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413.

1. In the case of Private First Class CHARLES C. BARNECLO (15060095), Headquarters Detachment, Army Exchange Service, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as finds the accused guilty of voluntary manslaughter in violation of Article of War 93 and only so much of the sentence as includes dishonorable discharge, total forfeitures and confinement at hard labor for ten years, which holding is hereby approved. The Federal Reformatory, Chillicothe, Ohio, should be designated as the place of confinement. Under the provisions of Article of War 50½, you will then have authority to order execution of the sentence as thus modified.

2. The publication of the general court-martial order may be accomplished by you as the successor in command to the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, and as officer commanding for the time being as provided by Article of War 46.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3957. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3957).

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

CONFIDENTIAL

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

BOARD OF REVIEW NO. 2

8 NOV 1944

CM ETO 3963

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ALVAN J. NELSON, Jr. (33070760), Headquarters Company, 156th Infantry.	Trial by GCM, convened at Fremington, Devonshire, England, 16 August 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Alvan J. Nelson, Junior, Headquarters Company, 156th Infantry, did, at Woolacombe, North Devonshire, England, on or about 20 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Swindon, Wiltshire, England, on or about 12 July 1944.

He pleaded not guilty to and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to be-

come due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved only so much of the findings as involved termination of the desertion on July 12, 1944 (manner not shown), approved the sentence but reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution showed, through the testimony of the First Sergeant of accused's organization and by the introduction of a duly authenticated copy of the company morning report, that accused absented himself without leave from his organization on 20 December 1944 and remained absent for a period of approximately six and one-half months (R8,9,10; Pros.Ex.B).

4. In explanation of his absence, accused made an unsworn statement in which he recited that his left hand was bad and that as a result of such disability he was unable effectively to use a rifle (R11). He therefore felt that he would be unable to perform adequately in combat and as a result his rifle "became an obsession" with him (R11). He also stated that the day of his departure was "an awful day" due to the fact that there had been a training accident in which "over fifty fellows" had lost their lives (R11). He further asserted that he did not remember leaving and stated that "I knew nothing at the time; I only went to sleep" (R11). He admitted that he had gone to Swindon and that he had there been apprehended (R11).

5. Although the recitals contained in accused's statement, if true, may serve in some measure to mitigate the seriousness of the offense charged, they do not afford an explanation of an absence of more than six months and in fact, are not only consistent with but indicative of an intent not to return. In view of the prolonged absence, which accused admitted was terminated by apprehension, the court was justified in inferring that accused intended permanently to absent himself from the military service (CM ETO 1629, O'Donnell; MCM, 1928, par.130, pp.143-144).

6. At the arraignment, defense counsel moved that an inquiry be made into the sanity of the accused. The motion was denied. In making the motion, the defense counsel did not assert either that accused was mentally irresponsible at the time of the commission of the alleged offense or that he had insufficient mental capacity to understand the nature of the proceedings or intelligently to conduct or to co-operate in his defense. Rather, he merely stated that, in his opinion, accused was "a psycho case" and that he "should have a psycho expert to determine his condition" (R7). The court was empowered to constitute itself the

judge of the extent to which the burden of inquiring into the mental condition of the accused had been imposed upon it by the representation of defense counsel (CM 193543, Kazmaier). Insofar as can be gathered from the record, accused made his unsworn statement in an intelligent manner and the court, in addition, had the opportunity of observing the actions and demeanor of the accused at the trial. The question of the sanity of the accused was one for the court to determine and it does not appear the court abused its discretion in reaching its decision. There was no error in denying the motion (CM 124538, Dig.Ops. JAG, 1912-40, sec.395(36)).

7. The charge sheet shows that accused is 25 years three months of age. He was inducted at Camp Lee, Virginia, on 10 June 1941, 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.

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private ALVAN J. NELSON, Jr. (33070760), Headquarters Company, 156th 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. In view of the testimony about accused's crippled hand and counsel's reference to his mental state, it is suggested that the execution of the dishonorable discharge be suspended, in order that further inquiry may be made in the interests of justice, before final discharge.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3963. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3963).

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

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

BOARD OF REVIEW NO. 2

25 NOV 1944

CM ETO 3964

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private RAYMOND LAWRENCE (34073418), Company A, 383 Engineer Battalion (Separate).	Trial by GCM, convened at Dorchester, Dorsetshire, England, 6 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Raymond Lawrence, Company A, 383 Engineer Battalion (Separate) did, near West Knighton, Dorsetshire, England, on or about 11 July 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Douglas Reginald Bryan Davis, a male human being.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial, for wrongfully accosting a section officer who was then in the execution of her office, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations (successor

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command) approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. On behalf of the prosecution, Douglas Davis, a fourteen year old English boy, testified that about 10:30 a.m., on July 11, 1944, while he was riding his bicycle home from a dance, a colored American soldier stopped him, opened his pants over his protest, and sucked his penis. When he started to cry the soldier went away (R7-10).

Two identification parades were held at accused's camp following the offense, at the second of which Davis positively identified accused as the assailant (R8,14,17,18). He also identified him in court (R8).

4. The accused declined to take the stand as a witness, after being fully informed of his rights by the court. Lieutenants Wells and Patterson, officers of accused's organization, and Davis, the victim, were recalled by the defense as witnesses on behalf of accused. Wells testified that at the first identification parade, consisting of a line-up of thirty soldiers, including accused, Davis "walked up and down the line and said he (accused) was not in the line" (R17). Patterson testified that the thirty men were all different shades of color and that Davis "pointed out one man who was extremely dark and said he would be about the color of the man who attacked him". This man, according to Patterson was "much darker than Lawrence" (R19). Davis testified that he was "positive" accused was not present at the first identification parade (R21).

5. A question of fact as to the identity of accused was raised by the record of trial. The testimony concerning accused's identity was definite and convincing, although he was not observed or pointed out at the first identification parade held. The court heard the evidence, viewed the witnesses and found accused guilty of the offense charged. There is substantial evidence in the record to sustain the finding of the court. Such findings, as to matters of fact, when supported by substantial evidence, are final and should not be disturbed upon appellate review (CM ETO 492, Lewis; CM ETO 832, Waite; CM ETO 1360, Poe).

> "Sodomy consists of sexual connection * * * by rectum or by mouth, by a man with a human being" (MCM, 1928, par.149k, p.177).

Sodomy per os is condemned by Article of War 93 (CM ETO 24, White; CM ETO 339, Gage; CM ETO 1743, Penson).

Another question of importance is presented by this record. The court before which accused was arraigned and tried on 6 September 1944 was appointed by the Commanding General, Southern Base Section,

Communications Zone, European Theater of Operations, on 12 August 1944. Southern Base Section was dissolved as of 0001 hours, 1 September 1944 and United Kingdom Base, Communications Zone, European Theater of Operations, was activated at the same time and on the same date (GO 42, 31 Aug. 1944, Hq. Com. Z, ETOUSA). Legally constituted courts of the Southern Base Section were absorbed by and became an instrumentality of United Kingdom Base. The jurisdiction of the court before which accused was arraigned and tried is therefore sustained (CM ETO 4054, Carey, et.al.).

6. The charge sheet shows that accused is 29 years of age. He was inducted at Camp Livingstone, Louisiana, 18 April 1941. No prior service is shown.

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

8. Confinement in a penitentiary is authorized for the offense of sodomy (AW 42; D.C. Code, title 22, sec.107; par.90a, p.81, MCM, 1928). As accused is under 31 years of age and the sentence is for not more than 10 years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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CONFIDENTIAL

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private RAYMOND LAWRENCE (34073418), Company A, 383 Engineer Battalion (Separate), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 CM ETO 3964. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3964).

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

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

BOARD OF REVIEW NO. 1

28 OCT 1944

CM ETO 3966

UNITED STATES	THIRD UNITED STATES ARMY
v.	Trial by GCM, convened at Chambon, France, 2 September 1944. Sentence: Dismissal.
Major CLAIR A. BUCK (O-473943), Medical Corps, 69th Medical Group.	

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

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

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

CHARGE I: Violation of the 95th Article of War.
Specification 1: In that Major Clair A. Buck, 69th Medical Group, then commanding the 54th Field Hospital, was, on or about 15 April 1944, while on a train en route from Fort Bragg, North Carolina, to Camp Kilmer, New Jersey, grossly drunk and conspicuously disorderly, in the presence of officers and nurses of his command.
Specification 2: (Nolle prosequi).

CHARGE II: Violation of the 85th Article of War.
Specification: In that Major Clair A. Buck, 69th Medical Group, then commanding the 54th Field Hospital, was, at Camp Kilmer, New Jersey, from on or about 17 April 1944

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to about 19 April 1944, drunk while on duty as commanding officer of the 54th Field Hospital.

CHARGE III: Violation of the 96th Article of War. (Nolle prosequi).
Specification 1: (Nolle prosequi).
Specification 2: (Nolle prosequi).
Specification 3: (Nolle prosequi).
Specification 4: (Nolle prosequi).
Specification 5: (Nolle prosequi).
Specification 6: (Nolle prosequi).
Specification 7: (Nolle prosequi).
Specification 8: (Nolle prosequi).
Specification 9: (Nolle prosequi).

He pleaded guilty to and was found guilty of both charges and the specification under each. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Third United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, "in order that the defendant will not escape all punishment for his disgraceful conduct," confirmed the sentence though deemed wholly inadequate to conviction of such grave offenses, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

Captain Aaron Goldblatt, Medical Corps, testified that on 15 April 1944 accused was commanding officer of the 54th Field Hospital and witness was a member of his organization. About 7:30 that evening the organization left Fort Bragg, North Carolina, by train to go to Camp Kilmer, New Jersey, where it was to embark for an overseas station (R7-8, 10,12-13). About 22 officers and 18 nurses occupied the whole of one car, the quarters of the officers and nurses being separated by a door which remained open during the night. They were all members of accused's command (R8,10-11,17). About two or three hours after the departure, liquor was brought into the car and placed before accused who began to drink, and passed drinks to some of the officers and nurses. "This went on for some time". Officers visited the nurses' section and vice versa (R8,11). Two other majors drank with accused and were passing around the drinks. Some drinks were given to the nurses in their section of the coach (R17). A large nurse, about six feet tall and weighing about 175 pounds, entered the officers' section, who "looked like she had had several drinks" (R13-14,17). At first she sat opposite accused and then sat beside him. Accused continued to drink throughout the evening and the nurse seated

beside him was somewhat drunk. They were "just loving each other up" and later witness observed that they had a coat or some article pulled over their heads (R8-9,12,18). They were drinking, were sort of huddled together and she was cooperating "more than fully." Fellow officers and nurses observed their conduct. Witness was under the impression that accused was fully clothed (R10,14). When Goldblatt fell asleep about 12:30 a.m. the drinking by accused and others in the car was still going on (R8).

When witness awakened about 6:00 a.m. he saw accused pick up his trousers and try to put them on while standing in the aisle. He was "a little bit awkward about it and kind of fumbling," and "looked like the morning after the night before." The nurse was still in their seat and when she arose she appeared fully dressed. (R12,15). Although other officers removed their field jackets and shoes that night in order to be comfortable for the journey (R15), no one else removed his trousers (R17). Someone during the morning asked accused about the presence of the nurse and "whether or not he was successful." Accused replied that she "gave him a 'scissor leg'" (R11). During the evening of 15 April accused was somewhat boisterous and "pretty well lit up." Witness testified that in his opinion accused was drunk, "conspicuously disorderly" (R8,9,11), and was intoxicated within the definition of drunkenness in the Manual for Courts-Martial (par.145, p.160), namely:

> "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness" (R9).

Witness was also of the opinion that during the first part of the evening of 15 April accused was in such condition as to be able to perform his duties as commanding officer of the 54th Field Hospital, but not during the latter part of the evening (R12). Some of the nurses and a lieutenant also became intoxicated (R15). Witness was a member of accused's organization from 15 March 1944 until 20 July (R7,16), and during this time was in contact almost daily with him. In his opinion accused was a chronic alcoholic (R16-17). About 18 hours were consumed in making the journey to Camp Kilmer (R13). (Specification 1, Charge I).

With reference to Charge II and Specification (drunkenness on duty 17-19 April 1944, in violation of Article of War 85), First Lieutenant Kenneth D. Hunt, Medical Administrative Corps, 54th Field Hospital, testified that the organization arrived at Camp Kilmer 16 April and left for overseas on 19 April. Witness was the adjutant of the organization. When at Camp Kilmer he saw accused about ten times, mostly in the latter's quarters. On one occasion witness and accused attended a meeting together. Witness saw accused drinking on several occasions. Although accused was not drinking when they went to the meeting, in witness' opinion he was drunk "nearly all the time" witness saw him at Camp Kilmer. Further, in witness' opinion, accused was drunk within the foregoing

definition of drunkenness in the Manual for Courts-Martial. Apart from attending the meeting, accused performed no duties while at Camp Kilmer and witness did all the supervisory work which was necessary to enable the organization to leave for overseas. Although Hunt and accused were supposed to eat at the same mess during this interval, he could not recall seeing accused at the mess at any time (R18-22).

4. For the defense, Major Perry C. Talkington, Medical Corps, Medical Section, Third United States Army, consultant in neuropsychiatry, testified as to the various types of chronic alcoholism (R23-26). He lived with accused for about one month while the latter was in arrest and in confinement in the medical section. Witness saw

> "no reason to believe that he (accused) has a psychoneurosis or psychosis or that he needs formal examination."

He formed no opinion whether accused was a chronic alcoholic (R26-27).

Accused, upon being advised of his rights, elected to remain silent (R27-28).

5. With reference to Charge I and its Specification (being grossly drunk and conspicuously disorderly before members of his command in violation of Article of War 95), the coach in which accused was riding was entirely filled with nurses and officers of his command. Accused, in their presence, drank steadily throughout the evening, became intoxicated and boisterous, and openly indulged in a prolonged, flagrant "petting party" with a nurse who was also somewhat inebriated and cooperated "more than fully" with accused. The following morning the nurse was still in their seat and accused was trying awkwardly to put on his trousers in the aisle of the coach. He showed visible effects of his drinking bout of the previous evening, during which he furnished liquor to other members of his command. Some of the nurses and an officer also became intoxicated. The degree of accused's intoxication was such that during the latter part of the evening he was not able, in Goldblatt's opinion, to perform his duties as commanding officer of his organization.

The question remaining for consideration is whether accused's drunkenness and disorderly conduct was of such an aggravated nature as to amount to conduct unbecoming an officer and gentleman within the meaning of Article of War 95. In Winthrop's Military Law and Precedents it is stated that the word "unbecoming" as used in Article of War 95

> "is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety * * * but morally unbefitting and unworthy" (Reprint, p.711).

The conduct contemplated by Article of War 95

> "must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." (Reprint, pp.711-712).

Winthrop cites as an instance of an offense chargeable under Article of War 61 (present AW 95):

> "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Reprint, p.717).

In paragraph 151, MCM, 1928, p.186, the offense of "being grossly drunk and conspicuously disorderly in a public place" is listed as an example of a violation of Article of War 95. It is further stated therein that the article contemplates conduct by an officer which, taking all the circumstances into consideration, shows that he is morally unfit to be an officer and to be considered a gentleman.

The findings indicate that the court believed the evidence sufficient to establish that accused was drunk and disorderly as alleged, and in view of all the circumstances of the case the Board of Review will not disturb its findings. Accused's drunkenness was gross and his disorderly conduct was decidedly conspicuous. His conduct as a whole far transgressed military canons of fairness and decency (CM ETO 25, Kenny; CM ETO 1197, Carr). The pleas of guilty to Charge I and the Specification thereunder are fully supported by the evidence.

With reference to Charge II and its Specification (drunkenness on duty in violation of Article of War 85) the offense denounced by this article is:

> "drunkenness upon any occasion of duty properly devolved upon an officer or soldier by reason of his office, command, rank or general military obligation" (Winthrop's Military Law & Precedents, Reprint, p.613).

> "The term 'duty' as used in this article means of course military duty. But, it is important to note, every duty which an officer or soldier is legally required, by superior

military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty" (Ibid., pp.614-615; MCM, 1928, par.145, p.159).

It was clearly established by the evidence that accused, at the time and place alleged, was drunk on duty as alleged. He was the commanding officer of an organization which was in a staging area for about three days, preparing to go overseas. It was necessary that, as such commanding officer, he perform highly important duties during this short, critical period concerning the preparation of his unit for its overseas departure. Apart from attending one meeting he performed no duties whatsoever, and was so intoxicated during this time that it was necessary for his adjutant to take entire charge of the necessary supervisory work. The pleas of guilty were fully supported by the evidence (CM ETO 1065, Stratton; CM ETO 1267, Bailes).

6. The charge sheet shows that accused is 45 years of age, and that he was commissioned a major, Army of the United States, 8 June 1943, to serve for the duration of the war plus six months. His former service was as follows: "Enlisted U.S.N. 9 May 1917, honorable discharge 19 July 1919."

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

8. A sentence of dismissal is mandatory upon conviction of an officer of being drunk on duty in time of war in violation of Article of War 85 (AW 85; CM 255639 (1942), Bull.JAG, Oct 1942, Vol.I, No.5, par. 443, p.275). Dismissal is also mandatory upon conviction of an officer of a violation of Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Major CLAIR A. BUCK (O-473943), Medical Corps, 69th Medical Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3966. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3966).

B. FRANKLIN RITER,
Colonel, J.A.G.D.,
Acting Assistant Judge Advocate General

(Sentence ordered executed. GCMO 107, ETO, 17 Nov 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 3974

15 NOV 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private ROY BROWN (36179665), 1912th Ordnance Company (Ammunition) Aviation.	Trial by GCM, convened at AAF 590, England, 19 and 22 September 1944. 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. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that Private Roy Brown, 1912th Ordnance Company (Ammunition) Aviation, AAF Station 581, APO 635, U.S.Army, did, without proper leave, absent himself from his command at AAF Station 502, APO 149, from about 2 August 1944, to about 26 August 1944.

He pleaded not guilty, and was found guilty of the Specification except the words "26 August 1944" substituting therefor "23 August 1944" and guilty of the Charge. Evidence was introduced of four previous convictions, three for absence without leave of 4, 30 and 17 days respectively, in violation of Article of War 61, and one for being disorderly in camp and improperly wearing sergeant's chevrons, in violation of Article of War 96. He was sentenced to be dishonorably discharged the

(196)

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 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 the provisions of Article of War 50½.

3. Competent uncontradicted evidence establishes the fact that accused went absent without leave from his command on 2 August 1944, as alleged (Pros.Ex.1), that search was made and he could not be found and that he was apprehended by military police in London on 23 August 1944 (R9,12,21,22). He was placed in confinement at the time of his apprehension (Pros.Ex.3) and returned to his organization on 26 August 1944 (Pros.Ex.2).

4. Accused did not testify or make any statement to the court (R25).

5. The charge sheet shows that accused is 21 years eight months of age. He was inducted into the Army at Fort Custer, Michigan, on 9 April 1942. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is proper.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (197)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 NOV 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U.S.Army.

1. In the case of Private ROY BROWN (36179665), 1912th Ordnance Company (Ammunition) Aviation, 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 3974. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3974).

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

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

BOARD OF REVIEW NO. 2

14 NOV 1944

CM ETO 3984

UNITED STATES	)	2D ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Headquarters 2d Armored Division, APO 252, 11 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class WILLIAM E. DAVIS (33067980), Headquarters & Headquarters Company, 1st Battalion, 67th Armored Regiment.	)	

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

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Pfc William E. Davis, Headquarters & Headquarters Company, 1st Battalion, 67th Armored Regiment, being on guard and posted as a sentinel near Lengronne, France, on or about 30 July 1944, was found sleeping on his post.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of con-

finement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution showed that, due to a report indicating a threatened break-through by the enemy, accused was posted as a guard at the entrance to his unit's bivouac area at approximately 0430 hours, 30 July 1944 (R4,5). Lieutenant Masters, one of accused's company officers, approached accused's post some fifteen minutes later and was not challenged (R5). Accused was at that time sitting on the edge of a ditch with his head down on his knees, and it was necessary for Lieutenant Masters to call to accused twice, the second time rathersharply, before an answer was received (R5,6). When reprimanded, accused stated "that he was sorry that it happened and would I give him a break and not turn him in (R6). In a sworn statement, signed by accused after having been advised of his rights, accused said that he had "just dozed off" when Lieutenant Masters approached (R7; Pros.Ex.B).

4. Accused, after having been advised of his rights, as a witness, testified that on 30 July 1944 he was awakened and detailed by Lieutenant Masters to "go out on the highway and watch down the road" (R11). After he had been on his post for approximately fifteen minutes, he sat down in a ditch, began to feel a little sleepy and "was beginning to partially doze and so I shook my head and then Lieutenant Masters walked up behind me and said 'Davis', and I rose up and answered and said, 'Sir'" (R11,12). He also stated that he suffered from "sinus trouble" and "kidney trouble", the latter of which had been aggravated by the conditions under which he was then forced to live and which interfered with his sleep since it was necessary for him to arise "at nights" to relieve himself (R12). However, he had not been hospitalized but on a full duty status since the beginning of the Normandy campaign nor had he been on sick call within the past month (R12). Accused further stated that, inasmuch as his unit had been under almost continuous fire, he had slept only a few hours each night for four or five nights prior to 30 July 1944 (R12) and he was on anti-aircraft guard on 29 July from eight to ten o'clock in the evening and on regular vehicle guard from twelve to one fifteen on the morning of 30 July (R11). The testimony of accused with reference to his ill health and his inability to secure adequate sleep due to combat conditions was corroborated, in the main, by the testimony of two members of accused's unit (R8,9,10).

5. The evidence is amply sufficient to show that accused was a sentinel within the meaning of Article of War 86, and that he was duly posted as such on the date alleged (Bull. JAG, Vol.III, No.3, Mar.1944, sec.444, p.99). From the testimony given at the trial, together with the admissions of the accused, the court was warranted in drawing the inference that accused was asleep on his post (Winthrop's Military Law & Precedents, 1920 Reprint, p.616).

6. The charge sheet shows that accused is 24 years of age. He was inducted at Rockville, Maryland, on 7 October 1941. 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 finding of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(202) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 NOV 1944 TO: Commanding General, 2d Armored Division, APO 252, U. S. Army.

1. In the case of Private First Class WILLIAM E. DAVIS (33067980), Headquarters & Headquarters Company, 1st Battalion, 67th Armored Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Accused has served over three years and has no previous convictions. The evidence indicates he has continued on a full duty status since the beginning of the Normandy campaign despite illness, and there is nothing in the record or accompanying papers to indicate that he is not rehabitable. In view of the extenuating circumstances herein and the theater policy for salvage of man power, it is recommended that the dishonorable discharge be suspended and the Seine Disciplinary Training Center be designated as the place of confinement. If this is done the supplementary action should be forwarded for attachment to the record.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3984. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3984).

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

3984

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

BOARD OF REVIEW NO. 1

13 DEC 1944

CM ETO 3988

U N I T E D S T A T E S v. Private JAMES R. O'BERRY (14028319), Company E, 28th Infantry	8TH INFANTRY DIVISION Trial by GCM, convened at APO 8, U. S. Army, France, 19-20 September 1944. 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
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 64th Article of War.
Specification: In that Private James R. O'Berry, Company "E", 28th Infantry, having received a lawful command from 2nd Lt. Earnest L. Reed, his superior officer, to return to his post, did, at APO 8, U. S. Army, on or about August 9, 1944, willfully disobey the same.

CHARGE II: Violation of the 65th Article of War.
Specification: In that * * * did, at APO 8, U. S. Army, on or about August 9, 1944, use the following threatening language toward Technical Sergeant Donald C. Townsley, who was then in the execution of his duty, "When we get back to combat again, I will kill you," or words to that effect.

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CHARGE III: Violation of the 63rd Article of War.
Specification: In that * * * did, at APO 8, U. S. Army, on or about August 9, 1944, behave himself with disrespect towards 2nd Lt. Earnest L. Reed, his superior officer, by saying to him, "When we get back in combat again, I will kill you," or words to that effect.

CHARGE IV: Violation of the 75th Article of War.
Specification: In that * * * being present with his company while it was engaged with the enemy, did at Ame de Claids, France, on or about 26 July, 1944, shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it until on or about 1500 31 July 1944, in or near the vicinity of Coutances, France.

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 their respective specifications. Evidence was introduced of two previous convictions: one by special court-martial for attempting to strike a noncommissioned officer who was in the execution of his office and willful disobedience of the order of a noncommissioned officer in violation of Article of War 65, and one by summary court for absence without leave for four hours in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 uncontroverted evidence for the prosecution is, in summary, as follows:

Charge IV and Specification: At 0530 hours on 26 July 1944, Company E, 28th Infantry, moved from its position in reserve into an attack against the enemy (R8-9,13). Accused was a rifleman in the mortar section of the company (R5,8,13). During the evening of that day the mortar section was separated from the remainder of the company by enemy fire, the lieutenant in command thereof was wounded and evacuated, and at about 2100 hours the first sergeant of the company assumed command of the section (R5,8,12). The members of the section were "dug in" in a defensive position and the new commander issued an order, which was passed on to the men by other noncommissioned officers, that no one might leave the area (R5-6,8,11). At this time the section was in the vicinity of Ame de Claids, France, about 300 yards from the enemy (R5, 12-13), and was receiving enemy machine gun and mobile gunfire (R8,12).

Accused was present with his section shortly after the order was given and was last seen by the first sergeant about 2130 hours digging a foxhole near a hedgerow. The latter first noted at 2330 hours that accused was absent. A search of the vicinity failed to reveal his presence (R6,9,10). He had no permission to be absent from his section and was not wounded (R6-7). No patrols were sent out that night (R10). The separation of the mortar section from the remainder of the company by enemy action, referred to above, prevented forward movement by section personnel but movement to the rear from the section's position was possible "if you kept down low" in order to avoid enemy fire, which continued intermittently throughout the night (R9-11).

About 0600 hours on 28 July, a medical officer saw accused at the second battalion aid station, about 500 yards from Company E, and not having seen him the preceding night, asked him what he was doing there. Accused replied that "he brought in some wounded soldiers during the night" and remained there overnight. The officer directed him to return to his company, and after having breakfast accused left (R19). It was duly stipulated that he reported for duty to the field train of the 28th Infantry on 30 July 1944 (R20). An extract copy of the morning report of Company E for 11 August 1944 showing accused absent without leave from 2330 hours, 26 July 1944, through 1500 hours, 31 July 1944, was admitted in evidence without objection (R7; Pros.Ex.A). At the time accused returned, the company was not engaged with the enemy (R9).

Charge I and Specification: On 9 August 1944 accused was out on the road, without authority, talking to a woman. Lieutenant (Ernest L.) Reed saw him and asked him what he was doing there. He argued with Reed who thereupon gave him a direct order: "'Go back to your squad immediately'" (R15-17). Accused stated

> "he didn't care whether he would be court-martialed he was court-martialed so many times before that another one wouldn't mean a thing" (R15).

For a period of 3-5 minutes accused remained standing where he was, and continued arguing with Reed in an insubordinate manner. Accused was accorded an opportunity to obey the order and although he did not verbally announce his intention of disobeying it, he gave no indication and manifested no intention of obeying it, and for that reason Reed placed him under arrest (R15-18).

Charges II and III and Specifications: Thereupon Technical Sergeant Donald C. Townsley, of accused's company, took his rifle from him, directed him to "move out", and marched him back to the company bivouac area (R15,17-18). There accused, about ten yards from Lieutenant Reed, who was telephoning to the command post (R15-16) and about ten feet from Townsley (R17), addressed the following remarks to Townsley and Reed in a violent manner:

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"'When we get into combat I'll shoot both you son of a bitches'" (R15,17).

Townsley had no question as to what persons accused addressed this remark (R16).

4. (a) For the defense, accused's squad leader testified that accused was a first scout, was present with the squad in combat since 7 July, always obeyed witness' orders and "if the man wants to be, he is an excellent soldier" (R20).

(b) After his rights were explained to him, accused elected to remain silent (R21).

5. (a) The evidence leaves no doubt that at the time and place alleged in the Specification of Charge IV accused abandoned his company, then engaged with the enemy and sought safety in the rear, remaining absent until he surrendered on 30 July 1944. Both elements of the offense in violation of Article of War 75 were fully established (CM ETO 3196, Puleio; CM ETO 4093, Martin M. Folse; CM ETO 4285, Gentile).

(b) Accused's willful disobedience of the lawful command of his superior officer, as alleged in the Specification of Charge I, which command contemplated immediate obedience or the immediate taking of steps preparatory to obedience by accused, was established by the evidence (CM ETO 2469, Tibi).

(c) Likewise accused's guilt of using threatening language against Townsley as alleged in the Specification of Charge II was clearly shown (CM ETO 3801, Edward H. Smith, and authorities there cited), as was also his guilt of disrespectful behavior towards his superior officer, Lieutenant Reed, by using such language as alleged in the Specification of Charge III (MCM, 1928, par.133, pp.146-147; CM ETO 106, Orbon).

6. The charge sheet shows that accused is 21 years of age and enlisted 1 February 1941 to serve for three years. His service period is governed by the Service Extension Act of 1941. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and 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 willful disobedience of the lawful command of a superior officer and also for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 64,75).

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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 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(208)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 13 DEC 1944 TO: Commanding General, Headquarters 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private JAMES R. O'BERRY (14028319), Company E, 28th 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 3988. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3988).

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

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

BOARD OF REVIEW NO. 1

16 NOV 1944

CM ETO 3989

U N I T E D S T A T E S	8th INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, U. S. Army, 20 September 1944.
Private (formerly Private First Class) LAWRENCE J. FOLSE (14039756), Company L, 28th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private (then Private First Class) Lawrence J. Folse, Company L, 28th Infantry, being present with his Company while it was engaged with the enemy, did, at or near Gousenou, France, on or about August 26, 1944, shamefully abandon the said Company, and seek safety in the rear, and did fail to rejoin it until he was apprehended by Military Authorities on 1330 August 29, 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 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

(210)

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 40 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence, including accused's own testimony (R13), establishes that, at the time and place alleged (4,8-9), accused, a rifleman, without permission abandoned his company (R4-7; Pros.Ex.A), which was before the enemy and under fire (R4,8-9), sought safety in the rear (R5,10-12), and did not return until his apprehension three days later, as alleged (R10-12; Pros.Ex.A). Both elements of the violation of Article of War 75 were thus established (CM ETO 3196, Puleio, and authorities therein cited).

4. The absence from the court of Major Leonard C. Burson, named as a member in the appointing order, is neither recorded nor accounted for. The irregularity, however, is immaterial (CM ETO 2469, Tibi).

5. The charge sheet shows that accused is 24 years of age and enlisted 7 January 1941 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 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 misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks Greenhaven, New York, as the place of confinement is authorized (AW 42 Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

(211)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding General, 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private (formerly Private First Class) LAWRENCE J. FOLSE (14039756), Company L, 28th 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 3989. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3989).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3991

10 NOV 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened near La Parray, France, 4 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private FRANK VALDEZ (38008379), 560th Quartermaster Railhead Company.	

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

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

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

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

Specification: In that Private Frank Valdez, 560th Quartermaster Railhead Company, being detailed as a permanent guard, did, in the vicinity of Govin, Calvados, France, while his organization was in close proximity to the enemy, without proper leave absent himself from his said organization from about 28 July 1944 to about 1 August 1944.

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

Specification: In that * * * having been restricted to the limits of his company area, did, at Govin, Calvados, France, on or about 28 July 1944 break said restriction by going to Catz, Calvados, France.

(214)

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of two previous convictions by summary court for absence without leave, for two days and five days, respectively, and of two previous convictions by special court-martial for absence without leave for seven days and eight days, respectively, all in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge II and of Charge II as reads, "In that Private Frank Valdez, 560th Quartermaster Railhead Company, having been restricted to the limits of his company area, did, at Govin, Calvados, France, on or about 28 July 1944 break said restriction", approved the sentence but reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence showed that accused was on permanent guard duty with his organization, located then about seven miles north of the enemy, on and about 28 July 1944, but that on that day he was absent when called for duty and, though search was made, he could not be found (R7). At the time he was under restriction to the company area from a previous summary court sentence (R8). He was not again seen by either his first sergeant or the sergeant of the guard, or the commander of his company, until the day of trial (R8,10,11). A stipulation signed by the accused, as well as counsel, was introduced to the effect that accused had turned himself in on the evening of 1 August 1944, to WOJG Herbert Williams, stating he was absent without leave from his organization. He was turned over to the Provost Marshal, Advance Section, and then to the Provost Marshal, First United States Army (R13; Prox.Ex.2).

4. Accused presented no witnesses or evidence to the court.

5. The charge sheet shows accused to be 27 years and five months of age. He was inducted at Denver, Colorado, 8 July 1941, without prior service.

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

rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

CONFIDENTIAL

(216) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 NOV 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private FRANK VALDEZ (38008379), 560th 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 and this indorsement. The file number of the record in this office is CM ETO 3991. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3991).

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

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

BOARD OF REVIEW NO. 2

18 NOV 1944

CM ETO 3992

U N I T E D S T A T E S	)	FIRST UNITED STATES ARMY
	)	
v.	)	Trial by GCM, convened near Le Perray, France, 4 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ARTHUR T. McKINNON (32607392), 3171st Quartermaster Service Company	)	

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

1. The record of trial in the case of the 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 65th Article of War.

Specification 1: In that Private Arthur T. McKinnon, 3171st Quartermaster Service Company, having received a lawful order from Sergeant Stephen Sobers and First Sergeant Thomas A. Collins, Jr., noncommissioned officers who were then in the execution of their office, to return to work in the Signal Depot Yard did, at Saint Samson, France, on or about 1500 9 August 1944, willfully disobey the same.

Specification 2: In that *** did, at Saint Samson, France, on or about 1800 9 August 1944, use the following threatening and insulting language toward Sergeant Stephen Sobers, a noncommissioned

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officer who was then in the execution of his office "You mother fucker you, I'll get you for this! If I don't get you, my friends will!" or words to that effect.

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

Specification: In that * * * did, at Saint Samson, France, on or about 1500, 9 August 1944, wrongfully and willfully behave himself in such a way as to promote racial discord in the military service by publicly uttering the following contemptuous and disrespectful language to Sergeant Stephen Sobers and First Sergeant Thomas A. Collins, Jr., noncommissioned officers who were then in the execution of their office, "You (Sergeant Stephen Sobers) can report me to your White Father or put me in the stockade", and "Collins (First Sergeant Thomas A. Collins, Jr.) ain't no Goddamn good either, he's all for some white mother fucker," or words to that effect.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for one day, in violation of Article of War 61. Three-fourths of the members of the court present 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 15 years. The reviewing authority approved only so much of the findings of guilty of Specification 2, Charge I, as involves a finding of guilty, under the circumstances as alleged, of using the following threatening language toward Sergeant Stephen Sobers, a noncommissioned officer who was then in the execution of his office, "I'll get you for this! If I don't get you, my friends will!", or words to that effect, approved the sentence, but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows: That on 9 August 1944, accused's unit was located at Saint Samson, France (R7). First Sergeant Thomas A. Collins, Jr., accompanied by Sergeant Sobers, both of accused's unit, at "about three o'clock," found accused near his foxhole. Accused stated to them that he was supposed to be at work with his squad but was not able to work. After some argument on the part of accused who said if he went back to his squad he would not work but only go to sleep, Collins ordered accused to go back to his squad. Accused made no effort to go (R8). As Collins was leaving him, after giving him the order at

three o'clock to return to work, accused yelled out, "Sgt. Collins is no Goddamn good either, he's all for some white mother fucker" (R9). Collins was then in the execution of his office. It was evident at that time that accused had been drinking and he was telling a group of men, "at the top of his voice that he didn't kiss no Goddamn body's ass to get along in the Army" (R10). Sergeant Stephen Sobers of accused's unit at about three o'clock the same day was looking for some men missing from their work and found accused arguing with two men. He gave accused a definite order to report to his squad leader and he refused. He said he was "not going back to no mother fucking yard" and made no move to go, telling Sobers, "report me to the White Father or send me to the stockade" (R12). Sobers heard Collins later order accused to work and the words used by accused at that time (R13). Later when accused was in the captain's office, he threatened Sobers and said, "I will get you for this and if I don't, my friends will". About five o'clock accused was placed in arrest by the commanding officer in the orderly room and at that time was arguing loudly and denied he had refused to obey orders or used the language as charged. Sobers was called in to verify that act. (R9) Accused was drunk but not too drunk to know what was going on (R15).

4. Accused, as a witness, testified he had three quarts of cognac that morning and started drinking and got drunk. He explained to both Sobers and Collins when they ordered him to go to work that he was in no condition to do so but claims he did go over to the yard. He denied remembering anything else happening that day (R16). He admitted he did not go back to work at the time he received the order and denied making any kind of vulgar remarks to the two sergeants but refused to swear that he did not. Defense called no other witnesses (R17-20).

5. The evidence establishes the acts done under the circumstances described in Specifications 1 and 2 of Charge I and in the Specification of Charge II. Accused used not only the most degrading epithets to describe the noncommissioned officers, but implied that the officers in performing their duty were siding with the white race and against the colored. The long argument and loud voice of accused was unquestionably adopted by him so that as many of his fellow colored soldiers as possible could hear. His language was highly inflammatory under the circumstances and his conduct was willful, tending directly to promote racial discord in the company. Under existing conditions in this theater, any conduct, whether by white or colored troops, which tends to promote racial discord in the military service is highly prejudicial to good order and military discipline.

6. The charge sheet shows accused is 22 years of age. He was inducted at Newark, New Jersey, 14 January 1943, without prior service.

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

of 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 (CM ETO 1920, Horton).

Judge Advocate

Judge Advocate

Judge Advocate

(221)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army

1. In the case of Private ARTHUR T. McKINNON (32607392), 3171st Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3992. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3992).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3993

17 NOV 1944

UNITED STATES	8th INFANTRY DIVISION
v.	Trial by GCM, convened at APO 8, United States Army, 20 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private OSCAR M. JOHNSON (15042047), Company H, 28th Infantry.	

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

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

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

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

Specification: In that Private Oscar M. Johnson, 15042047, Company H, 28th Infantry, did, without proper leave, absent himself from his organization at APO #8, U. S. Army, from about 1900 5 August 1944 to about 1130 9 August 1944.

CHARGE II: Violation of the 86th Article of War.
(Finding of Not Guilty.)

Specification: (Finding of Not Guilty.)

He pleaded not guilty and was found guilty of Charge I and its Specification, not guilty of Charge II and its Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days, in violation of Article of War 61. He was sentenced to be

dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The uncontradicted evidence shows that accused went absent without leave from his organization outside of Rennes, France, at 1900 hours, 5 August 1944, and returned voluntarily at about 1130, 9 August 1944. On 5 August the duties of accused's platoon were to furnish anti-aircraft protection during the day and security at night.

4. No evidence was adduced by the defense on behalf of accused who, after his rights were explained to him, elected to remain silent.

5. The charge sheet shows that accused is 21 years of age and that, with no prior service, he enlisted 8 July 1940, to serve three years.

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.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (225)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 NOV 1944 TO: Commanding General, 8th Infantry Division, APO 8, U. S. Army.

1. In the case of Private OSCAR M. JOHNSON (15042047), Company H, 28th 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 3993. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 3993).

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

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Confidential
19 Feb 1946
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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

4 DEC 1944

CM ETO 4004

U N I T E D S T A T E S	83D INFANTRY DIVISION
v.	Trial by GCM, convened at APO 83, U. S. Army, 1 September 1944.
Private ELMO H. BEST (38567647), Company B, 329th Infantry	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 75th Article of War:
Specification: In that Private Elmo H. Best, Company B, 329th Infantry, being present with his company while it was before the enemy, did at or near Sainteny, France, on or about 22 July 1944 shamefully abandon the said company and seek safety in the rear.

CHARGE II: Violation of the 64th Article of War.
(Finding of guilty disapproved)
Specification: (Finding of guilty disapproved)

He pleaded not guilty. All members of the court present at the time the vote was taken concurring, he was found guilty of Charge I and the Specification thereunder, and three-fourths of the members of the court present at the time the vote was taken concurring, he was found guilty of Charge II and its Specification. No evidence of previous

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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, 83d Infantry Division, approved the sentence, but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the findings of the Specification of Charge II and Charge II, confirmed the sentence, but owing to special circumstances in the case and in view of the recommendation for clemency by the convening authority, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. The following procedural matters merit attention:

(a) The record shows (R2) that the trial took place four days after the charges were served on accused. He consented in open court to trial at the time (R3). In the absence of indication that any of his substantial rights were prejudiced, the irregularity, if any, may be regarded as harmless (CM ETO 3475, Blackwell et al; CM ETO 3937, Bigrow; CM ETO 4095, Delre).

(b) Major Norman P. Cowden, Assistant Adjutant General of the 83d Infantry Division referred the case to the trial judge advocate for trial by command of the division commander. Major Cowden was duly appointed and sat as a member of the court herein. This act was purely administrative and in the absence of challenge (R3) and of indication of injury to any of accused's substantial rights, this irregularity also may be regarded as harmless (CM ETO 3828, Carpenter, and authorities therein cited; CM ETO 4095, Delre).

(c) The action of the confirming authority in disapproving the findings of guilty of Charge II and the Specification thereunder (alleging willful disobedience by accused of a lawful command of his superior officer to return to his unit), was authorized. Included in the power of the confirming authority under the provisions of Article of War 50 to confirm and commute the sentence of death imposed by the court, authorized punishment for a violation of either Article of War 64 or 75, was the power to disapprove a finding of the court (par.(a), AW 49).

4. Uncontroverted competent evidence for the prosecution of a substantial and reliable nature established the following:

Accused, a replacement, was an ammunition bearer in the heavy weapons (4th) platoon of Company B, 329th Infantry, for several days prior to 22 July 1944 (R8,10,12,14). During this period, when the company was engaged in some slight action against the enemy (R8), accused usually performed his duties properly and, although at times he was nervous and "scared" (R11,15), there was evidence that he did not exhibit more than normal fear (R11).

On the night of 21 July the first platoon of Company B, situated near Sainteny, France, about 500 yards from the front lines (R7,9, 16), was ordered forward to fill a gap created by the withdrawal of an adjoining armored unit under an enemy counter-attack. On the morning of 22 July Companies A and C were in defensive positions and Company B was in support about 200 yards to their rear (R7,10,13). The latter company was receiving enemy artillery, mortar and small-arms fire and casualties were sustained (R7,10). Accused was present with his platoon when Company B moved into its position on 21 July (R10), and was at breakfast about 0600 hours on 22 July. At that time his squad leader told him to be ready to move at a moment's notice (R13), and he replied to the effect that he would be ready. About 0630 hours, directly after "chow", the squad leader discovered accused's pack ready but he had departed (R14). A search of the area failed to reveal his presence (R12,14). He was not sent on any kind of detail on that morning (R14,21).

Later in the day on 22 July Captain Doyle R. Bunch, regimental adjutant of the 329th Infantry, saw accused in the service company area about four miles to the rear of the Company B area (R16-17,19). He was turned over to Captain Bunch, whose duties included the handling of stragglers, by the service company maintenance officer "for proper disposition--back to the front if possible" (R17,19). Captain Bunch conveyed him in his jeep to the vicinity of the area of Company B. On the way he endeavored to persuade accused to return to his company, but the latter persisted in saying "he didn't want to go back and didn't care". When told "he could get as much as death" for his act, he stated:

> "'I don't care. If I get court-martialed and get death, I will get it over with sooner'" (R17).

Accused appeared nervous and depressed and "very slightly" under shock, but he was coherent and was apparently not wounded (R18,19). When they arrived in front of the regimental aid station near the company area, Captain Bunch said to accused:

> "'I am giving you an order to go back to the front lines and return to your duty as you should'" (R18).

Accused responded "'I don't want to go back'" (R18,19,21). His statements were voluntary (R20). After waiting over 30 seconds, during which time accused did not comply with the order, Captain Bunch ordered accused to accompany him to the aid station. He complied and from there a medical officer sent him to the division neuropsychiatrist, who examined him and issued a report of the examination (R19-20).

When accused's company commander saw him in a rest area about 30 July, warned him of his rights and asked him why he left the company, accused replied

> "roughly, that he didn't care, he would rather take a court-martial than stay up in the front lines * * * that he couldn't stand it in the front lines" (R8-9).

At that time he appeared calm rather than nervous or strained (R8). He did not appear to be abnormal, excited or uneasy (R9).

5. After his rights were explained to him, accused elected to remain silent. No evidence was introduced for the defense (R21).

6. (a) In order to resolve "a question in the mind of the court as to the mental stability of the accused", the court called to the stand as its own witness Major Allen W. Byrnes, Medical Corps, neuropsychiatrist for the 83d Infantry Division, who had in his possession a copy of the official report of the findings with respect to accused of a sanity board (of which he was senior member) appointed by the division commander on 2 August 1944. Objections by the defense to the calling of the witness and to the introduction in evidence of the report on the ground that accused's sanity was not in issue and therefore the evidence might prejudice him, were overruled by the president and the law member (R22). Major Byrnes in his testimony identified a true copy of the mentioned report, which was admitted in evidence as Prosecution's Exhibit 1, over objection by the defense on the grounds stated and on general grounds (R23). Accused was interviewed by the board of four officers on 5 August. Before questioning accused, witness warned him of his rights (R23-24). The copy of the board's findings reads as follows:

> "a. This soldier understood right from wrong, and with regard to the offense charged, he could adhere to the right, furthermore, he was at the time so far free from mental defect, disease or derangement as to be able, to concerning the particular act charged, both to distinguish right from wrong and to adhere to the right.
>
> b. He is sane and mentally responsible for the offense committed.

c. The accused is sufficiently sane to intelligently conduct or cooperate in his defense.

* * * * *

MILITARY HISTORY. On 24 July 1944, after having contemplated the act for two days, the soldier left his organization and was quite promptly taken into custody by the Military Police. The same evening he was transferred to another station where, at least two other neuropsychiatrists could examine him; attention is invited to their report, attached hereto. The sanity board of this Division reviewed this case, and their findings are a part of this report. Previous to his leaving his organization, he had been at the front, actively engaged with the enemy for twelve days. He gave as his reason for leaving, the fact that he was afraid; this fear seems to be more a concern for his mother's feelings in the even of his being injured, than the actual fear in itself of being wounded or killed. He does not desire to return to front line duty, even if given the opportunity.

This soldier did not have an arrogant attitude, as might be assumed, but had a defensive bravado of desperation, in a quiet and resigned manner" (Pros.Ex.1).

Witness further testified that he saw accused on 22 July 1944 and that he was not then suffering from shock or unduly nervous nor did he appear to be a medical problem (R24). It would not be possible for him to have been otherwise at 0600 hours than he was when witness saw him (R25), or to have been other than responsible for his acts on 22 July (R24).

(b) The action of the court in overruling the defense objections, calling Major Byrnes to the stand and admitting in evidence the copy of the sanity board's report was correct in substance, although the law member and not the president was the proper member to rule upon both objections.

"If at any time before the court * * * imposes a sentence it appears to the court for any reason that additional evidence with respect to the accused's mental responsibility for an offense charged should be obtained in the interest of justice, the court will call for such additional evidence" (MCM, 1928, par.75, p.58) (Cf: par.63, p.49).

The evidence of accused's admissions against interest to the effect that he would prefer trial by court-martial, and by intimation even the death sentence, to duty in the front lines, was certainly sufficient reason for the court to seek additional evidence with respect to his mental responsibility for the offense charged. The failure of the defense to object to the admission in evidence of Prosecution's Exhibit 1 on the ground that although it was a copy it did not appear (other than by the bare statement of the trial judge advocate) that the original was lost, destroyed or otherwise unavailable, operated as a waiver of objection on that ground (MCM, 1928, par.116a, p.120). As to subject matter, the report was admissible under the familiar exception to the hearsay rule respecting official statements in writing (MCM, 1928, par.117a, p.121) insofar as it stated the board's opinion as to accused's mental condition and the reasons therefor. Insofar as it related to accused's act of leaving his organization and his contemplation thereof, it was hearsay, but in view of the convincing evidence of accused's guilt of the offense charged, the admission in evidence of this portion of the report, even assuming the court considered it, cannot be deemed to have injuriously affected accused's substantial rights (Cf: CM ETO 4005, Sumner, and authorities therein cited).

7. (a) The evidence, including his own admissions against interest, is full and clear that accused, who was sound in body and mind, at the time and place alleged, while his company was before the enemy, abandoned it and sought safety in the rear. Both elements of the offense in violation of Article of War 75 were fully established (CM ETO 3196, Puleio, and authorities therein cited; CM ETO 4095, Delre).

(b) The record of trial contains a considerable amount of hearsay. As it was received without objection by the defense and as there was ample convincing evidence upon all issues, it may be concluded that accused's substantial rights were not injured by its admission in evidence (CM ETO 4095, Delre; CM ETO 4122, Blevins).

(c) There was some evidence that prior to the time of the offense accused was nervous and "scared" and that thereafter he was nervous, depressed and suffering slightly from shock. Whether or not he "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior", which would constitute a defense (Winthrop's Military Law and Precedents, Reprint, p.624) was essentially a question of fact for the determination of the court. In view of substantial, competent evidence that accused was not suffering from such illness or disability, the court's determination of the issue against him in its findings of guilty will not be disturbed upon appellate review (CM ETO 1663, Ison; CM ETO 1693, Allen; CM ETO 4095, Delre).

8. The charge sheet shows that accused is 18 years ten months of age and was inducted 1 December 1943 at Oklahoma City, Oklahoma, to serve for the duration of the war plus six months. He had no prior service.

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

10. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private ELMO H. BEST (38567[illegible]7), Company B, 329th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of such 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 4004. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4004).

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

(Sentence as commuted ordered executed. GCMO 121, ETO, 10 Dec 1944)

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14 Feb 1946
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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

4 DEC 1944

CM ETO 4005

U N I T E D S T A T E S	)	83D INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 83, U. S. Army, 25 August 1944.
Private First Class COOLIE SUMNER (35666001), Company I, 331st Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In the Private First Class Coolie Sumner, Company I, 331st Infantry, did, at or near La Semallarie, France, on or about 10 July 1944, while before the enemy, shamefully run away from his company, and did not return until apprehended by the military police.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death by musketry. The reviewing authority, the Commanding General, 83d 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

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Operations, confirmed the sentence, but due to unusual circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. The prosecution's evidence was as follows, in summary:

On 10 July 1944 accused was a member of the rifle platoon, Company I, 331st Infantry (R6,9,11,18). On that day the company attacked and reached its objective, a crossroad about 2500 yards southwest of La Semallarie, France (R7,11,14) and for three or four days thereafter was in contact with the enemy (R13). Accused was seen with his company on 10 July following the attack. Shells were falling in the vicinity and there was machine-gun fire (R7,10,15,16). Company I made numerous attacks but was driven back under enemy fire of various types and casualties were heavy. Thereafter a successful flanking attack was made on 10 or 11 July (R7,10), after which accused was not seen again by members of his company until he was returned thereto on 25 July (R8, 10,12,13,15,16,18). Sometime between 23 and 25 July (R20,22) he was discovered and apprehended along with five other soldiers by a military policeman at least a mile and a half to the rear of the front lines at a place where there was little shelling (R19-21). The soldiers, with the exception of one who said he was from Company M (R20), all stated that they were from Company I. Two of the group were eating supper, apparently consisting of Army rations.

"They said they had just finished eating and were going back to their outfit" (R19,20,21).

Accused had an M-1 rifle and ammunition. He was dirty, unshaven and nervous but otherwise in "fairly good" condition, and he did not appear to be a casualty (R19). He stated that he left his unit about 14 or 15 July (R21). The military policeman escorted them to the command post of his battalion (R19). When accused was returned from the latter post to his company, the communications sergeant asked him why he "took off", and accused voluntarily replied "'A fellow can stand just so much'" (R13). He appeared, however, to be normal physically (R8). Upon cross-examination, the first sergeant stated that prior to 10 July accused did not always perform his duties and was transferred to the rifle platoon, after which he performed his duties and reacted normally in action (R9).

4. After his rights were explained to him, accused elected to remain silent. No evidence was introduced for the defense (R22).

5. Although the precise time of accused's departure from his company does not appear in the record, it is clear from the evidence that

at some time on or about 10 July 1944, when his company was before the enemy near La Semallarie, he left it and proceeded about a mile and a half to the rear, where he was apprehended sometime on or after 23 July. His admissions confirm the existence of both elements of the offense in violation of Article of War 75, which were convincingly proved (CM ETO 3196, Puleio, and authorities there cited; CM ETO 4095, Delre).

6. (a) There were some instances of the admission of hearsay evidence herein which are deemed harmless, as above indicated, in view of the convincing evidence of accused's guilt.

(b) Any error involved in admitting testimony that prior to 10 July accused did not always perform his duties, was self-invited by the defense and cannot be held to have injuriously affected accused's substantial rights (CM ETO 438, Smith; CM ETO 3197, Colson and Brown).

(c) The trial judge advocate was appointed by order of the appointing authority (par.1, SO 165, Hq. 83d Inf. Div.) dated 23 August 1944, on which day he served a copy of the charges on accused. The charges were not referred to the former for trial, however, until 24 August 1944. For the reasons stated by the Board of Review in its holding in CM ETO 3948, Paulercio, the irregularity was harmless. The record shows (R2) that the trial took place, accused consenting, two days after the charges were served on him, and also that Major Norman P. Cowden, Assistant Adjutant General of the 83d Infantry Division, who by command of the division commander referred the case for trial, was appointed and sat as a member of the court. For the reasons stated in the last cited case, these irregularities also were harmless.

7. The charge sheet shows that accused is 24 years ten months of age and was inducted 15 October 1942 at Cincinnati, Ohio. No prior service is shown.

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

9. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 DEC 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private First Class COOLIE SUMNER (35666001), Company I, 331st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support 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 such 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 4005. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4005).

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

(Sentence as commuted ordered executed. GCMO 123, ETO, 11 Dec 1944)

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

BOARD OF REVIEW NO. 2

17 NOV 1944

CM ETO 4012

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at Headquarters 2nd Advanced Air Depot Area, IX Air Force Service Command, APO 149, 14 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Federal Reformatory, Chillicothe, Ohio.
Private JOHN J. O'CONNELL (32297460), Detachment "A", Eighth Air Force Intransit Depot Group.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private John J. O'Connell, 1st Port Intransit Depot Squadron, First Intransit Depot Group, then Private First Class, Detachment "A", Eighth Air Force Intransit Depot Group, did, on or about 17 August 1944, at Bivouac Area, Detachment "A", Eighth Air Force Intransit Depot Group, with intent to commit a felony, viz., sodomy, commit an assault upon Private First Class Frank Kopacz, Detachment "A", Eighth Air Force Intransit Depot Group, by willfully and feloniously, and against the order of nature attempting to have carnal connection per rectum with said Private First Class Kopacz.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The offense charged was established by the testimony of the victim of the assault, corroborated by that of an officer of accused's group and a sergeant who was a member of accused's organization, as to various significant attendant circumstances. According to the victim's account accused employed force in his effort to accomplish his purpose. Accused, having elected to testify, denied the victim's story. He sought to explain obviously incriminating circumstances by testimony inculpating the victim, corroborated as to certain unessential details, by two defense witnesses.

4. The action of the reviewing authority designates the accused by the same name, rank and army serial number as the charge sheet but recites his organization as "First Port Intransit Depot Squadron, First Intransit Depot Group". It will be noted that the prosecution and the defense entered into a stipulation at the beginning of the trial that the accused was a member of the organization specified in the reviewing authority's action and that he was formerly a member of the organization specified on the charge sheet (R4).

5. The charge sheet shows that accused is 34 years of age and that, with no prior service, he was inducted at Fort Jay, New York, 6 April 1942.

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

7. Penitentiary confinement is authorized (AW 42; 18 USC 458) but, as accused is over 31 years of age, designation of a federal reformatory is not authorized (Cir 229, WD, 8 June 1944, sec II, pars. 1a(1), 3a). The designation of the United States Penitentiary, Lewisburg, Pennsylvania would be proper (ibid, pars. 1b(4) and 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 NOV 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Private JOHN J. O'CONNELL (32297460), Detachment "A", Eighth Air Force Intransit 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, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. While the record is legally sufficient to support the findings and sentence because the court had a right to believe the story told by the complaining witness, nevertheless it is far from satisfactory. Kopacz was admittedly drunk, as were many others. How could O'Connell succeed in undressing Kopacz if the latter resisted? If O'Connell intended and attempted to commit sodomy on his visit to Kopacz' tent, as the latter testified, why would he invite two witnesses to go along? Sergeant Flynn, who was asleep in the same foxhole with Kopacz, is quoted by Corporal Licausi as saying, "go ahead and suck him and let him get to hell out of here". This is corroborated by Delouchrey. Flynn was not a witness at either the trial or the investigation, but this remark, if true, rather clearly exhibits Kopacz' character. The conviction rests entirely on the latter's testimony.

Sodomy is like rape, "a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." (MCM 1928, p.165)

3. The record of trial is returned so you may, if you desire, give further consideration to your final action. If you order execution of the sentence, it will be necessary for you to change your designation of the place of confinement to the United States Penitentiary, Lewisburg, Pennsylvania, in order to comply with the pertinent authorities cited in paragraph 7 of the foregoing holding. This may be done in the published court-martial order.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4012. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4012).

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

4012

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

BOARD OF REVIEW NO. 1

4 NOV 1944

CM ETO 4017

U N I T E D S T A T E S	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private WILLIAM D. PENNYFEATHER (32801627), 3868th Quartermaster Truck Company (TC).	Trial by GCM, convened at Cherbourg, France, 2 September 1944. Sentence: To be hanged by the neck until dead.

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

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1. The record of trial in the case of the 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 D. Pennyfeather, 3868 Quartermaster Truck Company (TC), did, at 1 Rue Emmanuel Liais, Cherbourg, France, on or about 1 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mme. Julia Herbaut, 1 Rue Emmanuel Liais, Cherbourg, France.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for four days, escape from confinement, breach of restriction and entering a restricted area, in violation of Articles of War 61, 69 and 96. All members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead.

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

3. The evidence for the prosecution, which was undisputed, shows that on 1 August 1944 Madame Julia Herbaut lived on the third floor, 1 Rue Emmanuel Liais, Cherbourg, France. In another apartment on the same floor lived Emile Lobbrecht, his sister Georgette, and Marcel Chevereau. Georgette's fiance, Roger Berton, was visiting the Lobbrechts during the evening of 1 August (R5-6,10-11,13,17). About midnight four colored soldiers knocked at the downstairs door and called "Is there any girls", "Is there any Boche". When Emile Lobbrecht opened the window, the soldiers said "Come downstairs, gentlemen", whereupon Lobbrecht, Chevereau and Berton obeyed (R6,11,12,13). The colored soldiers forced open the door, said "There are Germans here", and a knife was held against Berton's chest. The three Frenchmen, upon being ordered to do so, went upstairs, and three of the colored soldiers "followed behind with their knives" (R6,13-14). Accused, a small soldier who was armed with a knife, entered the Lobbrecht apartment and searched the premises while the other two soldiers remained by the door. Accused's penis was hanging out of his trousers. Georgette, who was sitting on the bed, became frightened and went over to Berton. Accused "went to catch hold of her" but his companions prevented him from doing so and took him out of the room (R6-7,12,14,16).

About midnight Madame Herbaut, fully clothed, was lying on her bed when accused entered her apartment. His penis was hanging out of his trousers. She arose and immediately went to the door. She told him to leave but he refused and entered and locked the door. When she succeeded in opening it, she observed two other colored soldiers on the stairs. She screamed for help (R17-18) and was heard by the Lobbrechts, Chevereau and Berton. The three men hastened to her apartment and found her screaming and struggling with accused while the two other soldiers looked on. Although accused's two fellow soldiers were armed with knives Lobbrecht pushed them aside, entered the room and told accused to desist, stating that Madame Herbaut was his wife. Accused paid no attention, dragged her to her bed, threw her violently upon it, got on top of her and raised her clothing. He put his knee on her leg to force her legs apart and held her arms behind her back. She struggled "very strongly" (R6-7,9-10,12-13,15,18). Finally accused bit her on the left cheek, loosened her arm and told her, by making signs with his head, to "introduce" his penis. When she refused he tried to bite her on her other cheek. She continually tried to get away from him but finally became so weak she "could do no more". She inserted his penis in her person "rather than he bite me a second time" (R18-20). During this time Lobbrecht, Chevereau and Berton could not get near the bed because

the two soldiers with accused stood between them and the bed, holding knives (R7-8,20-21). Chevereau in fact remained in the entrance to the Herbaut apartment (R15) and Lobbrecht testified that although he did not see the actual act of intercourse (R10), he did see accused lying on top of the woman (R7). Berton, Chevereau and Lobbrecht finally departed to summon aid (R7-8,15). Accused's two companions left the room before the arrival of the military police (R16,20). When the military police arrived in the room, Lobbrecht was hiding in a small adjoining chamber as he feared the soldiers would harm him because the police were called (R8).

After 11:00 p.m. that evening, Corporal Donald L. Sharshel, 1118th Military Police Company, Aviation, and Private Arthur J. Thomas, 707th Military Police Battalion, noticed two colored soldiers standing in front of the house, trying to hide behind two Frenchmen. The soldiers said they were waiting for their "buddy" who was upstairs. The two military policemen ordered them to return to their barracks as it was after 11:00 p.m., the curfew hour, and then went to the Herbaut apartment where they found accused on top of the woman on the bed. Accused was having intercourse and "was really going to town". The woman appeared to be making no resistance, but was sighing or groaning. When the military policemen forcibly removed accused from the woman's person he said "I'm getting myself some pussy". Madame Herbaut pulled down her dress and showed the policemen a blotch or spot on the left side of her face (R21-25). After accused was taken away, she cleaned herself and discovered the presence of semen (R19-20).

Georgette Lobbrecht and Chevereau testified that accused appeared to be drunk (R13,16). Lobbrecht testified that in his opinion accused was drunk but "not very". He did not stagger (R9). Asked if accused appeared to be drunk, Madame Herbaut testified "If he was drunk in any case he understood what I said" (R20). According to Thomas, accused "had some drink in him", but was able to get about and knew what he was doing (R23). Sharshel testified that in his opinion accused "was drinking" but witness would not say that he was drunk (R25).

4. For the defense, it was stipulated by the prosecution and defense that if Major K. B. Conger, Medical Corps, 298th General Hospital, were present, he would testify as follows:

> "Medical Examination on Mme. Julia Herbaut was carried out August 2, 1944, 1550 hours. This revealed no lacrations /lacerations/ or bruises of the perineum, thighs, or vaginal mucous membranes.
> Microscopic examination of a discharge from the cervix revealed many mixed epithelial and pus cells and numerous mixed organisms. No tram negative intracellular displococci seen.
> Only sign of violence consisted of two semi-elliptical marks on left cheek over maxillary region, superficial, with concavities adjoining.
> No spermatazoa found on exam. of cervical discharge" (R26; Defendant's Ex.A).

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Upon being advised of his rights, accused elected to remain silent (R27).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. Any penetration, however slight, of a woman's genitals, is sufficient carnal knowledge, whether emission occurs or not.

* * * * * * * * * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

* * * * * * * * * *

Proof.--(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent" (MCM, 1928, par.149b, p.165).

"Carnal knowledge of the female with her consent is not rape, provided she is above the age of consent, or is capable in the eyes of the law of giving consent, or her consent is not extorted by threats and fear of immediate bodily harm. * * * <u>There is a difference between consent and submission; every consent involves submission, but it by no means follows that a mere submission involves consent</u>" (52 CJ, sec.26, pp.1016,1017) (Underscoring supplied).

"The female need not resist so 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).

"<u>The force</u>. The force implied in the term <u>'rape' may be of any sort, if sufficient to overcome resistance. * * * It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or of grievous bodily harm or other injury</u> * * *.

4017

Non-consent. Absence of free will, or non-consent, on the part of the female, may consist and appear * * * in her yielding through reasonable fear of death or extreme injury impending or threatened; * * * in the fact that her will has been constrained, or her passive acquiescence obtained, by * * * other controlling means or influence" (Winthrop's Military Law and Precedents - Reprint, pp.677-678) (Underscoring supplied).

"Acquiescence through fear not consent. Consent, however reluctant, negatives rape; but when the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (1 Wharton's Criminal Law, 12th Ed., sec.701, p.942) (Underscoring supplied).

"An actual force used by the accused sufficient to create an apprehension of death in the mind of the victim need not be proved. If a less degree of force is used, but coupled with threats to kill or to inflict bodily harm, in fear of which she involuntarily submits, the intimidation practiced will be regarded as constructive force" (Underhill's Criminal Evidence, 4th Ed., sec.675, pp.1272-1273) (Underscoring supplied).

It was clearly established by the evidence that accused assaulted Madame Herbaut by force and against her will, and that penetration occurred. Her screams and calls for help were heard by those in the Lobbrecht apartment and her prolonged struggles with accused were observed by the witnesses Lobbrecht and Chevereau. Despite the protestations of Lobbrecht, accused dragged the woman to the bed, flung her violently upon it, got on top of her and raised her clothing. He used his knee to force her legs apart and held her arms behind her back. During this time the woman resisted strongly and finally accused bit her severely on the cheek. He released one arm and demanded that she insert his penis in her person. When she refused he tried to bite her on the other cheek. She continued to struggle but ultimately became utterly exhausted and powerless. Because of this fact and rather than submit to additional biting, she finally inserted his penis and accused had intercourse with her. It was necessary to remove accused from her person by force. He freely admitted the fact of intercourse. The bite on the victim's cheek was plainly visible and was corroborated by the medical evidence. Upon cleaning herself the woman discovered the presence of semen. The French civilians were unable

physically to prevent the outrage themselves or to witness its actual consummation because of the presence of accused's two fellow soldiers who stood between them and the bed with drawn knives.

The facts of this case are of the same general pattern as those involved in the case of CM ETO 3740, Sanders et al. The victim, Madame Herbaut, testified that she introduced accused's penis into her vagina. The evidence of the military police, who arrived late in the episode, was that during their observation of the act of intercourse the woman offered no resistance but was heard to give "a low moan or groan". The following quotation from the Sanders case is cogent and applicable to the conduct of Madame Herbaut:

> "It is apparent * * * that an accused may be guilty of accomplishing rape by mere threats of bodily harm as distinguished from rape by means of actual force and violence. In each instance the offense must be consummated without the voluntary consent of the victim. Rape accomplished through force and violence ordinarily requires proof that the victim exercised all of her powers of resistance, consistent with the surrounding circumstances. Such offense assumes that the victim does resist and her opposition is overcome by physical force of her assailant. Rape accomplished by threats of bodily harm assumes that she does not resist but upon the contrary that she is prevented from doing so through fear caused by the assailant's threats to inflict upon her great bodily harm (People v. Battilana, __Cal. App. (2nd)__, 126 Pac. (2nd) 923)".

In the instant case the evidence is substantial and convincing that Madame Herbaut's passive conduct at the time of the sexual act was the direct and consequential result of physical violence visited upon her by accused and the fear engendered in her of additional violence and further injury.

In view of the foregoing the Board of Review is of the opinion that competent, substantial evidence fully supported the findings of guilty of rape (CM ETO 3141, Whitfield; CM ETO 3740, Sanders et al; CM ETO 3859, Watson and Wimberly; CM ETO 2686, Brinson and Smith; CM ETO 3197, Colson and Brown; CM ETO 2472, Blevins).

6. The question of accused's intoxication and the effect thereof on the general criminal intent involved in the offense of rape, were issues of fact for the sole determination of the court. Such determination, reflected in the findings of guilty, will not be disturbed upon appellate review as it was fully supported by evidence of a competent

and substantial nature (CM ETO 3475, Blackwell et al and authorities cited therein).

7. The charge sheet shows that accused is 24 years of age and was inducted at the United States Army Induction Station, New York City, New York, 11 February 1943, 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 rape is death or life imprisonment as the court-martial may direct (AW 92).

B. Franklin Pitts Judge Advocate

Edward H. Hargest Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(250)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private WILLIAM D. PENNYFEATHER (32801627), 3868th Quartermaster Truck Company (TC), 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.

2. When copies of the published order are forwarded to this office they should be accompanied by the record of trial, the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4017. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4017).

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

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

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 103, ETO, 15 Nov 1944)

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

BOARD OF REVIEW NO. 1

28 DEC 1944

CM ETO 4020

U N I T E D S T A T E S	4TH INFANTRY DIVISION
v.	Trial by GCM, convened at Saint Vith, Belgium, 28 September 1944.
Private JOE F. HERNANDEZ (39705029), Company "C", 801st Tank Destroyer Battalion.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

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

Specification: In that Private Joe F. Hernandez, Company "C", 801st Tank Destroyer Battalion, did, at Bleialf, Germany, on or about 22 September 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Johann Voutz, a human being, by shooting him with a pistol.

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

Specification: In that * * * did, at Bleialf, Germany, on or about 22 September 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Elmer T. Powell, Company "C", 801st Tank Destroyer Battalion, by willfully and feloniously shooting the said Private Elmer T. Powell in the right shoulder with a pistol.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of 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. Evidence for the prosecution:

On the afternoon of 22 September 1944, Sergeant Howard G. Chase, Technician Fifth Grade Emery M. Vos, Private Elmer T. Powell and accused, all members of the same gun squad, Company C, 801st Tank Destroyer Battalion, then in Bleialf, Germany, entered a house in which German equipment and uniforms had been discovered. Powell was armed with an M-1 rifle and accused carried a pistol. At the building they met a civilian, described by Powell as "an old German man" (R5,13-14,24). In searching the house, accused found some bottles containing liquor and with Powell "had a few drinks". Powell "guessed" it was wine (R6) but Vos, who was offered some, called it cognac (R14). Chase and Vos departed, leaving Powell, accused and "the old man" in the house. Accused "was feeling good. He had had a few drinks" (R14). The three of them were in the same room together (R5). The German did not speak English but

> "acted like a nice old man. He was as friendly as he could be." (R9).

Powell discovered a typewriter on a long table, which prompted him to sit down before it with the intention of writing a reply to a letter from his brother which he took from his pocket (R6). It took him three to five minutes (R7) to insert the letter in the machine and to commence typing on a blank part of the paper (R6; Pros. Ex.A). He got as far as

> " dear brother received"

when he heard a shot and turned about to find the German face down on the floor, where he "grunted two or three times" (R6). Accused stood nearby, but there was no gun in his hand (R6,8). Powell said,

> "What are you doing, Joe. Are you crazy?"

Accused answered,

> "The old man made a pass at me so I shot him" (R7,8).

The room was well lighted by daylight which entered through two glass windows. No glass was broken and there was no firing outside. The shot

had come from within the room. Powell said, "I am going to get out of here" (R5,9). Vos then entered the house and, seeing the old man on the floor, asked Powell, "What happened, who did it?" Vos testified that

> "Powell and Hernandez said he was laid out from drinking, and I said, 'I don't believe it'" (R14).

Vos and Powell proceeded to the gun emplacement where Powell reported the event to Chase. Upon accused's arrival there fifteen minutes later when questioned by Chase, he said, "No, I didn't shoot him" (R10). Accused then

> "jerked out his pistol and stuck it in the Sergeant's stomach" (R10),

saying "he would shoot him or anybody who turned him in" (R10). Powell, kneeling on the ground with his M-1 propped against one knee, volunteered the information that he had turned him in. They "got to arguing" and as Powell started to get up, after laying down his weapon, accused fired, wounding him in the right shoulder (R10,12,15,24-25). Vos testified accused was drunk and that just before he fired he

> "had his gun on all of them and said, 'Don't ever fuck with me because I will shoot you'" (R15).

Private Witold Bobulski, of Company C, was also present at the time of this shooting, which he described as follows:

> "After I was on guard about five minutes I asked a T-5 to watch my guard while I fried some eggs. The next thing, Private Hernandez, Private Powell and Sergeant Chase were talking just between themselves. I knew something was up and just kept frying my eggs. I heard Private Powell say, 'Put down that gun and I will whip your ass'. Then I heard a shot. That was after I heard Hernandez say, 'Never fuck with me'" (R20).

He did not see any weapon in accused's hand and

> "wouldn't say he was drunk, but he was feeling pretty good" (R20).

Chase's testimony and that of Private Larry Hendricks, of Company C, corroborated in substance the foregoing versions of the circumstances that immediately preceded the shooting of Powell by accused (R24,26-27). Chase heard accused say prior to the shooting, "I will shoot you, Powell" (R25 and

> "he said something about shooting him in the heart, as I remember it" (R25).

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In Chase's opinion accused was so drunk he did not know what he was doing (R25). Hendricks was about 30 feet away when he heard accused say to Powell "I will kill him" and just before accused fired he said,

> "I will kill you and I will kill anybody that fucks with me" (R28).

To Hendricks, accused

> "seemed to be in full command of his faculties. He seemed to handle himself pretty well" (R27).

As soon as accused fired, Chase hit him two or three times across the head with a carbine, knocking him to the ground, and Hendricks took away the pistol. The weapon was an old type of German luger (R26; Pros.Ex.B).

First Lieutenant Donald M. McDade, Company C, came upon the scene soon after this shooting occurred. He observed that Powell had been shot in the right shoulder and that a "medic" was caring for him. In making an investigation of a report of the killing of a German, he drove two miles in his jeep with three enlisted men, accompanied also by accused, who rode on the hood of the vehicle. McDade noticed that accused had no difficulty in climbing onto the hood of the jeep and did not act "as a drunken man would". Thereafter at about 1800 or 1830 hours, in the company of Captain Phil L. Barringer, Medical Corps, 801st Tank Battalion, and another officer, he went to the house where the German civilian had reportedly been shot (R16-17,28) and described the room where they found the body as follows:

> "The general condition when I walked into the room, entering a door on the left corner, to my right as I entered the room was a table and on the left hand side of the table was a typewriter. On the center of the table were some empty bottles and on the right of the table about five glasses, three small sherbert glasses and two sort of transparent glass drinking cups. As I came in the door, which swung to the right, behind the door was the body of the German civilian, lying diagonally to the corner, and to the rear was a closet built into the corner of the wall. As I entered the room, on the left was a small table, and to my knowledge that is about all I remember of the room" (R17).

A cartridge case (Pros. Ex.C) was found under the body and a projectile (Pros. Ex.D) was discovered underneath a table on the opposite side of the room from the body (R18-19,29).

Captain Barringer examined the German and found that he was dead (R28). His name, he learned, was Johann Voutz (R29). Death resulted from

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a bullet wound, the bullet having

> "entered the abdomen at the right upper quadrant at a point approximately midway between the ninth costal cartilage and the umbilicus. Further examination revealed what appeared to be the exit of the bullet, just to the right of mid-line at the approximate level of the second sacral vertebra at the right side and posterior" (R25).

The wound had been caused by a small arms weapon. The projectile referred to "or a like one" was received in evidence and identified by Barringer (R18-19,29; Pros. Ex.D). At about 1830 or 1900 hours the same day he examined accused who was, in his opinion, intoxicated (R30-31).

Nicholas Pullen, Second Burgomeister of the town of Bleialf, identified the civilian who "in your town was shot by an American soldier" as Johann Vouts and further identified him from a photograph (R23; Pros. Ex.E). Hilda Vouts, daughter of the deceased, also identified Johann Vouts from the same photograph as her father, who died 22 September after "he was shot by an American", and whose body she saw buried (R22).

4. Evidence for the defense:

After being advised of his rights, accused elected to be sworn and to testify in his own behalf (R33). His account of the circumstances that preceded the death of the German was as follows:

> "On the 22d me and the rest of the fellows went to this house. They all got in and I was the last man going in. I went in and as I was going in there was a door to the left and I looked in there and there was some bottles of whiskey and cognac, and I went in there by myself, and then Powell came from upstairs and saw me at that table drinking and we started drinking together. The other fellows went out, all except me and Powell. We was there and had a few drinks and he said, 'I am going to write a letter on the typewriter', and I said, 'Go ahead, I will wait for you', and that is when the old man comes in, and started gabbling. I didn't know what he was talking about. I offered him a drink and he kept on talking, the two of us there, and Powell was writing the letter, and I was there drinking. We had a few drinks. So then Powell gets through writing the letter and goes out and me and the old man were right there. I was standing by the table and he was going to grab the bottle - I had some bottles. Before he had taken us down stairs and showed us where they were - he knew the house pretty well. I had some bottles here (indicating both pockets of his outer garment). When he took us down to the basement to show

us around I put the bottles in my pockets (indicating outer pockets again). We saw a lot of German uniforms in the basement, and we went upstairs in the house and all of us went over there to the same table and started drinking all over again. We kept on drinking and pretty soon Powell goes out. I don't know where he went. The old man and me was there and I grabbed the bottle for another drink and when I put the bottle to my mouth, from the corner of my eye I saw something coming at me, and I swung my head back and my bottle hit the bottle of the old man, and I swung around and hit the old man in the stomach with my fist" (R33-34).

At that moment Powell was outside in the hallway. He came in and asked "What did you hit the old man for?" Accused answered

"He tried to hit me on the head with a bottle, I hit him in the stomach" (R34).

Accused denied that he ever shot the old man, but stated that the pistol in evidence, Pros. Ex. B, was his, that he had it with him while in the house and that Powell did not use it (R34). Accused carried the pistol under his sweater and before he hit the old man he and Powell "drank about a quart and a half or two quarts". He was drunk but knew what he was doing (R35).

Examined by members of the court accused could not explain how the deceased "got the bullet" while only he and deceased were in the room (R36).

5. With reference to Charge I and Specification, it was established beyond all doubt by the evidence that accused shot and killed Johann Voutz as alleged. The law applicable to the particular circumstances of this case is fully set out in CM ETO 3180, Porter and cases therein cited. Whether or not the intent to kill was formed under the influence of an uncontrollable passion aroused by adequate provocation was a question peculiarly within the province of the court. It decided that accused's intent to kill was not formed under such influence and in view of all the evidence, the Board of Review will not disturb the findings of the court (CM ETO 2007, Harris, Jr).

6. With reference to Charge II and Specification, the evidence, fully and completely supporting the allegations, was not disputed and showed beyond any reasonable doubt that accused fired his pistol at Powell intending to kill him (CM ETO 1535, J. Cooper; CM ETO 2297, Johnson and Leper; CM ETO 2672, Brooks; CM ETO 2899, Reeves). The evidence would have sustained a finding of murder had death ensued. Absent the fact of death, accused's guilt of the crime of assault with intent to commit murder is an automatic legal sequence (CM ETO 2899, Reeves, and authorities therein cited).

7. The charge sheet shows that accused is 33 years five months of age and was inducted 16 July 1943 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 offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for murder is death or life imprisonment as a court-martial may direct (AW 92) and confinement in a penitentiary is authorized by Article of War 42 and sections 275,330, Federal Criminal Code (18 USCA 454,567). Confinement in a penitentiary is also authorized for the crime of assault with intent to commit murder 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

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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CONFIDENTIAL

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War Department Branch Office of The Judge Advocate General with the European Theater of Operations. 28 DEC 1944 TO: Commanding General, 4th Infantry Division, APO 4, U. S. Army.

1. In the case of Private JOE F. HERNANDEZ (39705029), Company "C", 801st Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4020. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4020).

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

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

BOARD OF REVIEW NO. 2

10 MAR 1945

CM ETO 4028

U N I T E D S T A T E S	SOUTHERN BASE SECTION (now succeeded by UNITED KINGDOM BASE), COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private MANUEL MORENO (38071294) Company A, 603rd Tank Destroyer Battalion (SP)	Trial by GCM, convened at U.S. General Depot G-25, APO 518, 24 August 1944, Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Manuel Moreno, Company A, 603rd Tank Destroyer Battalion (SP), did, at Sherborne, Gloucestershire, England, on or about 5 July 1944, wrongfully and feloniously commit an indecent assault upon Anthony C. R. Sabin, a minor, by taking down his trousers, straddling

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him, and placing his (Private Moreno's) penis between the legs of the said Anthony C. R. Sabin.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions was introduced, one by special court-martial for absence without leave for fifteen days and one by summary court for absence without leave for nine days, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Anthony C. R. Sabin, nine years of age, testified that he and his younger brother eight years old, met a soldier on the evening of 5 July 1944 and stopped to talk with him (R7,9). The soldier told them "if you want any gum come with me". Anthony complied with the soldier's request and accompanied him "up among the woods" (R7). There, according to Anthony's testimony, the soldier removed the boy's trousers, lay on top of him, "pulled his diggy out and stuck it up my behind". When the soldier "stopped", Anthony went home (R8). Anthony's father testified that Anthony came home crying shortly before ten o'clock on 5 July 1944 and told him what had occurred (R12). Mr. Sabin, accompanied by Anthony, Anthony's younger brother, and "George.... a man who works in the garden", then returned to the scene of the incident to try to find the soldier involved (R8,13; Def.Ex.1). They there saw a soldier whom Anthony identified as the soldier who had "insulted" him. Mr. Sabin then "found the Colonel" and informed him of what had happened. An identification parade was held at which Anthony again identified accused as his assailant (R13). Anthony was taken home at which time his mother examined him and found "a slight redness and dampness.....between his legs and his behind" (R15). Anthony was examined by a medical officer the following day and a copy of that officer's written report, admitted in evidence without objection by the defense, indicates that his examination did not disclose any evidence of physical restraint or of penetration of the boy's rectum (R18; Pros.Ex.2). Later, two additional identification parades were held at both of which Anthony identified accused as the soldier who had assaulted him (R13,16).

The prosecution introduced a signed sworn statement made by accused, after being advised of his rights, to an agent of the

Criminal Investigation Division. In this statement accused recited that on the evening of 5 July 1944 he was on guard duty from 1900 to 2110 hours after which he returned to the supply room where he talked to the supply sergeant for about ten minutes whereupon, at about 2140 hours, he started for the guardhouse. On his way there he encountered two young English civilian boys to one of whom he gave some gum. The boy "took it and I left them and walked away". Accused arrived at the guardhouse about 2150 hours. He left his equipment there, started to return to the supply room and on his way back encountered two civilian men and two civilian boys. He recognized the boys as those to whom he had previously given the gum. At the request of one of the civilian men, accused accompanied the civilians to the guardhouse. The officer of the day arrived, a line-up was held, and "the two civilian boys identified me in the line-up"(Pros.Ex.1).

4. After his rights had been explained to him, accused was sworn as a witness on his own behalf. His testimony on the stand was, in substance, a repetition of the recitals contained in his pre-trial statement (R21,22). He also brought out that the men who formed the identification parade or "line-up" on the night of the incident were selected from the men then on guard duty and that there were less than six men in the "line-up" (R22,24). He also stated that he was of Mexican nationality, that one of the other members of the guard was of Spanish nationality and that the latter was not a member of the first "line-up" (R22). However, the latter was present during a subsequent identification parade at which Anthony Sabin identified accused (R24).

5. The actual commission of the act alleged was shown primarily by the testimony of the victim, a boy nine years of age. This witness was sworn but no preliminary examination was conducted by the trial judge advocate or the court to determine the witness' competency to testify based upon his intelligence and capacity and his ability to understand the nature and obligation of an oath. While it is better practice todetermine these issues on the basis of a preliminary examination on voir dire, it is within the discretion of the court to determine the competency of a child witness by his demeanor on the stand and the coherence and intelligence of his testimony (CM ETO 2759, Davis; Dig.Op. JAG, 1912-40, sec.395 (58), p.238; MCM, 1928, par.120,p.125). The record does not indicate that there was an abuse of discretion by the court in accepting the boy's testimony in this case. His testimony, corroborated by that of accused and other witnesses as to surrounding circumstances, constitutes evidence amply sufficient to support the court's findings that accused was guilty of the offense charged.

6. While the conduct of the accused in this case approaches an assault with intent to commit sodomy and the proof might well

have been sufficient to support a conviction of this offense had it been charged, the specification as drawn alleges only an indecent assault upon a minor. The question of the maximum period of confinement which may be imposed for this offense has been the subject of some difficulty in the past. While it seems clear that the punishment imposable for this offense is not governed by the Table of maximum punishments (CM 199369, Davis, (1932); CM 208073, Moran (1937); and see CM 188606, Paparis, (1929)), or by any Federal penal statute of general application (idem), the question whether the maximum period of confinement is limited by the provisions of the District of Columbia Code has been a more troublesome one. For a time it was held that the maximum confinement imposable for the offense was two years on the theory that such offense was analogous to the offenses denounced by that provision of the District of Columbia Code (then sec.37, Title 6, now sec. 22-901, Chapter 9, Title 22) which makes punishable by confinement for two years certain acts of cruelty to children (CM Davis, supra). However, this position was subsequently abandoned on the ground that this statute was not intended to embrace the taking of sexual liberties with children or committing acts of a lascivious nature upon them but contemplated only "physical harm to a child, abandoning one, or exploiting one for gain" (CM 210762, Valeroso, (1938)). With this decision, the position with reference to this question became that the maximum punishment for offenses of this type was not only not prescribed by the Table of maximum punishments or by any Federal statute of general application but also that no maximum punishment therefor was to be found in the District of Columbia Code, (CM 212272, Dill, (1929); CM 224649, Woodall, (1943)). The general position that the offense here under consideration is not specifically denounced by the Table of maximum punishments or by any Federal statute or the District of Columbia Code was adopted in this theater in CM ETO 571, Leach (1943). However, it was pointed out in that case that the District of Columbia Code, after setting forth the punishment for assaults with intent to kill, to rape, to commit robbery and for other types of assaults, goes on to provide that whoever assaults another with intent to commit any offense which may be punished by confinement in the penitentiary may be imprisoned for five years (DC Code, 1940 Ed., Title 22, Ch.5, sec.22-503, p.497). While it was recognized that this omnibus provision did not specifically cover indecent assaults upon minors, the view was expressed that the period of confinement for that offense should not exceed that prescribed for the more serious types of assault denounced by the section of the Code cited above. Under this view, the period of confinement which may be imposed upon conviction of the offense of indecent assault upon a minor may equal, but may not exceed, that prescribed for assaults with intent to commit an offense which may be punished by confinement in a penitentiary, i.e., five years. The Leach case was followed in CM ETO 2195, Shorter, in which the Board upheld a sentence which included confinement at hard labor for five years upon conviction of

accused under a specification which alleged that he did "wrongully and unlawfully take indecent liberties with * * * a female child, under six years of age, by placing his hand inside her clothing and against the legs and private parts" of the child. The Leach case was followed in CM ETO 3869, Marcum, wherein accused was found guilty of a specification which alleged that he did "wrongfully, unlawfully and feloniously take indecent liberties with * * * a female under nine years of age, by fondling her and placing his hands upon her leg and private parts".

However, in CM ETO 3436, Paquette, another section of the District of Columbia Code was applied in determining the maximum punishment imposable for the offense of making indecent advances to a 12 year old youth by fondling his penis. A second specification in the same case alleged that accused performed, in the presence of the same minor, "an act of gross indecency upon himself, to wit: Masturbation". In discussing the sentence, the Board of Review said:

> "(The specifications) allege, respectively, assault and battery and indecent exposure, in violation of Article of War 96. Each offense, however, as alleged and established in this particular case, presents the more serious aspect of clearly service discrediting conduct calculated to corrupt the morals and contribute to the delinquency of a child. The District of Columbia Code provides that any person committing such an offense 'shall be guilty of a misdemeanor and punished by a fine not exceeding $200 or imprisonment not exceeding 12 months or by both fine and imprisonment' (D. C. Code, 1940 Edition, Title 11, Chapter 9, sec.11-919, p.298). While the court was authorized to impose punishment with reference to each offense in its most serious aspect, it was of course, limited to the aggregate of the maximum authorized for each offense. * * * In this instance the maximum, as fixed by the District of Columbia Code, is one year for each offense, authorizing an aggregate of two years confinement for the two offenses".

The record was accordingly held legally sufficient to support only as much of the sentence as adjudged dishonorable discharge, total forfeitures and confinement at hard labor for two years.

The Paquette case thus represents a divergence from the views

expressed in the Leach, Shorter and Marcum cases. Confusion arises from the fact that the Paquette opinion undertakes neither to distinguish nor to overrule these precedents. It therefore becomes necessary, in deciding this case, to determine whether the Paquette or the Leach case establishes the rule here applicable with reference to the maximum punishment legally authorized for the offense of which accused stands convicted.

The offense in the Paquette case, as alleged and proved, involved conduct devoid of actual physical violence toward the 12 year old minor, who submitted with apparent complacency to the tickling of his penis by the accused. While technically the touching of the lad's private parts may, because of his minority, have constituted an assault despite his tacit consent, the onus of the offense, as pleaded and as established by the proof, was accused's conducting himself, in the relationship shown, in a manner tending to contribute to the minor's delinquency. For that reason the District of Columbia Juvenile Court Statute was held to apply.

In the instant case, the specification alleges and the proof shows a veritable assault and battery accompanied by aggravating indecencies, adding elements clearly not essential to a conviction under the juvenile court statute and bringing the case squarely within the rule announced in the Leach, Shorter and Marcum cases. The fact that the indecencies accompanying the assault were of a nature which might be reasonably regarded as tending to contribute to the delinquency of a minor, does not affect the character of the greater offense charged, but merely constitutes the lesser conduct tending to contribute to the delinquency of a minor - an included one; just as, in the instant case, simple assault and battery is also a lesser offense, included in the greater offense of indecent assault upon a minor, with which accused was charged.

6. The charge sheet shows that accused is 24 years of age and was inducted at Fort Bliss, Texas, 30 January 1942. No prior service is shown.

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

8. The designation of the Eastern Branch, United States Dis-

ciplinary 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

(DISSENT) Judge Advocate

Judge Advocate

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

BOARD OF REVIEW NO. 2

10 MAR 1945

CM ETO 4028

U N I T E D S T A T E S	SOUTHERN BASE SECTION (now succeeded by UNITED KINGDOM BASE), COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private MANUEL MORENO (38071294) Company A, 603rd Tank Destroyer Battalion (SP)	Trial by GCM, convened at U.S. General Depot G-25, APO 518, 24 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York

DISSENTING OPINION by HILL, Judge Advocate

1. I find myself in disagreement with that part of the majority holding by the Board of Review which approves the sentence imposed in this case: confinement for four years. The offense charged was indecent assault on a minor in violation of Article of War 96. The employment of force was not alleged nor was there any evidence of force or violence. In any event, the offense was not alleged or charged as an assault under Article of War 93.

2. The offense in question was an indecent or aggravated assault. Its quality as an aggravated offense lies somewhere between the felonious and the simple assault, as known at common law; and it is so recognized and punished by statute. To constitute such a statutory offense there must be an assault which may consist of indecent liberties or familiarities with a female, without her consent when she is not a minor, or with a child regardless of consent (5 CJ sec.197-200, pp730-2).

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Some states protect children from such conduct by statutes which condemn it as tending to contribute to juvenile delinquency or as tending to impair the morals of a minor.

3. Felonious assaults are punished by penitentiary confinement, while simple assaults are generally punishable by workhouse confinement not exceeding six months. The aggravated or indecent assault, such as is found in the instant case, is punished by statute, generally it is believed, by confinement not exceeding one year. In any event the District of Columbia Code has had since 1938, a statute which condemns and punishes this particular offense by imprisonment for not more than one year (CM ETO 3436, Paquette).

4. Articles of War 93 and 96, and the Manual for Courts-Martial, 1928, respectively condemn and punish felonious assault and simple or common assault. The punishment provided therefor in the Table of maximum punishments is in line with that imposed by civil statutes. Although indecent assault, a generally recognized distinct offense as pointed out, is properly punishable under Article of War 96 as service discrediting, no punishment is provided for this offense and no closely related offense is mentioned in the Table of maximum punishments as set forth in the Manual (MCM, 1928, par.104c, pp.97-101). Offenses not thus provided for remain punishable by military courts as authorized by statute. The Federal statutes of general application are silent on the subject of the offense of indecent assault. However, as stated above, since 1938 the District of Columbia Code has denounced conduct which involves indecent liberties (an assault, in fact, there being no consent, as we have seen) on a child.

5. The pertinent parts of District of Columbia Code, adopted in 1938, to which reference has been made (1940 Ed., Title 11, Chapter 9) reads:

"Sec.11-906 (18:255): * * *

(a) This chapter shall apply to any person under the age of 18 years -

* * *

(4) Who habitually so deports himself as to injure or endanger * * * the morals * * * of himself or others; or

* * *

(8) Who associates with * * * immoral persons;"

* * *

"Sec.11-919 (18:268): Any person who by act or omission willfully causes, encourages or contributes to any condition which would bring a child within the provisions of this chapter, or who by such act or omission tends to

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> cause such a condition, shall be guilty of a misdemeanor and punished by a fine not exceeding $200 or imprisoned not exceeding 12 months, or by both fine and imprisonment".

The broad scope of statutes of this type is illustrated by State v. Dunn, 53 Ore. 304, 99 Pac.278, 100 Pac.258 (1909), the following digest of which is set forth in Wharton's Criminal Law, 12th Ed., Vol.1, Ch.XII, sec.375, p.496, footnote 13:

> "Under a statute providing that any person who shall be responsible for a delinquency, or who does any act which tends to cause a child to become a delinquent, is guilty of a misdemeanor and another statute defining a delinquent child to be one under eighteen years of age who violates any law, is incorrigible, associates with criminals, frequents a bawdy-house, an information alleging the doing of acts tending to make the child become a delinquent is sufficient; it is not necessary to allege that she actually became a delinquent".

Further facts with respect to this case are set forth later in the same footnote as follows:

> "Removing clothes of infant female, and trying to induce her to have sexual intercourse with accused by arousing her passions, etc.; information charging such acts, and alleging their tendency to make such child delinquent, held to be sufficient without alleging she actually became a delinquent, under statute providing that any person responsible for, or who does any act, which tends to cause, such child's delinquency, is guilty of a misdemeanor, and another statute defining a delinquent child as one under the age of eighteen years who violates any law, is incorrigible, associates with criminals, frequents bawdy-houses, etc".

6. The question of the maximum period of confinement which may be imposed in military courts for this offense, indecent assault, has

been the subject of some difficulty in the past because, as stated, this offense is not governed by the Table of maximum punishments (CM 199369, Davis). For a time it was held that the then section 37, title 6, now section 22-901, chapter 9, title 22 of the District of Columbia Code (not that cited above), which makes punishable by imprisonment certain acts of cruelty to children, incorporated the conduct found in this type of case and that such being the case military courts should apply the yardstick of that code provision for the punishment of such offense (CM 199369, Davis, supra). However that statute was subsequently determined to embrace only conduct toward a child which involved "physical harm to a child, abandoning one, or exploiting for gain" and not conduct which affected the morals of a child. Consequently, this statute was held not to condemn offenses of this type (indecent assault) and not, therefore, to limit the punishment thereof to two years (CM 210762, Valeroso, 1938). Subsequently under a forced construction of another portion of the District of Columbia Code, one which applies to assaults with intent to commit a felony, as is shown in the majority opinion, it was held that the offense under consideration could be punished by imprisonment for not exceeding five years.

7. Recently, in CM ETO 3436, Paquette, the Board of Review pointed out that since 1938, since the Davis and Valeroso cases (supra), a new provision had been enacted for the District of Columbia Code (that provision discussed at length above: 1940 Ed. Title 11, Chap.9) which provision condemned and punished indecent conduct toward a child. The Paquette case held that the punishment provided by that Code provision limited the punishment imposable by military court for this type of offense. This decision is referred to at length in the majority opinion. There is no real difference between the conduct of accused in the Paquette case and of the accused in the instant case. There is not an iota of evidence that any force or violence was used on the boy in the instant case. There was neither allegation nor proof of felonious intent in the instant case. The instant offense falls into that "in between"category described above (par.2, supra).

8. It is believed that the view expressed in the Paquette case, founded squarely on the fundamental legal principle expressed in the Davis case, is sounder than that adopted in the Leach, Shorter and Marcum cases, (see majority holding). The Davis case was right in principle. It should now find sound application by utilization of the pertinent District of Columbia statute.

9. For the foregoing reasons it is my opinion that the record of trial is legally sufficient to support only so much of the sen-

tence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.


Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 10 MAR 1945 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private MANUEL MORENO (38071294), Company A, 603rd Tank Destroyer Battalion (SP), 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 4028. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4028).

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

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

BOARD OF REVIEW NO. 2

16 NOV 1944

CM ETO 4029

U N I T E D S T A T E S	CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
General Prisoner JOHN M. HOPKINS (35321260), 2912th Disciplinary Training Center.	Trial by GCM, convened at London, England, 25 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by BOARD OF REVIEW No. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that General Prisoner John M. Hopkins, 2912th Disciplinary Training Center, European Theater of Operations, United States Army, did, without proper leave, absent himself from the 67th General Hospital, European Theater of Operations, United States Army at Taunton, England from about 20 July 1944 to about 1 August 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * having been duly placed in confinement in the 67th General Hospital, European Theater of Operations, United States Army, on or about 20 July 1944, did, at Taunton, England, on or about 20 July 1944, escape from said confinement before he was set at liberty by proper authority.

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CHARGE III: Violation of the 94th Article of War.
Specification 1. In that * * * did, at London, England, on or about 23 July 1944, feloniously take, steal, and carry away one (1) pair drawers, cotton khaki, of the value of about thirty-four cents ($.34), one (1) pair socks, cotton Olive Drab, of the value of about sixteen cents ($.16), one (1) towel, bath Olive Drab, of the value of about forty-three ($.43), property of the United States Army furnished and intended for the military service thereof.

Specification 2. In that * * * did, at London, England, on or about 27 July 1944, feloniously take, steal, and carry away one (1) blouse, Olive Drab, of the value of about ten dollars and fifty-three cents ($10.53), two (2) pairs trousers, Olive Drab, of the value of about eight dollars and seventy cents ($8.70), two (2) sun-tan shirts, of the value of about three dollars and seventy-six cents ($3.76), two (2) shirts, wool, Olive Drab, of the value of about eight dollars and forty-four cents ($8.44), one (1) necktie, of the value of about nineteen cents ($.19), one (1) pair of eye-glasses in case, of the value of about five dollars ($5.00), the property of the United States Army furnished and intended for the military service thereof.

He pleaded guilty to Charges I and II and their specifications and not guilty to Charge III and its specifications. He was found guilty of Charges I and II and their specifications; guilty of Specification 1 of Charge III, except the words "One (1) pair socks, cotton Olive Drab, of the value of about sixteen cents ($.16), one (1) towel, bath Olive Drab, of the value of about forty-three cents ($.43)"; guilty of Specification 2, except the words "Two (2) pairs trousers, Olive Drab, of the value of about eight dollars and seventy cents ($8.70), two (2) sun-tan shirts, of the value of about three dollars and seventy-six cents ($3.76), two (2) shirts, wool, Olive Drab, of the value of about eight dollars and forty-four cents ($8.44), one (1) necktie, of the value of about nineteen cents ($.19), one (1) pair of eye-glasses in case, of the value of about five dollars ($5.00)", substituting therefor the words "One (1) pair trousers, Olive Drab, of the value of about four dollars and thirty-five cents ($4.35), one (1) sun-tan shirt, of the value of about one dollar and eighty-eight cents ($1.88)"; of the excepted words, not guilty; of the substituted words, guilty, and guilty of Charge III. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence shows, and accused admits that he escaped from a

locked ward at the 67th General Hospital at Taunton, England, on July 20, 1944 and remained absent until discovered at an Army billet in London on August 1, 1944, as alleged in Charges I and II and their specifications (R4,18-19). Various items of army issue clothing were missed by soldiers from billets in London during the time they also were occupied by accused (R12-14). Some of this clothing was found in his possession when he was returned to military custody (R15).

4. Accused testified that he escaped because he wanted to go to France and wipe out his former sentence, and that he turned in when he found out that the organization he was staying with in London was not going for several months. The clothing he was wearing he said he purchased from a soldier he did not know (R18-21).

5. Examination of the records of this office show that the accused herein was tried by general court-martial and sentenced on 12 April 1944 to be dishonorably discharged the service, to total forfeitures and to confinement at hard labor for 20 years, which sentence was approved but the period of confinement reduced to eight years and, as so modified, was ordered executed by General Court-Martial Orders No. 146, dated 24 June 1944. To warrant a finding of guilty upon trial of a general prisoner for desertion or absence without leave, it is incumbent upon the prosecution to establish as a necessary element of proof that the dishonorable discharge has not been executed and that he is still a soldier (CM 199224, Hoppert; CM 199970, Thompson; CM 200589, Reed). Thereafter he was transferred from Bristol, England, to the 2912th Disciplinary Training Center at Shepton Mallet. He should have been discharged by July 20 pursuant to the order dated June 24, 1944, but in any event, the record contains no evidence that he was still a soldier. He is described as a general prisoner,and a general prisoner cannot commit the military offense of absence without leave (Dig.Op.JAG.1912-40, par 416(11) pg.270).// The findings of guilty of Charges II and III and their specifications, as modified, will support confinement at hard labor for two years.

6. The charge sheet shows accused to be 27 years and nine months of age. He was inducted 4 September 1942, at Cleveland, Ohio. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors, other than noted, injuriously affecting the substantial rights of accused, were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, but is legally sufficient to support the findings of guilty of Charge II and III and their specifications, and the sentence except the confinement portion thereof which must be reduced to two years.

[redacted] Judge Advocate

[redacted] Judge Advocate

Benjamin R Sleeper Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of General Prisoner JOHN M. HOPKINS (35321260), 2912th Disciplinary Training Center, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charges II and III and their specifications, and the sentence except the confinement portion thereof which must be reduced to two years, which holding is hereby approved. Under the provisions of Article of War 50½, you will then have authority to order execution of the sentence.

2. I particularly invite your attention to the fact that the period of confinement in the approved sentence is excessive. Accordingly, by additional action, which should be forwarded to this office for attachment to the record, you should reduce the period of confinement to two years, which reduction will be recited in the general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4029. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4029).

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

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

BOARD OF REVIEW NO. 2 12 DEC 1944

CM ETO 4030

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private GEORGE M. ELSER (31130675), 347th Replacement Company, 66th Replacement Battalion	Trial by GCM, convened at Warminster, Wiltshire, England, 5 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1: In that Private George M. Elser, 347th Replacement Company, 66th Replacement Battalion, did, without proper leave absent himself from his camp and duties at 347th Replacement Company, 66th Replacement Battalion, Chalcot Park, Wilts, England, from on or about 19 May, 1944, to on or about 7 June, 1944.

Specification 2: In that * * * did, without proper leave absent himself from his camp and duties at 347th Replacement Company, 66th Replacement Battalion, Chalcot Park, Wilts, England, from on or about 9 June, 1944, to on or about 11 June, 1944.

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Specification 3: In that * * * did, without proper leave absent himself from his camp and duties, at 347th Replacement Company, 66th Replacement Battalion, Chalcot Park, Wilts, England, from on or about 13 June, 1944, to on or about 8 August, 1944.

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

Specification 1: In that * * * having been duly placed in confinement in The Camp Stockade, 66th Replacement Battalion, Chalcot Park, Wilts, England, on or about 7 June, 1944, did, at Chalcot Park, Wilts, England, on or about 9 June, 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * * having been duly placed in confinement in The Post Stockade, 16th Replacement Depot, Warminster Barracks, Wilts, England, on or about 11 June, 1944, did, at Warminster Barracks, Wilts, England, on or about 13 June, 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for about 14 days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, successor in command, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution showed that accused is a private in the United States Army, attached to 347th Replacement Company, 66th Replacement Battalion (R8,9). It was further shown by extract copies of morning reports that accused absented himself from his camp and duties without leave, on the dates, at the places, and for the periods, severally alleged in Specifications 1, 2 and 3 of Charge I (R9-12,14, 16,18; Pros. Exs.1-8). The prosecution proved by competent evidence that accused was confined on 7 June 1944 in the camp stockade and that he escaped from confinement on 9 June at the place, as alleged in Specification I, Charge II (R10-14; Pros. Ex.4); and further, that accused after having been placed in confinement in the post stockade on 11 June 1944 again escaped from confinement on 13 June 1944, as alleged in Specification 2, Charge II (R15-18; Pros. Ex.5). It was stipulated

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that accused was returned to military control at Nottingham, England, on 8 August 1944 (R18).

4. Accused, advised of his rights, made an unsworn statement in which he specifically admitted his initial absence without leave on 19 May, and by inescapable implication admitted generally the other offenses for which he was tried. He attributed his difficulties to family worries; word that his daughter had been killed in the United States (R19-20).

5. In view of the admissions made by accused in his statement in court it is unnecessary to determine whether any of the morning reports received as prima facie evidence were inadmissible because of their hearsay character. Other competent evidence proved his absence and accused was properly found guilty of the offenses charged.

6. Legally constituted courts of the Southern Base Section, Communications Zone, were absorbed by and became an instrumentality of United Kingdom Base. The jurisdiction of the court before which accused was arraigned and tried was therefore unimpaired (CM ETO 4054, Carey, et al).

7. Accused is 23 years of age. He enlisted 24 September 1940. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Absence without leave in violation of Article of War 61 is punishable, as a court-martial may direct, excepting by death.

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

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 DEC 1944 TO: Commanding General, Headquarters United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private GEORGE M. ELSER (31130675), 347th Replacement Company, 66th Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 4030. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4030).

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

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

BOARD OF REVIEW NO. 1

CM ETO 4042

24 NOV 1944

U N I T E D S T A T E S	)	IX ENGINEER COMMAND
	)	
v.	)	Trial by GCM, convened at Headquarters, IX Engineer Command, APO 126, U.S. Army, 11,12 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.
Sergeant JOHN J. ROSINSKI (11061814), Company "A", 816th Engineer Aviation Battalion	)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant John J. Rosinski, Company "A", 816th Engineer Aviation Battalion, did, at A-35 Airfield, France, APO 126, U.S. Army, on or about 13 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Percy N. Bartlett, Company "A", 816th Engineer Aviation Battalion, a human being by shooting him with a rifle.

He pleaded not guilty and was found guilty of the Specification, except the words "with malice aforethought," "deliberately," and "with premeditation," of the excepted words not guilty and not guilty of the Charge

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but guilty of a violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, 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 established that about 7:15 p.m., 13 August 1944, in the Company "A" area of the 816th Engineer Aviation Battalion, at A-35 Airfield near LeMans, France, accused, in an altercation with Technician Fifth Grade Percy N. Bartlett (R4), called him "you rebel nigger fucking son of a bitch" (R15), or words of like import (R4,6,8,12). Bartlett ended the altercation by striking accused two or three times on the head with a pup-tent pole (R4,6,8,9-10,13,14), which instrument was received in evidence (R4; Pros. Ex. 1). Bartlett then sat down beside Technician Fifth Grade Elmer C. Meck, also of Company "A", by the latter's tent. Accused went to his tent 20 to 25 yards away and returned in about three minutes holding a rifle. He said to Bartlett, "Are you going to apologize for what you have done?" Bartlett told him "to get away and leave him alone". When accused repeated his question, Meck told him to put the gun down and forget about it (R3,4,9). Accused replied, "Shut up or you get it too", and again asked Bartlett, "Are you going to apologize?" Bartlett said he would and accused told him to put up his right hand. As Bartlett, sitting on the ground (R11), extended his right hand as if to shake hands, accused brushed it aside and started shooting (R5,9,11), firing three shots (R18,20,23,24). Bartlett sustained three wounds, a slight one in the scalp, one in the left hand and one in the abdomen (R10, 32,48), which caused his death 24 hours later (R48). The accused used the rifle belonging to his tent mate, Technician Fifth Grade Edwin L. Gates, Company "A" (R24,25), who previously left it unloaded in front of their tent (R10,32,48). The weapon was received in evidence, without objection (R23; Pros. Ex. 2). There was evidence that at the time of the shooting accused's breath smelled of alcohol (R7) and that he had been drinking (R10-12, 14-15,25,27,30). His condition was variously described as "sober" (R5), "not drunk" (R26) and that he "did not appear to be drunk" (R21). While Bartlett was receiving first aid (R18), accused stood in front of his tent where Technician Fifth Grade William E. Burford of his company, asked him who had done the shooting. He replied "I did," and when asked why, said

> "he had shot Bartlett in self-defense because he was getting tired of getting beat up all the time" (R12,13).

Approached by Technician Fifth Grade William N. Hill of his company, accused told him to get away or he would give him the same thing (R22,23). First Lieutenant Lloyd Latendresse of Company "A" questioned several men,

trying to find out what occurred. He asked accused if he knew anything about it. Accused said something like "Well, I ought to know, I shot him" (R19,20). Captain Edgar R. Jackson, Jr., Commanding Officer of Company "A", talked with accused who

> "kept saying he had taken all he was going to and was tired of being beat up all the time" (R28,31).

The following day (14 August), while he was being guarded by his tent-mate Gates, he said "that he hadn't meant to kill Corporal Bartlett", explaining

> "I was aiming at his feet and the load went 'way up here'" (R26).

4. (a) On behalf of the defense it was shown that accused had been with his organization since 1 March 1942 and that his work was excellent (R34).

On the afternoon of 13 August 1944 accused while on a work detail went with other men of his company in a truck to obtain a load of gravel. While the truck was being loaded, members of the detail, including accused, purchased wine and calvados from a nearby village (R35). Accused's canteen was filled with calvados (R36) and he was seen taking three drinks from it after three p.m. (R37).

(b) After being advised of his rights, accused testified that he enlisted in March, 1942 (R41), and was assigned to the 816th Engineer Aviation Battalion in May 1942. Prior to 13 August 1944 he had never drunk calvados. At one p.m. of that day he had a drink of it with wine for a chaser (R42-43). When he went to work that afternoon he took along "two bottles of wine and cognac". He did not know whether he finished the bottles by the time the work was completed and remembered nothing about having a fight with Bartlett, being struck with a tent pole or calling Bartlett any names. Deceased was his "buddy".

> "All I know is when I got up the next morning I was in one of those little brick pens, and the side of my head was sore. I thought maybe I had fallen down or something" (R42-44).

5. Second Lieutenant Ramsey W. Dulin, Jr., Corps of Engineers, 816th Engineer Aviation Battalion, called as a witness at the request of the court, testified that at about 6 p.m. that evening he conversed with accused for about ten minutes.

> "His appearance was normal. He seemed to have all his faculties about him, though he had been

drinking. I smelled it upon his breath. But when he talked his conversation had a definite trend of thought, and he was coherent in his speech" (R61).

6. The evidence shows clearly that at the time and place alleged accused, after an altercation with Bartlett in which accused was struck several times over the head with a pup tent pole, procured a loaded rifle and fired point blank at his victim at a time when the latter, seated on the ground, was offering his hand in a gesture of apology. Except for the testimony of accused, it was apparent that he was sober, although he had been drinking, and understood the consequences of his act, for he acknowledged to several witnesses soon after the event that he had shot Bartlett.

"Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not" (1 Wharton's Criminal Law, 12th Ed., sec. 422, pp. 637-640).

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (Ibid., sec. 423, p. 640).

"Deadly weapon used by the accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (Ibid., sec. 426, pp. 652-655).

The evidence fully supports the finding of accused guilty of manslaughter within the principles above set forth (CM ETO 3937, Bigrow; CM ETO 3362, Shackleford). The testimony of accused indicated that he was drunk at the time of the shooting. The determination of the question whether his drunkenness fell short of that sufficient to affect mental capacity to entertain the necessary intent was the peculiar prerogative of the court, which question it resolved against accused (CM ETO 3937, Bigrow, and cases therein cited). The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of voluntary manslaughter, which offense is included in murder (MCM, 1928, par. 148a, p. 162; CM 165268 (1925); Dig. Op. JAG 1912-1920, sec. 450(2)b, 310; CM ETO 3937, Bigrow; CM ETO 3362, Shackleford).

7. The charge sheet shows that accused is 34 years and one month of age, and enlisted 2 March 1942 at Springfield, Massachusetts. His period of service is governed by the Service Extension Act of 1941. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and 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. Confinement in a penitentiary is authorized upon conviction of voluntary manslaughter by AW 42 and Sec. 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, par. 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 of Operations. 24 NOV 1944 TO: Commanding Officer, IX Engineer Command, APO 126, U. S. Army

1. In the case of Sergeant JOHN J. ROSINSKI (11061814), Company "A", 816th Engineer Aviation 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 4042. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4042).

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

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

BOARD OF REVIEW NO. 2

CM ETO 4053

15 NOV 1944

U N I T E D S T A T E S v. Private CLARENCE R. JORDAN (32162970), 415th Engineer Dump Truck Company.	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at 104th Station Hospital, Ringwood, Hampshire, England, 10 August 1944. Sentence: Dishonorable discharge, total forfeitures and confinement for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty.)

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

Specification: In that Private Clarence R. Jordan, 415th Engineer Dump Truck Company, did, at Burley Camp, Hants, England, on or about 12 July 1944, behave himself with disrespect toward Captain Charles M. Canon Jr., his superior officer, by saying to him, "I'm not interested in what you have to say to me, make all the charges you want to against me. You've got me in here on a bunch of trumped up charges and I don't care what you do to me," or words to that effect, and also by shouting to him from outside the orderly room tent, "what the hell do you want?" and contemptuously turning from the said Captain Charles M. Canon Jr. and

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leaving him while he was talking to him, the said Private Clarence R. Jordan.

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

Specification: In that * * * having received a lawful command from Second Lieutenant Charles F. Geiger, Jr., his superior officer, to get up and go to work, did, at Burley Camp, Hants, England, on or about 12 July 1944, willfully disobey the same.

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

Specification: (Finding of not guilty.)

He pleaded not guilty, and was found guilty of Charges II and III and their specifications and not guilty of Charges I and IV and the specifications thereunder. Evidence was introduced of one previous conviction by special court-martial for two absences without leave for six days and for five months, 20 days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused and two other prisoners were in bed in the guard tent at Burley Camp at 0800 hours, 12 July 1944, when Second Lieutenant Charles F. Geiger, one of accused's company officers, ordered them to get out of bed and go to work (R11-12). The work he wanted them to do was to clean out a trailer in the motor pool. All three refused. Geiger stated that he would report their refusal to the company commander. Accused told him to go ahead and report it, which the lieutenant did; whereupon a guard was dispatched to escort the prisoners to the company orderly room (R12). There, Captain Charles M. Canon, Jr., the company commander, asked accused if he understood Lieutenant Geiger's order. Accused replied that he did. Captain Canon then inquired what his answer was and accused said, "I am not going to work". As the captain turned to question the next prisoner, accused attempted to leave the orderly tent. Captain Canon called him to attention and instructed him to remain. Accused remarked, "I am not interested in what you got to say. You have me in here on a bunch of trumped up charges and I am not going to work". Then he turned and left the tent. Canon called to him as he got outside. Accused "replied very loudly and very sarcastically 'What the hell do you want?'" Told to return to the orderly tent, he did so and stood at attention until he was dismissed (R21). Upon cross examination, Captain Canon testified that, on the date in question, accused had been confined for five weeks because of the alleged prior offenses (Charges I and IV) of which he was acquitted at the instant trial (R22-23).

4. For the defense, the first sergeant of accused's company testified that, during his interview with accused in the orderly room, Captain Canon seemed provoked. When accused first came in, he - accused - "was normal and when Captain Canon spoke to him again he seemed to be provoked". Accused was a good soldier. He normally spoke in a loud tone and his manner of speaking could be interpreted as "contemptuous" (R27-28). Three enlisted men, the company clerk, charge of quarters and a corporal, who was writing out money orders, were in the orderly room during Captain Canon's interview with accused. Each contraverted Captain Canon's testimony as to accused's disrespectful attitude and none of them head accused inquire "what the hell" the captain wanted him for, or shout profanely (R36-42).

Accused elected to testify under oath, in substance, as follows: On 12 July 1944 he had been under guard about a month and a half.

> "During that time I did nothing, the time just hung heavy. I asked the men if I could do some work around there for them, press their clothes if they needed any pressing. * * * I was told not to go any further from the tent to the mess hall and back from the mess hall to the tent and down to the latrine. That was the area I was confined to and time just hung heavy. I got excited. * * * I don't remember Lt. Geiger giving me any order. * * * I did not shout disrespectfully to Captain Canon. I stayed and listened to what he had to tell me and I told him that the charges he was bringing against me were unfair to me as far as I could see and I went to leave the tent and he called me back and I stood at attention and waited till he got through, then he dismissed me" (R30-31).

He denied going outside the tent or shouting from the door at Captain Canon, explaining, however, that "I have a habit of mumbling which he might have misinterpreted". He objected to working under guard, believing "that a man under guard in the company area is not supposed to do any work". He did not understand Captain Canon to order him to go to work. "He asked me to go to work", accused testified, "and I asked (sic) Captain Canon if he removed the guard from over me I would go to work" (R31).

On cross-examination accused testified that he did not hear any order by Lieutenant Gieger to get up and go to work, explaining that the officer went over to another prisoner's bed and said, "I want you men to get up and go to work". He did not specify any men. Asked if he "didn't" think "he meant you", accused replied, "I didn't know, I was lying there" (R32-33).

5. Ample evidence sustains the findings of guilty of disobedience and disrespect. Indeed, accused's testimony in effect admits the former and a substantial portion of the language involved in the latter; accused obviously relying on allegedly justified resentment in avoidance of

culpability. While his simultaneous acquittal on the charges of committing alleged offenses for which he had been for five weeks confined prior to the disobedience and disrespect of which he was convicted, may tend to account for the state of mind which apparently found expression in the latter offenses, even justified resentment will not relieve a soldier from the duty of obeying and behaving respectfully toward his superior officers.

> "The obligation to obey is one to be fulfilled without hesitation, with alacrity and to the full. * * * Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing until after compliance his complaint and application for redress" (Winthrop's Military Law and Precedents, 1920 Reprint, pp.572-573).

> "It is no defense * * * to a charge for using [disrespectful] language, that the same only stated facts, or that what was said was no more than deserved by the superior. If an officer or soldier has been aggrieved by his commander, he should, instead of inveighing against him, properly seek redress * * * through regular military channels" (Ibid., p.568).

6. The charge sheet shows that accused is 30 years one month of age and that, with no prior service, he was inducted 31 July 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.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 15 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army.

1. In the case of Private CLARENCE R. JORDAN (32162970), 415th Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4053. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4053).

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

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

BOARD OF REVIEW NO. 1

14 NOV 1944

CM ETO 4054

U N I T E D S T A T E S

v.

Privates EDWARD J. CAREY (31224581), THOMAS COLELLA (31445002), JOSEPH L. DEL TEDESCO (35225077), WILLIAM G. GRESKY (36773268), OLIVER A. OPENBRONER (13168267), ANDREW PERSICHILLI (32957024), ANTHONY RIZZON, JR. (36153613), PETER ROSELLI (32573382), ALFRED S. SEBASTIANO (32541599), all of the 372nd Replacement Company, 100th Replacement Battalion (Package X43H).

UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.

Trial by GCM, convened at Warminster, Wiltshire, England, 1 September 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Edward J. Carey, Package X43H, 372nd Replacement Company, 100th Replacement Battalion, did, at Camp Number 73, Codford, Wilts, England, on or about 17 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:

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transportation to the continent of Europe and assignment to combat zone organization and to shirk important service, to wit: transportation to continent of Europe and assignment to combat zone organization, and did remain absent in desertion until he was apprehended at or near Codford, Wilts, England, on or about 21 July 1944.

Each of the other accused whose name appears in the caption hereof was tried upon a several and separate Charge and Specification directed against him which was identical in all averments with the Charge and Specification above set forth, except as to the designation of the accused. The accused were tried together with their consent.

Each accused pleaded not guilty and, three-fourths of the members of the court present at the times the respective votes were taken concurring, each was found guilty of the Charge and Specification directed against him. Evidence was introduced of the following number of previous convictions, all by special courts-martial, for absence without leave for the periods indicated in violation of Article of War 61: As to accused CAREY, one for seven days; as to accused COLELLA, one for 65 days; as to accused DEL TEDESCO, one for 11 days; as to accused GRESKY, one for 12 days; as to accused OPENBROWER, one for 20 days; as to accused PERSICHILLI, one for 22 days; as to accused RIZZON, one for nine days; as to accused SEBASTIANO, two for eight and seven days, respectively. As to accused ROSELLI, evidence was introduced of two previous convictions by special court-martial: one for using insulting language, striking superior officer and being drunk and disorderly in violation of Articles of War 65 and 96, and one for absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present at the times the respective 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 15 years. The reviewing authority approved each of the sentences but reduced the period of confinement of each accused to 10 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each accused, and forwarded the record of trial for action under the provisions of Article of War 50½.

3. Preliminary to consideration of the case on its merits, a serious question involving the legal existence and jurisdiction of the court which tried accused must be determined. The problem becomes known to the Board of Review because of its authority and duty upon appellate review to take judicial notice of orders and directives of the War Department, the European Theater of Operations, and the Communications Zone of the European Theater of Operations (CM ETO 1538, Rhodes; CM ETO 2788, Coats and Garcia; CM ETO 3649, Mitchell).

(a) United Kingdom Base, Communications Zone, European Theater of Operations, was established pursuant to GO 34, 14 August 1944, Communications Zone, European Theater of Operations, which, among other things, directed:

> "1. Effective 10 September 1944, the United Kingdom Base is established for the administration of the Communications Zone activities in the United Kingdom. Headquarters, United Kingdom Base, will be in London."

(b) United Kingdom Base was organized pursuant to GO 35, 15 August 1944, as amended by GO 39, 22 August 1944, which provided in pertinent part:

> "1. The United Kingdom Base will be activated on 10 September 1944, with responsibilities and authorities as defined in General Orders No 34, this headquarters, 14 August 1944." (GO 35, 15 Aug 1944).
>
> * * * * * *
>
> "2. The Western Base Section, less its District VIII, will become the Western District on 10 September 1944, under command of the UK Base. On the same date, the present District VIII, Western Base Section, will become the Eastern District under command of the UK Base. Such part of the present Western Base Section staff as is not required to staff the Western District will be organized as Continental Section No 4, under the command of Colonel FENTON S. JACOBS, Cav, who will command the Western District until assigned a mission with his Section No 4." (GO 39, 22 Aug 1944).
>
> * * * * * *
>
> "3. The Southern Base Section will become the Southern District on 10 September 1944, under command of the UK Base. Such part as may be necessary of the present Southern Base Section staff not required for the Southern District will be utilized in forming the UK Base staff." (GO 35, 15 Aug 1944).
>
> * * * * * *
>
> "6. The Central Base Section will become the Central District on 10 September 1944, under command of the UK Base." (GO 39, 22 Aug 1944).

(c) General Orders 42, 31 August 1944, Communications Zone, European Theater of Operations, thereafter provided:

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"1. The United Kingdom Base is established, effective 0001 hours, 1 September 1944, with headquarters at APO 871.

2. The United Kingdom Base will consist of the territory now comprising Western Base Section, Southern Base Section and Central Base Section.

3. Effective 0001 hours, 1 September 1944, Western Base Section, Southern Base Section and Central Base Section are dissolved.

4. Brigadier General HARRY B. VAUGHAN, USA, is announced as Commanding General, United Kingdom Base.

5. So much of General Orders No 34, this headquarters, 14 August 1944, and General Orders No 35, this headquarters, 15 August 1944, as amended by General Orders No 39, this headquarters, 22 August 1944, as is in conflict herewith is rescinded."

(d) Pursuant to Article of War 8 and by direction of the President, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, was empowered to appoint General Courts-Martial effective 10 September 1944 (War Department cable No. WARX 24902, dated 4 September 1944).

The court before which the accused were arraigned and which tried the instant case was appointed by the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, by SO No 233, 20 August 1944. It convened for the trial of the accused at 10:15 a.m. on 1 September 1944 (R4) and concluded its proceedings and deliberations at 4 p.m. on 1 September 1944 (R63). The charges upon which accused were tried were referred to the court by the Commanding General, Southern Base Section, on 23 August 1944.

From the foregoing the following situation is manifest:

(a) Southern Base Section, Communications Zone, was dissolved at 0001 hours on 1 September 1944 (par.3, GO 42, 31 August 1944, supra).

(b) The court which tried accused commenced its hearing at 10:15 a.m., 1 September 1944 - about 10 hours after the authority which appointed it had ceased to exist. The trial was concluded on the same day.

(c) United Kingdom Base, the successor in command to Southern Base Section, Communications Zone, came into existence at 0001 hours on 1 September 1944 (par.1, GO 42, 31 August 1944, supra) but was not authorized to exercise General Court-Martial jurisdiction until 10 September 1944 (War Department cable No. WARX 24902, supra).

The foregoing presents a legal question which may be stated thus:

> Where the authority empowered to appoint a general court-martial is dissolved, or ceases to exist, but its functions, personnel and installations are taken over by and included in another command, does a general court-martial appointed by it prior to its dissolution, in the absence of affirmative orders either disestablishing the court or sustaining its existence and jurisdiction, continue its legal existence with power and authority to arraign and try accused upon charges referred to the court by its appointing authority prior to its dissolution?

The original authority to appoint General Courts-Martial was conferred upon the Commanding General of Southern Base Section by the President of the United States under the authority of that portion of AW 8, which provides:

> "when empowered by the President, the commanding officer of any district or army force or body of troops may appoint general courts-martial."

Beyond peradventure, when the Southern Base Section was "dissolved" there was no longer a Commanding General thereof to exercise authority conferred by the President. The authority in futuro to appoint general courts-martial therefore automatically ceased, but does this fact necessarily carry with it the further conclusion that a court theretofore legally appointed by it also ceased to exist when the appointing authority was exterminated?

Simultaneously with the dissolution of Southern Base Section (par.3, GO 42, 31 Aug 1944, supra) the United Kingdom Base came into existence and operation (par.1, GO 42, 31 Aug 1944, supra). GO 42, 31 Aug 1944, advanced the effective date of the abolition of Southern Base Section and the creation of United Kingdom Base from 10 September 1944 to 0001 hours on 1 September 1944. Therefore, the preceding orders (GO 35, 15 Aug 1944, supra, as amended by GO 39, 22 Aug 1944, supra) were superseded in this respect. It is manifest from the contents of GOs 34, 35 and 39 that the Commanding General of United Kingdom Base succeeded the Commanding Officers of the Western, Southern and Central Base Sections in all of their duties, responsibilities, rights and

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privileges. There was no hiatus in this succession. The former's powers and functions came into existence eo instante with the dissolution of the powers and functions of his predecessors.

A logical corollary to this conclusion is that the discontinuance of Southern Base Section was effected by "including it in another command", viz, United Kingdom Base, and therefore the Commanding General of the latter was the "officer commanding for the time being" under the 46th Article of War. By virtue of said article the power of approval of the sentence of the court was vested in him, inasmuch as the "officer appointing the court", viz, the Commanding General of Southern Base Section, ceased to function at 0001 hours 1 September 1944. At no time was the court which tried the instant case without its approving authority.

Winthrop's comments on this specific question are timely:

> "'The officer commanding for the time being.' This is an officer who, by reason of the absence, removal, disability, &c., of the officer who originally ordered the court, or the merger or discontinuance meanwhile of his command, has succeeded to the exercise of such command and is exercising the same at the time when the proceedings and sentence are completed and require to be acted upon. Such officer will usually have been temporarily or indefinitely detailed for the command by the President, (or other superior;) but, where no such formal detail has been made, and none is required by statute or regulation to be made, he may be an officer upon whom the command has devolved by reason of his seniority in rank according to the usage of the service. Upon duly assuming the command 'for the time being,' such officer succeeds to all the rights of review and action which would have been possessed by the convening authority had his exercise of the command not been interrupted.
>
> * * * * * *
>
> Where, pending the proceedings in a case on trial, the command of the convening officer has been discontinued and included in a larger or other command, as where one department has been merged in another or in a Division, the commander of the latter will be the authority answering to the description of 'the officer commanding for

> the time being,' and will properly act upon the proceedings and sentence as indicated in Arts. 104 and 109. Where, under similar circumstances, the command of the convening officer has been discontinued altogether without being renewed in any form or included in another command, the General, if any, duly assigned by the President to the command of the army, will be 'the officer commanding for the time being,' or, if there be no authorized military commander of the entire army, the President himself as constitutional Commander-in-chief.
>
> 'The officer commanding for the time being' is invested with the same authority and discretion, and held to the same obligation, in the exercise of the power of approval, &c., as would be 'the officer ordering the court' in whose stead he acts." (Underscoring supplied) (Winthrop's Military Law and Precedents, Reprint, pp.450-451).

The court, although appointed by the Commanding General of Southern Base Section (SO 233, 20 August 1944, supra), was not dissolved or discontinued because he ceased to exist or function, any more than a depot or port command appointed by him ceased to exist upon his official death. The court was an instrumentality of Southern Base Section which was "included" in United Kingdom Base and it retained all of its original judicial power and authority. All that resulted was the displacement of the officer appointing the court by the "officer commanding for the time being" as the approving authority of any sentence imposed by the court.

It is true that the Commanding General of United Kingdom Base could not exercise the general court-martial powers conferred specifically on him by the President until 10 September 1944. A sharp distinction must be made in this connection. During the period from 1 September to 10 September he had no power to appoint a new court, but this is something separate and apart from his powers under AW 46 as "officer commanding for the time being". The former is the exercise of original authority under AW 8; the latter is the exercise of substituted authority given him by AW 46. In the exercise of his jurisdiction under the latter grant he possessed

> "the power and authority to perform such acts and take such procedure as may be required for the completion of cases undisposed of when said order went into effect, which necessarily includes the

> detail of additional members of a court reduced by the exigencies of the service below the minimum membership required by law." (250.43, Oct 27, 1919, Dig.Ops. JAG, 1912-1940, sec.365(5), p.172).

The conclusion of the matter, therefore, is that not only did the Commanding General of United Kingdom Base succeed to the powers of the Commanding General of Southern Base Section in respect to the "completion of cases undisposed of" when the latter officer ceased to function, but also that the court as an instrumentality of Southern Base Section continued to exist and became an instrumentality of United Kingdom Base as to all cases which had been referred to it for trial and which had not been completed when GO 42, 31 August 1944, dissolved the three Base Sections and simultaneously established United Kingdom Base.

The problem and its solution are essentially military in character. Rules and precedents of the civil law are either inapplicable or misleading and afford but a minimum of guidance. The situation presented requires a realistic approach and an application of the theory and practice of military command and administration. The comments of former Attorney General Cushing are particularly appropriate:

> "Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms; which eschews looseness or confusion in all things, but reflects that military administration must be capable of working in peace, it is true, but more especially amid the privations and the dangers of war." (7 Ops.Atty.Gen., 601,604).

In the opinion of the Board of Review the accused were arraigned and tried by a legally constituted court which had jurisdiction of the persons accused and of the offenses with which they were charged.

4. Without contradiction the prosecution's evidence showed that each accused had been received at Camp Codford, Wiltshire, England, (Camp 73) sometime prior to 8 July 1944, directly from the United States (R19) as part of a detachment consisting of former military prisoners (R27,28). Each of them was under sentence which (unless remitted or suspended) was in operation on 17 July 1944 (Pros.Exs.10-18). Upon arrival at the camp they were placed in "Package" X43H and assigned to the 372nd Replacement Company for processing in preparation for shipment to France as replacements in the combat ground forces (R19,31).

On 17 July 1944, at a formal muster of the "Package", all accused except Sebastiano and Rizzon were present (R28,29). The purpose of the muster was to determine the exact identity of the personnel who were to be included in the shipment. The muster was held in anticipation of entrainment (R29). On the same day and within a short time after this "Package" muster, a "roll call" was taken of the entire company (R27) and all accused were absent without leave (Pros.Exs.1-9). On that date the "Package" was shipped to France (R20,25,30,31), but the nine accused did not accompany it (R37,38).

After the departure of the "Package" and between 17 and 21 July the "Package" area was searched. Rifles belonging to all accused, except Openbrower, were found (R39,40). Helmets marked with numbers corresponding to the names of Carey, Colella, DelTedesco, Gresky, Openbrower, Persichilli and Roselli were also found and identified (R26). There were also discovered in the same area packs and clothing, but they were not identified as belonging to any of accused (R39).

On 21 July 1944, in a search of a wooded area about 1½ miles from Camp Codford, two bivouacs were discovered which indicated that they were being used by American soldiers as "hide-outs" (R32,34). The two camps were located about 400 yards from each other (R35). At the first one there was hay on the ground which had been used as a bed. Clothes racks and a box containing clothing and food were affixed to the trees. Neckties and new fatigue uniforms were found (R36). Also discovered were three army blankets (R32),

> "government uniforms, OD uniforms, two blouses * * * and about five sets of OD trousers and shirts * * * foodstuff, canned food * * * three overcoats, British and one Italian bayonet, civilian shoes, cigarets and other personal items, toilet articles" (R33).

There was also evidence that a fire had been used for cooking (R34). At the second camp there were two "pup" tents and there were "beds laid out on the ground" (R36).

Accused Del Tedesco, Persichilli, Roselli and Sebastiano were discovered at or near the bivouac sites and were taken into custody (R37-39). Gresky and Carey were seen at the first described camp or bivouac (R33,34). Rizzon was apprehended while attempting to escape (R36,45). Carey, Colella, Gresky and Openbrower eluded capture in the woods and were apprehended between 0300 and 0330 hours at the Red Cross Club in Bath on 21 July (R38,42), which was 24 miles from the "hide outs" (R35).

5. Each accused, except Sebastiano and Rizzon, elected to remain silent and presented no evidence in defense (R43,44,45).

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Sebastiano, in an unsworn statement, asserted that he left camp at 12:10 p.m. on 15 July on a pass and admitted that since that time he had not returned. He went to Bath and on Saturday (22 July), came back to Codford, met a friend, with whom he remained at the bivouac area, and never returned to camp. He denied knowledge that his company had been alerted (R44).

Rizzon made an unsworn statement in substance as follows: On 12 July he went to Bath, but returned to camp for clean clothes, and went back to Bath. On Monday (probably 17 July) he returned to the neighborhood of Codford where he met some "fellows * * *. They are shipped out now". They said they were in the woods, asked him to join them, and he did so. He was caught while coming through the field from Warminster. He asserted he had no knowledge the "Package" was alerted and that he intended to return to his organization (R45).

6. Each accused is charged with deserting the service of the United States by absenting himself from his organization and place of duty without leave, with intent (a) to avoid hazardous duty and (b) shirk important service, to wit,

> "transportation to the continent of Europe and assignment to combat zone organization."

The pleading of both specific intents in one specification was proper and the findings of guilty may be sustained upon proof of both or either of the specific intents (CM ETO 3234, Gray, and authorities therein cited). The absence of each accused from his organization from 17 July to and including 21 July 1944 was established beyond contradiction. It was also fairly proved that "Package" X43H (accuseds' organization) "was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service" (MCM, 1921, par.409, p.344). Combat service in France involves both hazardous duty and important service (CM ETO 3234, Gray, supra). Therefore, two of the elements of the offense were sustained by the proof. The question for determination is whether there is substantial evidence in support of the two remaining elements, viz:

(1) that notice of such orders and of imminent hazardous duty or important service was actually brought home to each accused; and

(2) that at the time each accused absented himself he entertained the specific intent to avoid hazardous duty or shirk important service (CM ETO 2368, Lybrand, and authorities therein cited).

In the present case the proof of these elements is discoverable in the overall picture presented by the evidence. Accused were members of a group of about 200 released military prisoners who had been recently brought from the United States to England, assembled into a "package" and assigned to a Replacement Company. They were processed for shipment to the French battle zones. The "Package" was formed about 8 July 1944. Soon thereafter Articles of War 28 and 58 were read and explained to personnel of the "Package", and all the accused were present on the occasion (R20). It was common knowledge among the members of the "Package" "that they were to be shipped to the Continent of Europe for assignment to a combat unit" (R25). During the processing and after the accused were billeted they received innoculations, issues of clothing and equipment and "dog tag" inspections, and were given instruction in weapon firing and gas attack. Simultaneously they received training which included road marches and different phases of infantry instruction (R19,20). When the crucial day for departure arrived all of the accused absented themselves without leave. It is highly significant that seven of accused were present at the "Package" muster on 17 July (Sebastiano and Rizzon were then missing) and yet when the company "roll call" was conducted within a short time thereafter they had all disappeared. Four days later a "hide-out", consisting of two bivouacs, was discovered in an isolated section of the neighboring wooded area. These bivouacs or camps were supplied and equipped with stolen government property and had obviously been recently used. Five of accused, including Sebastiano and Rizzon, were captured at or in the proximity of the camps. Four of accused were apprehended on the same day at Bath, 24 miles distant from the "hide-out". These highly incriminating circumstances were not of accidental or of coincidental occurrence. They were directly related to each other and formed an unbroken chain of circumstances and events from which the court was fully justified in concluding that each accused at the time he absented himself was fully aware that his "Package" was on the eve of departure for the battle zones in France where he would soon be assigned to an organization engaged in active combat, and that he deliberately absented himself to avoid this duty and service. A direct and positive inference also arises that the absences were the result of a conspiratorial agreement and premeditated planning in which each accused was an active participant. There is a shocking degree of reprehensibility and moral turpitude on the part of accused presented by this picture that cannot escape even the casual reader of the record of trial. The evidence, taken as a whole, excludes every fair and rational hypothesis except the guilt of accused (MCM, 1928, par.78, p.63). The court was fully justified in evaluating the circumstances, as its findings of guilty indicate, and such findings upon appellate review will be accepted as conclusive and final (CM ETO 3375, Tarpley; CM ETO 2686, Brinson and Smith ; CM ETO 3200, Price; CM ETO 4292, Hendricks).

The prosecution proved by competent, substantial evidence all of the elements of the offense alleged against each accused.

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7. The charge sheet shows the service of the several accused as follows:

Name	Age	Enlistment Place and Date	
Carey	23 yrs. 10 mos.	Boston, Mass. 14 Oct 1942	Each accused enlisted for duration of war plus six months. None of accused had any prior service (except Rizzon, whose service period is governed by the Service Extension Act of 1941).
Colella	33 yrs. 7 mos.	Providence, R.I. 15 Sep 1943	
Del Tedesco	22 yrs. 7 mos.	Columbus, Ohio 27 July 1943	
Gresky	19 yrs. 5 mos.	Chicago, Ill. 18 Nov 1943	
Openbrower	22 yrs. 2 mos.	Pittsburgh, Pa. 22 Nov 1942	
Persichilli	19 yrs. 5 mos.	Camden, N.J. 27 Aug 1943	
Rizzon	26 yrs. 2 mos.	Kalamazoo, Mich. 15 Mar 1941	
Roselli	28 yrs. 1 mo.	Newark, N.J. 9 Nov 1942	
Sebastiano	28 yrs. 4 mos.	Camp Upton, N.Y. 26 Oct 1942	

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

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

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

CONFIDENTIAL

14 Aug 45
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1st Ind. (305)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Privates EDWARD J. CAREY (31224581), THOMAS COLELLA (31445002), JOSEPH L. DEL TEDESCO (35225077), WILLIAM G. GRESKY (36773268), OLIVER A. OPENBRONER (13168267), ANDREW PERSICHILLI (32957024), ANTHONY RIZZON, JR. (36153613), PETER ROSELLI (32573382), ALFRED S. SEBASTIANO (32541599), all of 372nd Replacement Company, 100th Replacement Battalion (Package X43H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the approved sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4054. For convenience of reference, please place that number in brackets at the end of the orders: (CM ETO 4054).

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

CONFIDENTIAL

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

BOARD OF REVIEW NO. 1

CM ETO 4055

18 NOV 1944

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private GEORGE D. ACKERMAN (35368610), Attached Unassigned 363rd Replacement Company, 96th Replacement Battalion.	Trial by GCM, convened at Warminster, Wiltshire, England, 18 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for four years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private George D. Ackerman, Attached-Unassigned 363rd Replacement Company, 96th Replacement Battalion, did, at Stourport-on-Severn, Worcester, England, on or about 31 July 1944, feloniously take, steal, and carry away a gold watch, a gold chain, and a gold locket, of the value of about £25, of the equivalent value of $100.75, the property of Edna Whitehouse.

CHARGE II: Violation of the 61st Article of War.
Specification: In that * * * did, without proper leave absent himself from his organization at Tilshead, Wilts, England, from about 23 July 1944 to about 6 August 1944.

He pleaded not guilty and was found guilty of the Specification of Charge I, except the words "of the value of about £25, of the equivalent value of $100.75," substituting therefor the words "of the value of about £10/10 Shillings of the equivalent value of $42.36," of the excepted words not guilty, of the substituted words guilty, and guilty of Charge I, guilty of the Specification of Charge II, except the words, "6 August", substituting therefor the words, "1 August", of the excepted words not guilty, of the substituted words guilty, and guilty of Charge II. Evidence was introduced of two previous convictions by special court-martial, one for absence without leave for 23 days and failing to obey a lawful order of an officer, in violation of Articles of War 61 and 96, respectively, and one for larceny of a wrist watch, in violation of Article of War 93. 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 four years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence shows that accused was initially absent without leave from his organization on 23 July 1944 (R7; Pros.Ex.1). On 31 July 1944 at 1400 hours accused entered the home of Mrs. Edna Whitehouse in Brookside, Wilden, Stourport, Worcester, England, while it was unoccupied. He took her watch from a sideboard and her gold locket and chain from a dressing table in a bedroom (R8-9; Pros.Ex.4). On the same day he sold the watch to Mrs. Kate Catherine Thomas, 3 Swan Street, Kidderminster, Worcestershire, England, for fifty shillings and the gold chain for five shillings (R10; Pros.Ex.4). It was stipulated by and between the prosecution, defense counsel and accused that the value of the watch was six pounds, of the chain two pounds ten shillings, and of the locket two pounds, all of a total value of ten pounds ten shillings, equivalent to $42.36 (R10). The watch and chain so taken and sold were received in evidence and identified by Mrs. Whitehouse as her property, discovered missing from her home on 1 August 1944 (R9; Pros.Exs.2,3). Second Lieutenant Harry G. Brown, Provost Marshal, 297th General Hospital, interviewed accused on 1 August 1944 and warned him of his rights (R11). Accused then signed a statement in which he described his taking, on 31 July 1944, of a watch, a gold chain and a locket from Mrs. Whitehouse's home, and his sale of the watch and locket for 55 shillings (R11-12,14; Pros.Ex.4).

Upon cross-examination, defense counsel asked Captain James Randall, commanding officer of accused,

> "From your information he was in the hands of the Military Authorities 1 August 1944?"

to which the reply was made, "That is right" (R8).

4. Accused, after being advised of his rights (R14-15), elected to make an unsworn statement. He stated he had been in England for six months and never had a pass. He had a wife and children in the United States and expects another child

> "this month and this is one reason I am getting up here, to ask for leniency and to throw myself on the mercy of the court" (R15).

5. The court before which accused was arraigned and tried on 18 September 1944 was appointed by the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, on 20 August 1944. Southern Base Section was dissolved as of 0001 hours 1 September 1944 and United Kingdom Base, Communications Zone, European Theater of Operations, was activated at the same time and on the same date (GO 42, 31 Aug. 1944, Communications Zone, European Theater of Operations). United Kingdom Base absorbed Southern Base Section and the court became an instrumentality of the former command. Upon the authority of CM ETO 4054, Carey, et al, and CM ETO 3921, Byers, the function and jurisdiction of the court is sustained.

6. After the prosecution had laid a foundation for introduction of the confession of accused, the law member stated:

> "I ask that the accused be brought to the stand to testify as to the taking of this statement".

He then informed accused that it was voluntary on his part as to whether he wished to relate the manner in which the statement was taken. The accused replied that he had no objection, and thereupon was sworn (R12) and testified on this issue (R13). The procedure of the law member was irregular, and might easily have infringed accused's rights under the Fifth Amendment to the Federal Constitution and Article of War 24 (CM ETO 2297, Johnson & Loper). However no actual prejudice resulted to accused because his testimony introduced into the case defensive evidence favorable to himself and put in issue the admissibility of his confession (R13; Pros.Ex.4).

7. The evidence of the prosecution and the circumstances related by accused with respect to the securing of his confession (R13,14; Pros. Ex.4) raised an issue of fact as to its voluntary nature. Inasmuch as there is substantial evidence supporting the validity of the confession the ruling of the law member favorable to its admission in evidence will not be disturbed (CM ETO 3469, Green, and authorities therein cited; CM ETO 2926, Norman and Greenawalt).

8. As to the Specification of Charge I, larceny is defined as

> "the taking and carrying away, by trespass, of personal property the trespasser knows to belong either generally or specially to another,

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with intent to deprive such owner permanently of his property therein" (MCM, 1928, par.149g, p.171).

It was clearly shown by competent, substantial, undisputed evidence that accused did, at the time and place averred in the Specification, feloniously take, steal and carry away the property of Edna Whitehouse, as alleged (CM ETO 2840, Benson, and authorities therein cited).

As to the Specification of Charge II, the absence of the accused without leave was clearly proved in accordance with the findings of the court.

9. The charge sheet shows that accused is 28 years of age and was inducted 28 August 1942 at Indianapolis, Indiana, to serve for the duration of the war plus six months. He had no prior service.

10. The court was legally constituted and had jurisdiction of the person and 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. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind. (311)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 JUN 45 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private GEORGE D. ACKERMAN (35368610), attached unassigned 363rd Replacement Company, 96th Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 4055. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4055).

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

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

BOARD OF REVIEW NO. 1

CM ETO 4056

18 NOV 1944

UNITED STATES	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private THOMAS BROWN (33094698), 665th Quartermaster Truck Company	Trial by GCM, convened at Whittington Barracks, Lichfield, Staffordshire, England, 14 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War
Specification: In that Private Thomas Brown, 665th Quartermaster Truck Company, did, at Wem, Shropshire, England, on or about 23 July 1944, with intent to commit a felony, viz. rape, commit an assault upon Miss Dorothy Foulkes by wilfully and feloniously striking her and throwing her to the ground.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction, apparently by summary court, for breaking restriction by going off the post in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial

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for action pursuant to Article of War 50½.

3. The court, although appointed by the Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations, whose authority terminated upon dissolution of Western Base Section at 0001 hours, 1 September 1944 (GO 42, 31 August 1944, Communications Zone, European Theater of Operations), became an instrumentality of United Kingdom Base, Communications Zone, European Theater of Operations. Upon authority of CM ETO 4054, Carey et al and CM ETO 3921, Byers the jurisdiction of the court in the instant case is sustained.

4. The undisputed evidence showed that at about six p m on 23 July 1944 Miss Dorothy Foulkes, Shawbury, Shropshire, England, left her home to ride to the home of her aunt. She passed by a camp where there were American soldiers and noticed a negro lying on the ground (R6) by a gateway on her right. She continued past him, turned around and came back. The negro was then standing in the middle of the road and she jumped from her bicycle to avoid striking him. He asked her to go for a walk with him, then

> "edged me towards the hedge and got hold of my bicycle and said, 'could he ride my bicycle?' and I said, 'No'."

As she tried to pass him, he suddenly struck her "a terrific blow" on the side of her face, breaking off her glasses, and then threw her to the ground. She fell in a sitting position. He ran around the bicycle and put his hands about her throat. She arose terribly frightened and went to the side of the road, where he suddenly threw her against the gate "with terrific violence". She was "terrified then with his violence" and went through the gate with him into a field of oats where "he made me lay down on the ground". He got on the ground beside her, leaned over her and she "felt him pressing something into my private parts" (R7). She could not see, but

> "gained the impression that he was holding his person in his hand and he was leaning all his weight on me and pressing it into my private parts" (R8).

She heard voices in the road, stood up and could feel her knickers were wet and sticky. She wiped herself with her handkerchief. The negro left, whereupon she went at once to the camp and reported the occurrence (R8). Accused looked like the negro who assaulted her but she was not quite certain (R6).

Andrew James Rhodes, pathologist, Royal Salop Infirmary, Shrewsbury, examined Miss Foulkes on the morning of 24 July 1944. He described her injuries as follows:

> "The temple, the right temple, was tender and bruised. There was a cut on the crown of the head about two inches long. And on the front of the neck there was a number of small semi-

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circular abrasions which suggested that they had been made by fingernails. There was a large number of scratches and bruises on the back. Also a scratch on the right upper arm. There were some scratches on the left shin" (R25).

He made an examination of her genital region to which he found no injury and a microscopic examination from the secretion of the vaginal orifice revealed no spermatozoa (R26).

Major Artie C. Needham, Quartermaster Corps, Headquarters G-16, APO 209, as the official investigating officer, interviewed accused on 25 July 1944 and warned him of his rights (R14,16,21). Accused then signed a statement which described an assault "on a girl riding a bicycle" in substance the same as to time, place and detail as that set forth in the testimony of Miss Foulkes except that he denied striking her and attributed the wound near her eye to her falling off her bicycle (R24; Pros.Ex.1). Defense Counsel objected to the introduction of the statement in evidence on the grounds that it was not voluntary and that accused did not know its contents when he signed it (R16). At his request, accused was sworn and testified solely as to the admissibility of this evidence. He maintained that he signed the statement but did not read it because he did not have time (R18) and did not know its contents when he signed it (R19). He was ordered to sign it by his Commanding Officer, Captain Taylor, who said"he would punish me if I did not sign it" (R20). Major Needham testified that he not only advised accused of his rights before he signed the statement but that witness "went over it very carefully and asked him (accused) if he understood what he was signing and he said he did" (R21). John Richard Edwards, Police Sergeant, Shropshire Constabulary, Wem, Shropshire, was present at the time accused was interviewed and affirmed the testimony of Major Needham that accused was fully warned of his rights before he signed the statement, at which time accused's Commanding Officer, Captain Taylor, was present. The latter did not order accused to sign the statement, but told him that "

> "he need not make a statement unless he wished and that it was expressly up to him, he need not make a statement unless he wished" (R22).

5. After being advised of his rights, accused elected to remain silent. The defense introduced no evidence (R27).

6. The evidence supports the findings that accused at the time of the assault upon his victim entertained the specific intent to commit rape and the findings of guilty were fully warranted (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr; CM ETO 3255, Dove). The court was warranted in disbelieving accused's testimony as to the manner in which his statement was taken and his unfamiliarity with its contents, in view of the testimony of Major Needham and Police Sergeant Edwards.

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7. The charge sheet shows that accused is 25 years ten months of age and was inducted 5 June 1941 at Fort George G. Meade, Maryland. His period of service is governed by the Service Extension Act of 1941. 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. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and sec.276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Declassified by authority of
Col Kimbel, JAGO
Donald T. Grist
Capt AGD 23 Aug 45

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private THOMAS BROWN (33094698), 665th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4056. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4056).

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

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

BOARD OF REVIEW NO. 1 23 NOV 1944

CM ETO 4058

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private WILLIAM C. McCONNELL (33576296), attached unassigned, 363rd Replacement Company, 96th Replacement Battalion, 16th Replacement Depot	Trial by GCM, convened at Warminister, Wiltshire, England, 18 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private William C. McConnell, 363rd Replacement Company, 96th Replacement Battalion, 16th Replacement Depot, did, at Frome, Wilts, England, on or about 15 July, 1944, feloniously take, steal, and carry away British currency of the value of about £ 44, equivalent value of about $177.54; War Saving Certificates of the value of about £100, equivalent value of about $403.50; Saving Stamps Book of the value of about £-6, equivalent value of about $24.21; Bank books, cheque books, cigarettes, and keys of the value of about £-3, equivalent value of about $12.10, all the property of Arthur Charles Rollason.

He pleaded not guilty and was found not guilty of Specification 1 and guilty of Specification 2 and of the Charge. Evidence was introduced of two previous convictions, one by summary court for absence without

leave for one day in violation of Article of War 61 and one by special court-martial for leaving his appointed place for guard duty and insubordination toward a non-commissioned officer in violation of Articles of War 61 and 65 respectively. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence shows that on 15 July 1944 Arthur Charles Rollason, a fish and fruit merchant, residing at 3 New Buildings, Frome, Wiltshire, England, placed 44 pounds English currency in a tin box, containing War Savings Certificates (R7) for which 18 months previously he had paid 100 pounds, Savings Stamps of a value of six pounds 14 shillings six pence, a check book valued by him at four shillings and 100 cigarettes (R8). The tin box was about 18 inches long, nine inches deep and black in color. He placed it with its contents in the sideboard in the sitting room of his home and went out for an hour. The following morning it was missing. He found the box that afternoon "smashed to bits" at accused's billet (R7,9).

About seven o'clock on the evening of 15 July 1944 accused and Private Edward P. Billingsley, 363rd Infantry Replacement Company, went to a "pub" in Frome where they had seven or eight glasses of beer. Accused left and returned about 8:30 p m with a roll of money which he told Billingsley he had won in a crap game (R11-12).

On 24 August 1944 (Pros.Ex.1) accused was interviewed by First Lieutenant David Leventritt, 96th Replacement Battalion, who, as investigating officer, explained to him his rights under the 24th Article of War (R13-14). Accused then voluntarily made the following statement, which was received in evidence without objection:

> "I have known the Rollason family for some time, having been a guest in their home on numerous occasions, and I have been very well treated by them. I would not harm them in any way when I am in my right senses. Since I had visited their home frequently, the Rollasons gave me permission to come in any time without knocking on the door.
>
> "On Saturday, July 15th 1944, I went to Frome with Acting First Sergeant Benson and Private Billingsley, and went to drink at the Crown Pub, Keyford. We stayed a long time drinking beer and spirits and I got feeling very good and just didn't give a damn. I had an argument with

Benson, and after the argument drank seven pints of beer. I left the pub, went down to the area, hopped the wall and went to Rollason's home at #3 New Buildings. I knocked on the door and entered, as was my custom. I called for Mrs. Rollason but got no answer, so I just pushed open the door, which was unlocked. I snooped around and found a black box in the front room, in a bureau. I had never seen the box before, nor did I know its contents and it might have been empty for all I knew. I came out of the house with the box and stopped to talk with a girl named Mary, whom I knew. I then went back to the hut I had been living in. I took a shovel and broke the box open. I do not recall clearly taking out the money, but I believe I left the rest of the contents intact in the hut. I rejoined my friends in a nearby pub and I messed around until twelve o'clock, when I returned to camp. When I woke the next morning and found the roll of bills in my pocket, I became very scared. I must have been very drunk to do what I did" (R14-15; Pros.Ex.1).

On the evening of 15 July 1944 at about nine o'clock Private Charles H. R. Benson, Jr., 363rd Replacement Company, saw accused "running down the street towards me." Accused said to him, "I have just cleaned out a whole battalion in a crap game" and "I made 98 passes." Accused showed him a roll of money (R15-16). At about the same time accused met on the street Miss Sylvia Mary Coleman, of 26 New Buildings, Frome. He stopped to talk with her (R10) and she noticed that he was carrying a long black box, "sort of a tin." She did not notice whether or not he had been drinking (R11).

It was stipulated by and between the prosecution, defense counsel and accused that the value of 44 pounds is $177.54, 100 pounds --$403.50, 6 pounds -- $24.21, and 3 pounds--$12.10 (R15).

4. The evidence of the value of the British War Savings Certificates, savings stamps, check book and cigarettes was not satisfactory. The owner was not competent to express an opinion as to their respective values and the court could properly find only that these items had some value not in excess of $20 (MCM,1928,par.149g,p.173; 1 Wharton's Criminal Evidence, 11th Edition, sec.54,p.60; CM 228742, Blanco). However, no substantial right of the accused was injuriously prejudiced by Rollason's testimony, since it was clearly shown that accused also stole cash totalling 44 pounds, of a value equivalent to $174.54.

5. Upon the authority of CM ETO 4054 Carey et al and CM ETO 3921, Byers, the jurisdiction and function of the court before which accused was arraigned and tried is sustained.

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6. As to Specification 2 of the Charge, of which alone accused was convicted, the evidence plainly shows his commission of the larceny charged. It clearly warranted the court in inferring the existence of an intent permanently to deprive the owner of his money and other personal property and in finding accused guilty of larceny thereof as alleged (MCM, 1928, par.149g,pp.171-173; CM 149546 (1921), CM 108998, 122458 (1918), Dig. Op,JAG,1912-1940,sec.451 (37) p.323; CM ETO 1453, Fowler).

7. The charge sheet shows that accused is 21 years 11 months of age. He was inducted 19 March 1943, 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 offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. Confinement in a penitentiary for five years is authorized for the offense of larceny of personal property of a value exceeding $50 by AW 42 and section 287, Federal Criminal Code (18 USCA 466); and MCM,1928, par.104c, p.99. As accused is under 31 years of age and the sentence is not more than 10 years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir. 229, WD, 8 June 1944, sec.II, pars.1a(1) 3a).

[signature] Judge Advocate

Elwood K. Sargent Judge Advocate

Edward L. Stevens Jr. Judge Advocate

1st Ind. (323)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 23 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S.Army.

1. In the case of Private WILLIAM C. McCONNELL, (33576296), attached unassigned, 363rd Replacement Company, 96th Replacement Battalion, 16th Replacement Depot, 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 4058. For convenience of reference please place that number in brackets at the end of the record: CM ETO 4058.

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

COPY

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

BOARD OF REVIEW NO. 2

CM ETO 4059

17 November 1944

U N I T E D S T A T E S v. VICTOR BOSNICH (Z-90832), United States Merchant Seaman serving with the Armies of the United States in the field, along the lines of communication on board the United States Steamship George G. Crawford.	WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Belfast, Northern Ireland, 5 and 6 August, 1944. Sentence: Confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by BOARD OF REVIEW No. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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1. The record of trial in the case of the seaman 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 93rd Article of War.

Specification: In that United States Merchant Seaman Victor Bosnich, serving with the Armies of the United States in the field and along lines of communication on the United States Steamship "George G. Crawford", did, on board the United States Steamship "George G. Crawford", at or near Belfast, Northern Ireland, on or about 1 July 1944, with intent to commit a felony, viz, murder, commit an assault upon Frank Sintich by wilfully and feloniously shooting the said Frank Sintich in the body with a pistol.

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

Specification 1: In that * * * did, on board the United

States Steamship "George G. Crawford", at or near Belfast, Northern Ireland, on or about 1 July 1944, behave himself with disrespect towards Third Officer Glenn H. Stackhouse, his superior officer, by saying to him "you mother fucker, son of a bitch, bastard, prick, come down on the docks, I'm not taking orders from you", or words to that effect.

Specification 2: In that * * * did, on board the United States Steamship "George G. Crawford", at or near Belfast, Northern Ireland, on or about 1 July 1944, offer violence against Third Officer Glenn H. Stackhouse, his superior officer, who was then in the execution of his office, in that he, the said Victor Bosnich, did draw his arm back to his side in a threatening manner and invite the said Glenn H. Stackhouse down to the docks to fight.

On motion of defense counsel made at beginning of the trial, the President and Law Member ruled "that the charge under the 96th AW will be withdrawn when there is a charge under the 93d AW as serious as it is". The "ruling of the court is that the second charge of the 96 Article of War and the two specifications thereof will be withdrawn and will not be tried at the present time".

Accused pleaded not guilty to Charge I and its Specification. He was found guilty of the Charge and of the Specification "except the word 'murder', substituting therefor, 'manslaughter'; of the excepted words 'not guilty'; of the substituted words 'guilty'". No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations (successor in command), approved the sentence but remitted five years of the confinement, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The testimony of the prosecution shows that accused was "Deck Engineer" in the service of the United States Merchant Marine, signed on the steamship George G. Crawford, owned by the War Shipping Administration, operated by the American Range Liberty Lines and allocated to the United States Army under whose authority it also would be while in port (R6,47-48). Accused had been on shore in Belfast in the evening, returning to the ship about two o'clock the morning of 1 July 1944 (R35) with another sailor and two British Navy men. The British Navy men were stopped from going on the Crawford. Accused then took a bottle from the other sailor who went on board, and accused, becoming annoyed, "said he would shoot some 'bastard' when he come aboard" and then left the dock with the Navy men (R27-28). Sometime later accused returned to the ship and was escorted to his room, where he locked himself in (R57). He awakened his roommate and cursed him, then

offered the roommate a drink which was refused. Accused got a gun and told his roommate he was going to shoot him and invited him to get up and fight which invitation was also refused. Accused attempted to fire through the wall into the mess room which adjoined his but the gun misfired, he then cocked it and shot his roommate, Frank Sintich (R10) from a distance of about two feet, while Sintich still lay in his bunk. Accused gave no reason for the shooting. He held the gun steady and his speech was clear (R20). The bullet entered the right side and came out of the back near the spine, fortunately missing any vital spot (R24-25). To protect himself from a second shot, Sintich grappled with accused and succeeded in getting the gun away from him (R10), while some sailors in the adjoining mess room, hearing the shot, smashed in the locked door to accused's room, saw the two men there in a clinch, seized the gun when it fell from accused's hand and when he attempted to retrieve it, seized and pulled him through the broken door. Sintich followed, collapsed after a few steps and was removed by ambulance. In the struggle following, accused was knocked unconscious, bound and handcuffed (R 52-53). The bullet was found imbedded in the mattress on Sintich's bed and the empty shell case as well as some life ammunition was found in the room (R31,36). On 1 July, accused, after due warning of his rights, made a sworn written statement (R45-46), in which he detailed his movements preceding the hour of the shooting. He stated that after the two British Navy men were refused entry to the Crawford about two o'clock he left and drank with them on their ship. He claimed to remember nothing thereafter until the next day when he awaked to find himself strapped to a bed in the hospital. He admitted purchasing the pistol and seven rounds of ammunition about a month previous from an American soldier off the Normandy coast (Pros.Ex.O).

4. The defense produced as its only witnesses, two male nurses from the hospital to which accused was taken following the shooting. They testified accused was very intoxicated on arrival there (R74-75) and was a mass of bruises and contusions (R77). Accused remained silent.

5. The evidence is clear that accused was subject to trial by army court-martial (AW 2d). It is also convincingly evident that accused was very intoxicated prior to and at the time of the shooting. Any reason or motive for his action in shooting his roommate is lacking except the shadowy inference that he wanted the room to himself. It is undisputed that accused shot and wounded Sintich. An hour earlier, accused, who was drunk, had been provoked and angered at the refusal to allow his two British Navy friends to come aboard and at that time announced that he would shoot some "bastard" when he did return on board ship. When he did return it was necessary for some of his mates to escort him to his room because of his drunken and pugnacious conduct. He locked his room door and taking steady aim at a distance of two feet, without any cause shown, shot Sintich.

The offense undoubtedly was committed as the culmination of anger aroused by his prior arguments with the ships' guards, accentuated

by the liquor. Whether his grievances were real or fancies, they could not justify his action. His conduct was deliberate and his speech was clear and coherent. The intent alleged is properly inferable from the circumstances (Dig.Ops. JAG, 1912-40, sec.451(10), p.313; CM 193085, Teindl; CM ETO 3366, Kennedy; CM ETO 2899, Reeves; CM ETO 1535, Cooper; CM ETO 1725, Warner).

> "Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not" (Wharton's Criminal Law, Vol. 1, sec.422, pp.637-640).

> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought. The intent to kill being formed suddenly under the influence of violent passion or emotion which, for the time being, overwhelms the reason of the accused. It is not the weapon used, nor the intention to kill which fixes the grade of the crime, but the uncontrollable passion, aroused by adequate provocation, which for the time being renders the accused incapable of reasoning and unable to control his actions" (Ibid., par.423, pp.640,642).

> "Voluntary manslaughter is an intentional killing, without malice, in hot blood produced by adequate cause, and differs from murder in this, that though the act which occasions death be unlawful, or likely to be attended with bodily mischief, yet the malice aforethought, which is the essence of murder, is presumed to be wanting and the act being imputed to the infirmity of human nature, the punishment is proportionately lenient" (Ibid., par. 425, pp. 643-645).

It was within the province of the court to weigh the evidence and their finding evinces their belief that accused was greatly provoked as the result of which, under the influence of liquor, without premeditation, he shot accused with the intent to kill. The trial court was also charged with the sole determination of the question of fact whether accused was too drunk to entertain the required intent to commit the offense charged and, in the opinion of the Board of Review, its findings of guilty are fully supported by the evidence (CM ETO 1585, Houseworth; CM ETO 3212, Mull).

6. The president, who was also the law member, of the court erroneously granted the defense motion to strike out Charge II and its specifications. Both specifications and the charge were proper and complete and comprised offenses separate and distinct from Charge I and its Specification. The court was without right to withdraw this Charge and its specifications, such act being solely within the province

of the reviewing authority. Such act could not in any way prejudice the accused.

7. The charge sheet shows accused to be 25 years and five months of age. He was assigned on the United States Steamship George G. Crawford on 19 March 1944. His prior service, if any, is unknown.

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.

/s/ C.M. BENSCHOTEN Judge Advocate

/s/ JOHN WARREN HILL Judge Advocate

/s/ BENJAMIN R. SLEEPER Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations, 17 Nov. 44 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of VICTOR BOSNICH (Z-90832), United States Merchant Seaman serving with the Armies of the United States in the field, along the lines of communication on board the United States Steamship George G. Crawford, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4059. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4059).

(s) 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 of Operations
APO 887

BOARD OF REVIEW NO. 2

CM ETO 4071

25 NOV 1944

U N I T E D S T A T E S v. Privates THOMAS MARKS (34711756), EARNEST J. MORGAN (34542969), JAMES HOLLERMAN, Jr. (34549879), MATTHEWS McNEIL (34549001), and Tec 5 JOE W. WHEELER (34711684), all of Company A, 41st Signal Construction Battalion.	ADVANCE SECTION COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Reims, France, 20 September 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years as to Marks, McNeil and Hollerman. United States Penitentiary, Lewisburg, Pennsylvania. As to Morgan and Wheeler, acquittal.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Thomas Marks, Technician Fifth Grade Joe W. Wheeler, Private Matthews, McNeil, Private James Hollerman Jr., and PrivateEarnest J. Morgan, all of Company A, 41st Signal Construction Battalion, acting jointly, and in pursuance of a common intent, did, at or near Saint Prest, Eure Et Loir, France, on or about 6 September 1944, unlawfully enter the dwelling of Berthe Vvess, with intent to commit a criminal offense, to wit, assault and larceny therein.

Specification 2: In that * * * did, at or near Saint Prest, Eure Et Loir, France, on or about 6 September 1944, with

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intent to do her bodily harm, commit an assault upon Berthe Vvess, by willfully and feloniously striking and kicking the said Berthe Vvess, on the body with their fists and feet.

Specification 3: In that * * * did, at or near Saint Prest, Eure Et Loir, France, on or about 6 September 1944, with intent to do him bodily harm, commit an assault upon Staff Sergeant Angelo M. Desarno, 29th Infantry Regiment, by willfully and feloniously striking and kicking the said Staff Sergeant Angelo M. Desarno on the body with their fists and feet.

Specification 4: In that * * * did, at or near Saint Prest, Eure Et Loir, France, on or about 6 September 1944, with intent to do him bodily harm, commit an assault upon Private Alfred J. Quintin, 29th Infantry Regiment, by willfully and feloniously striking and kicking the said Private Alfred J. Quintin on the body with their fists and feet.

Specification 5: In that * * * did, at or near Saint Prest, Eure Et Loir, France, on or about 6 September 1944, feloniously take, steal, and carry away 357 francs, lawful money of France, of an exchange value of about $7.56, and one gold wedding ring, value of about 700 francs, of an exchange value of about $14.00, or the total value of about $21.56, the property of Berthe Vvess.

Specification 6: In that * * * did, at or near Saint Prest, Eure Et Loir, France, on or about 6 September 1944, with intent to commit a felony, viz., rape, commit an assault upon Andree Vvess, by willfully and feloniously throwing the said Andree Vvess on a bed and on the floor and striking her on the body with their fists, and attempting against her will, to have sexual intercourse with her.

Each pleaded not guilty to the Charge and its specifications. Accused Wheeler (R41) and Morgan were found not guilty. Accused Marks, Hollerman, and McNeil were each found guilty of the Charge and each of its specifications. No evidence of previous convictions was introduced as to Marks and McNeil. Evidence of one previous conviction was introduced as to Hollerman, by special court-martial for willful disobedience of a non-commissioned officer and behaving in an insubordinate and disrespectful manner, in violation of Article of War 65. 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 30 years. The reviewing authority approved the sentence as to each, reduced the period of confinement to 20 years, and designated the Federal Penitentiary, Lewisburg, Pennsylvania, as the place of confinement.

3. Evidence introduced by the prosecution showed that on the evening of 6 September 1944 (R15,26), Staff Sergeant Angelo M. Desarno and Private Alfred J. Quintin, both of the 29th Infantry Regiment, were at the home of Madame Berthe Vvess and her daughter, Andree Vvess, at or near Saint Prest, France, for the purpose of picking up laundry they were doing for the soldiers (R4,5,10,14,15). At about 2215 a commotion was heard in the yard (R5), followed by a knock on the door (R6,15) which was latched on the inside by a sliding latch (R6). The door was then forced open from without, the latch giving way, and five colored soldiers came in the room (R16,34). Accused Marks, Hollerman, and McNeil, all privates, Company A, 41st Signal Construction Battalion (R39,43), were identified as members of this group of intruders (R4-6, 14,15,3134). (The other accused, Morgan and Wheeler, were not identified to the satisfaction of the court and were acquitted). Desarno was asked by one why he had not opened the door when "they started to knock" and upon replying that the women did not want them in the house, accused Hollerman struck him with his fist on the side of the ear, on the nose, and on the top of the head, momentarily dazing him and causing bruises (R6-9). Quintin received a blow on his jaw, causing it to be swollen for four or five days (R17). The women were "mauled" (R7). The table was upset and the candle on it was extinguished (R17,28). Madame Vvess was struck and dragged by her hair out into the courtyard (R28); and her daughter, Andree, was thrown by accused Marks to the bed, which was in the same room downstairs (R7). Andree was struggling with Marks and two of the other soldiers, one of whom was accused Hollerman who went to the help of Marks and threw her on the ground, where Marks lifted up or tried to lift up her skirts (R28,24,34). Andree managed to escape and joined her mother in the yard whence they fled to the home of a neighbor (R35). The two women returned to their own home the following morning, to find that 357 francs, of an exchange value of about $7.56, and one gold wedding ring, of a value of about $14.00, had disappeared during their absence (R29,40). Shortly after midnight, on 7 September, accused McNeil and Hollerman were arrested about 75 yards from the scene of this violence (R25,26). In their possession they had a flashlight which had been lost by Quintin during the tussle at the house (R18,26; Pros. Ex. 1). Marks was arrested about the same time, and evidently in the same vicinity (R37,38). He was searched and in his watch pocket was found the wedding ring taken from the home of Madame Vvess (R29,38; Pros. Ex. 2).

4. Private Quintin was recalled as a witness for the defense. He confusedly testified that on two occasions, shortly after this occurrence at the home of Madame Vvess, he returned there with "CIC men", who were investigating, and that on one occasion accused McNeil and Marks were "along", "before they had the show down of those men" (R44-46).

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Accused were advised of their rights, and each elected to remain silent.

5. The evidence thus introduced shows that at the time and place mentioned in each of the specifications, the three accused acting jointly and pursuance of a common intent forcibly entered the dwelling of Berthe Vvess, assaulted her by mauling her and dragging her out of the house by her hair, assaulted Desarno and Quintin by striking them with their fists, stole from Berthe Vvess, in her home, property of the value of $21.56, and assaulted Andree Vvess in a manner which clearly indicated an intent that a rape be perpetrated on her by at least one of accused.

The fact that accused unlawfully entered this house and subsequently committed a larceny therein is sufficient to support and prove the allegation in Specification I that the entry into the dwelling was with intent to commit a criminal offense. Evidence of an actual larceny is competent to prove an intent to steal (9 Am Jur, par. 63, p. 272, "Burglary"). The conduct so alleged and proved constituted "Housebreaking" in violation of Article of War 93 (MCM, 1928, par. 149e, p. 169).

The assaults individually alleged in Specifications 2, 3, and 4 of the Charge were not substantiated by the proof. In each of these specifications it is alleged that there was an assault committed with hands and feet with intent to do bodily harm. There was no testimony that the instrumentality of any of these assaults was other than hands or fists. Each victim was struck by one accused. No kicking was proved. A fist is not a dangerous weapon or instrument and an assault with intent to do bodily harm is a felony, a violation of Article of War 93, only when a dangerous weapon or instrument is employed (Dig. Op. JAG 1912-1940, Sec. 451 (7) p. 312, CM 107659 (1917), 125267 (1919)). The conduct thus proved constituted a simple assault and battery, a lesser included offense, and was in violation of Article of War 96 rather than 93 the article under which each offense was charged (CM 238970 Hendley 25 B.R. 1).

The larceny alleged in Specification 5 of the Charge was fully established.

The assault on Andree Vvess was undoubtedly made with intent to rape her, as alleged in Specification 6. She was thrown on a bed and on the floor and force was employed by three of accused to hold her down. The lifting or attempted lifting up of her skirt proved the intent charged.

The three accused were shown to have aided and abetted each other in this attempt to obtain carnal knowledge of Andree Vvess by one of their number by force, rape. It is unnecessary to determine which of the accused was to have had the intercourse since the common law distinction between aiders and abetters and the principal is no longer of legal significance. Aiders and abetters under rules of general application may be charged as principals. Although two persons can not be guilty of a single joint rape,

all persons present aiding and abetting another in the commission of rape are guilty and punishable as principals (NATO 385, Speed). By analogy, the same rule applies with respect to the offense of attempted rape or that of assault with intent to commit rape. Accused here were properly found guilty as principals of acting jointly and in pursuance of a common intent in their assault on Andree Vvess with intent to rape her. (CM ETO 1052, Geddies, et al; CM NATO 643(1943) Bull.JAGVol 3, Feb 1944,p.62; CM ETO 4143 Blake, et al).

6. Accused Marks is 22 years old. He was inducted on 20 March 1943 at Camp Forrest, Tennessee, for the duration of the war plus six months. He had no prior service.

Accused Hollerman is 21 years old. He was inducted on 30 March 1943 at Camp Blanding, Florida, for the duration of the war plus six months. He had no prior service.

Accused McNeil is 20 years old. He was inducted 20 March 1943, at Camp Blanding, Florida, for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors, other than those noted above, 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 Specifications 1, 5, and 6 of the Charge and of the Charge, legally sufficient to support only so much of the findings of guilty of Specifications 2, 3, and 4 of the Charge as involves a finding of guilty of assault and battery by striking with their fists in violation of Article of War 96, and legally sufficient to support the sentence.

8. Penitentiary confinement is authorized for the offense of breaking house (DC Code, sec. 22-1801); and penitentiary confinement for 20 years is authorized for the offense of assault with intent to commit rape (AW 42; sec.276, Federal Criminal Code (18 USC 455)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4). 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 NOV 1944 TO: Commanding General, Advance Section Communications Zone, European Theater of Operations, APO 113, U. S. Army.

1. In the case of Privates THOMAS MARKS (34711756), EARNEST J. MORGAN (34542969), JAMES HOLLERMAN, Jr. (34549879), MATTHEWS McNEIL (34549001), and Technician Fifth Grade JOE W. WHEELER (34711684), all of Company A, 41st Signal Construction 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 of Specifications 1, 5 and 6 of the Charge, and the Charge, legally sufficient to support only so much of the findings of guilty of Specifications 2, 3, and 4 of the Charge as involves a finding of guilty of assault and battery by striking with their fists, in violation of Article of War 96, and legally sufficient to support the sentence, as to accused MARKS, HOLLERMAN and McNEIL.

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 4071. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4071).

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

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

BOARD OF REVIEW NO. 2

24 NOV 1944

CM ETO 4072

U N I T E D S T A T E S	)	VIII CORPS
	)	
v.	)	Trial by GCM, convened at Morlaix,
	)	Finistere, France, 29 August 1944.
Privates SEARCY HOWELL (38448510); and CLARENCE L. FRANKLIN (32572265), both of Battery A, 969th Field Artillery Battalion.	)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

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

Franklin

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Clarence L. Franklin, Battery "A" 969th Field Artillery Battalion did, near Arzano, Finistere, France on or about 15th August, 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Marie Gourlay.

Howell

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Searcy (NMI) Howell, Battery "A" 969th Field Artillery Battalion did, near Arzano, Finistere, France on or about 15th August, 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Marie Gourlay.

Each pleaded not guilty to and was found guilty of the Charge and Specification pertaining to him, all members present at the time the vote was taken concurring in each finding of guilty. Evidence was introduced of two previous convictions of each accused, one of each by special court-martial for absence without leave, Franklin for two hours, Howell "fr 8 April, 1944 to 8 April 1944"; and one of each by summary court for missing reveille, all in violation of Article of War 61. Each accused was sentenced, all members present at the time each vote was taken concurring, to be hanged by the neck until dead. The reviewing authority, the Commanding General, VIII Corps, approved the sentences and forwarded the record of trial for action pursuant to the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentences but, owing to special circumstances, commuted each to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of each accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 15 August 1944, while it was still daylight, the prosecutrix, Madame Marie Gourlay, a Brittany peasant woman, 35 years of age and the mother of four children, was attacked, while bicycling along a road near Arzano, by two colored soldiers whom she identified as the accused (R7-9,22). Franklin attacked her first. "He pulled the bicycle along with me"; she testified

> "Then he put his bayonet in the gun on my shoulder; took my bicycle; threw it on the side of the road. He threw me in the field. He put me in the hole and he violated me. * * * I wanted to go. He said no. He did not let me go. He threw me in the hole. * * * I was hollering and he said, 'You musn't holler' and he put his gun on his shoulder" (R9).

Franklin inserted his private parts in hers and maintained the connection for ten minutes (R9) during which time he put a hundred franc note in her pocket (R11). Howell, meanwhile, was watching the road (R10). When Franklin had finished, prosecutrix sat up. Howell "came and he threw me back and got on me * * *. Every time I tried to get up he pushed me back". His attack continued for five minutes during which he, also, inserted his private parts in her (R12). After the attack, Howell gave her a piece of chocolate (R16). Then both accused left the field and prosecutrix mounted her bicycle and rode "a good kilometer" to her cousin's house in Nieien, where she reported the attack (R12-13). Accompanied by her cousin, she went next door where she encountered two military policemen to whom she

explained her case. They took her in their car to the scene of the attack, thence along the road another "good kilometer" to a point where they found the accused "going towards camp". Accused "wanted to jump into the field". The military police stopped the car, disarmed accused, "put them on the motor of the car" and brought them to camp, where, three days later, prosecutrix again identified them, out of about twenty negroes, as the two who had attacked her (R14-15).

On cross-examination, prosecutrix testified that it was impossible to break away from Franklin's hold, when he first seized her. Asked, "Did you cry or attract any attention at that time?", she replied in the affirmative, explaining that she "hollered three times, but I could not holler loud enough because they were struggling with me". She had never associated with colored people, and when accused took her about 30 meters off the road to the place where they raped her, she was nervous, excited and afraid (R17). She was also weeping (R18). None of her clothes were torn in her efforts to escape. Despite her cries and struggles, accused succeeded in holding her (R19). Asked if she cried for help immediately after accused left, she replied, "I was hollering; I was crying; I was like a crazy woman" (R21).

Mme. Yvonne Coche, a "house woman" residing in Arzano, testified that the prosecutrix - whom the trial judge advocate referred to as "your cousin" - arrived at the witness' home about 9 o'clock on the evening of the 15th. "Her hair was undone and on her back there was dirt and dust. * * * She said she had been attacked by two black boys" (R23). She was crying and "as soon as she did clean herself, she left". As she was leaving, "the MP's asked her why she was crying". Then they took her into the car (R24).

Mme. Jacquette Guillern, another housewife residing in Arzano, testified that, at about 9 o'clock, Mrs. Coche came to get her to translate "what the MP's were saying". At that time prosecutrix was very nervous. She had apparently been crying and "she said she was attacked by two colored boys". Mrs. Guillern accompanied prosecutrix and the two military policemen in the latter's car.

> "We left right away for that field, the place of attack. The military police went into the fields to see if they were there. There was no one and so we got back into the car and went further on. From about that place to where we found them was about one kilometer or two. * * * They were on the left side of the street. I do not know whether they tried to jump the distance to the field. I do not know; I wasn't paying much attention; so the two MP's told them to stop and they stopped, and they took their

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pieces away from them and they put them on the front, motor of the car. Then we left for the camp and the officers arrived. They asked Mrs. Gourlay if they were the two. * * * She said right away that they were the two, and the small one had attacked her first" (R25).

The two military policemen testified that at about 9:15 on the night of August 15th they were at a cross roads about three-quarters of a mile from Arzano when a lady came up and started pointing down the road (R28,31). They accompanied her to a house whence prosecutrix emerged "in a sort of convulsions, crying". Mrs. Guillern was summoned as interpreter. Prosecutrix informed the military policemen that she had been attacked by two colored soldiers, whom she stated she would recognize (R28). The military police then took the two women in their jeep to the scene of the attack, thence down the road another mile (R28-29). There they saw accused walking along the side of the road. "One of them turned around and saw us and made a break through the hedge". One of the military policemen raised his gun and halted them. After the two had disarmed the accused, "We asked Mrs Guillern to ask Mrs. Gourlay if these were the two colored boys that attacked her. She said yes. I said, 'Be sure now, because this is nothing to fool around with.' Again she said yes. I said, 'Are you real positive that these are the two?' She said yes" (R29). Accused inquired, "What is this all about". Informed that "this lady claims you attacked her", they denied it. Asked, "Why did you make a break through the hedge?", accused Howell replied, "We weren't supposed to be out of camp and I saw your MP brassard and I thought you were going to pick us up" (R30-31). Accused were then placed on the front of the jeep and driven to battalion headquarters (R29).

4. For the defense, Private William J. Johnson, Battery B, 969th Field Artillery Battalion, testified that "about three miles" from the town of Arzano on the afternoon of 15 August 1944, accused Franklin borrowed an old 100 franc note from the witness, and, at the same time, exchanged a new 100 franc note which he - Franklin - had at the time for another old one belonging to the witness. When they parted, accused Franklin had 200 francs (R42-44).

Accused Franklin, after his rights were explained to him, elected to take the stand and be sworn (R35). He testified that he was in Arzano on 15 August 1944, along with accused Howell "and a few of the members of the service battery. They left about 7:30 or 8:00 p.m. for the purpose of returning to their organization, proceeding first along a road near the edge of town. Then they decided to take another road running parallel to the highway. They "figured it might be closer to go that way and also; we would not run into any of our officers. * * * We weren't supposed to be out of our area". While

going across country they met "a few of the boys that was stationed around there all along the road and went through their positions". They stayed off the highway for a mile or two, but finally decided to return to it "so we could find out where we were at" (R36). Moreover, "it was starting to get dark and we did not want to get shot. * * * By the outfits that was in the area". They did not, at any time while on the highway, stop a woman riding on a bicycle, nor did they at any time attack a woman. They were on the highway for about a minute before they were stopped by the military police. "When they came up", Franklin testified,

> "I asked them, 'What was it all about?' I thought to myself that they were stopping us just because we were on the highway and we knew we weren't supposed to be out in that area, and one of them asked me where was our outfit, and I told him, 'Up the road' and he said, 'Come here; get on the jeep' and disarmed us. Then he asked us, did we attack a woman and we told him no. He told us he was going to take us up to battalion headquarters and get it straightened out up there".

On the night in question, Franklin had about 200 francs in his possession. His money was the old type. "I borrowed a hundred francs from Private Johnson. He gave me an old one and I had one new one. I noticed that he had a pocket full of old type bank notes; so I asked him to trade me an old one for a new one". Franklin wanted old type bank notes because "Some places you go to; they don't accept invasion money" (R37). After spending some of his money in Arzano he had, on leaving the town, about 60 or 70 francs, all small notes. Accused Howell was with Franklin all evening (R38).

Upon cross-examination by the court, Franklin testified that he left camp on the trip in question, without permission, at 2:30 or 3:00 o'clock in the afternoon. He saw other members of his organization in town. Asked, "About how many men of your organization would you say were in town that evening?", he replied, "About a half a battery of men were there". To the ensuing question, "Is it usually the custom that half the battery can be absent?", he answered, "The men were not from my battery". He then explained that they were members of his battalion "stationed on the edge of town" (R40). He and Howell did not "mess" that night; they "lost track of time" while in town, so he - Franklin - "would not know" how long they were there (R41).

Accused Howell elected to remain silent after his rights were explained to him (R41-42).

5. Captain Richard C. Coddington, accused's company commander, recalled as a witness by the court, testified that, on 15 August, standing orders within the organization provided that no men leave without permission; and that the town, homes and vicinity were off limits (R44-45). The first time the witness knew accused were gone, on the date in question,

> "they were /already/ returning. The chiefs of sections had been previously told by me personally, twenty-four hours prior, that the men were to remain in the area. I checked with the chiefs of sections, upon the discrepancies of the men being gone, and it appeared that they had been given consent to leave the howitzer positions under the pretense of washing clothes, and they may not have taken the trouble to keep track of the time that they were gone".

No other men were reported absent during that period and accused were the only men absent from the witness' battery on 15 August (R45).

6. Accused were convicted of raping the prosecutrix. She testified to every element of the offense - threats and force employed to effect accuseds' purpose, her continuous resistance and unequivocal refusal to consent, penetration in each instance. Her prompt report of the outrage and her distraught condition when she reported it are wholly consistent with her testimony as to the commission of the offense; and the circumstances surrounding the apprehension of the accused - of which Franklin's explanation is far from satisfactory - tend strongly to corroborate her straight-forward identification of Howell and Franklin as her assailants. The evidence fully sustains the findings of guilty.

7. The charge sheets show that accused Franklin is 24 years one month of age and that, with no prior service, he was inducted at Newark, New Jersey, 6 November 1942; that accused Howell is 29 years eight months of age and that, with no prior service, he was inducted at Little Rock, Arkansas, 25 January 1943.

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

9. Penitentiary confinement is authorized (AW 42; 18 USC 457).

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).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate.

CONFIDENTIAL

(344)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 30 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates SEARCY HOWELL (38448510) and CLARENCE L. FRANKLIN (32572265), Battery A, 969th 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 4072. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4072).

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

(Sentences as commuted ordered executed. GCMO 118, 119, ETO, 10 Dec 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 4074

U N I T E D S T A T E S	29TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 29, U.S. Army, 22 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.
Private WILLIAM R. OLSEN (31290076), Company "C", 115th Infantry.	

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1. In that Private William R. Olsen, Company "C", 115th Infantry, being present with his company while it was engaged with the enemy, did near Le Lunder, Normandy, France, on or about 4 August 1944, shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it until the engagement was concluded.

Specification 2. In that * * * did, near Le Lunder, Normandy, France, on or about 4 August 1944, misbehave himself before the enemy by failing to advance with his command, which had then been ordered forward by the Company Commander to engage the enemy whose forces the said command was then opposing.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both 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 20 years. The reviewing authority approved the sentence, designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Uncontroverted evidence for the prosecution showed that on 4 August 1944 Company C, 115th Infantry, was engaged in an attack upon the enemy near St. Germain, France (R6,7,9,10). Accused, a member of the heavy weapons platoon of said company, was seen on the morning of that day moving with the 3rd Battalion, through which the company was to attack, toward the line of departure. He was facing toward the rear and was moving in that direction in a "roundabout" way (R7-8). About 9:30 a m when the company had been moving for about two hours, the first sergeant saw him coming up from the rear. Asked where he had been, he told the first sergeant

> "that he wasn't going up front and stick his neck out where it was hot" (R10).

The first sergeant did not see him thereafter (R11). In the early afternoon a staff sergeant of Company C, who needed men for the impending attack, searched for accused but was unable to find him (R9).

At the official investigation, after being warned of his rights, accused signed a statement to the effect that during an advance upon the enemy the shelling affected his nerves, that one particular barrage "broke" them completely, and that he went back to the battalion command post, whence he was ordered into arrest (R12-13; Pros.Ex.1). The defense objected to the admission of the statement, in effect on the ground that insufficient proof of the corpus delicti had been presented (R13). The court overruled the objection and the statement was admitted in evidence (R14). Without objection by the defense, a certified extract copy of a morning report of Company C was admitted in evidence (R14; Pros.Ex.2), showing accused "fr duty to arrest eff 4 Aug 44."

4. The defense introduced evidence of the number of battle casualties in the company up to 4 August 1944 (R15) and testimony of the division neuropsychiatrist that he examined accused about two weeks before the trial and

> "accused was unable to control his emotions at the time and had to leave the scene of combat" (R17).

Witness further testified that following his examination he recommended that accused be tried by court-martial for disciplinary training (R17,18), but that the proper corrective action for his case was not punitive but disciplinary (R19).

5. (a) There is competent substantial evidence in the record that on 4 August 1944 accused's company was engaged with the enemy and that he both abandoned his company and sought safety in the rear and thereafter failed to advance with the company, which, it may be inferred, had then been ordered forward by the company commander to attack the enemy, as alleged. The charging of what might be regarded as one transaction in two differently phrased specifications was justified in view of probable doubt as to the facts, evidenced by some confusion in the testimony as to the details of accused's actions (MCM,1928,par.27,p.17). Both elements of the violation of Article of War 75, however, were established as to each Specification (CM ETO 1663,Ison; CM ETO 3196, Puleio, and authorities therein cited).

(b) The court properly overruled the defense objection to the admission in evidence of accused's confession. The evidence, independent of the confession, showed that accused at one time was attempting to move to the rear and while coming up from the rear stated that he was not going up front and expose himself to danger. At a later time he could not be found at a place where he was needed for an attack upon the enemy. At the time his company was clearly shown to be engaged with the enemy. The morning report entry confirmed accused's statement as to his arrest while at the rear. The confession was adequately corroborated within the principles enounced in CM ETO 1042, Collette and CM ETO 2452, Briscoe).

Accused's statement referred to incidents "on or about 5 August 1944". (The specifications allege the offenses were committed on 4 August 1944). The evidentiary value and relevancy of the statement was essentially a question for the court.

(c) The factual question whether accused "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior" and thus had a defense to the charges (CM ETO 4095, Delre and authorities therein cited) was determined against him in the findings of guilty. Such determination is supported by evidence that he was suffering not from an "illness or other disability" but rather from lack of emotional control, and will thus not be disturbed by the Board of Review upon appellate review (Ibid).

6. The charge sheet shows that accused is 22 years of age and enlisted at Providence, Rhode Island, 8 February 1943. He had no prior service.

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

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

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9. Confinement in a Disciplinary Training Center in execution of a 20-year sentence, without suspension of dishonorable discharge, while authorized at the discretion of the officer exercising general court-martial jurisdiction by paragraph 4b(1), Circular 73 ETOUSA, 22 June 1944, is not in harmony with the policy expressed in paragraph 5b thereof. In any event, the Seine Disciplinary Training Center, Paris, France, rather than the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, would be the appropriate place of confinement apart from the policy above mentioned (TWX No. Ex-53842 from Commanding General, European Theater of Operations, 12 Oct 1944).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

4074

1st Ind. (349)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. TO: Commanding General, 29th Infantry Division, APO 29, U. S. Army.

1. In the case of Private WILLIAM R. OLSEN (31290076), Company "C", 115th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The designation of the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement is not in harmony with the policy expressed in paragraph 5b, Circular 73, ETOUSA, 22 June 1944. Unless suspension of the dishonorable discharge pending the soldier's release therefrom is contemplated, the appropriate place of confinement is the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210,WD,14 Sept 1944,sec.VI,as amended). Such place may properly be designated in a new action signed by you.

> "Any action taken may be recalled and modified before it has been published or the party to be affected has been duly notified of the same" (MCM,1928,par.87b,p.78).

In the event you take such action as to render appropriate the designation of a Disciplinary Training Center as the place of confinement, the Seine Disciplinary Training Center, Paris, France should be designated (TWX No. EX-53842 from Commanding General, European Theater of Operations, 12 Oct 1944). Any further action signed by you should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4074. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4074).

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

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

BOARD OF REVIEW NO. 1

CM ETO 4093

10 NOV 1944

U N I T E D S T A T E S	)	8TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 8, U. S. Army, 20, 25 September 1944.
Private (formerly Private First Class) MARTIN M. FOLSE (14039749), Company L, 28th Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private (then Private First Class) Martin M. Folse, Company L, 28th Infantry, being present with his company while it was engaged with the enemy, did, at or near Gousenou, France, on or about August 23, 1944, shamefully abandon the said Company, and did seek safety in the rear, and did fail to rejoin it until he surrendered himself to Captain Stedman P. Stauffer, Jr., at or near Bourg-blanc, France, on or about August 26, 1944.

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

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

3. (a). The prosecution's evidence showed that on 23 August 1944 accused, a rifleman on outpost duty, was present with his company which was located near Gousenou, France, and was under fire from the enemy, 600-800 yards away (R4,6,10). On or about that date and at that place, without authority he left the company area (R4-5,7-9; Pros. Ex. A) and proceeded several miles to the rear. After wandering about in territory where he was not authorized to be, he surrendered himself as alleged on 26 August (R7,11; Pros. Ex. A).

(b). Accused's testimony (R17-18) raised the issue whether his initial departure was without authority. Conceding, for purposes of argument, that such departure was authorized, the record contains competent, substantial evidence of accused's subsequent abandonment of his company, to-wit: his failure to return thereto from a point five miles from its position after he had received authority only "to go to the barn where there was water" (R17). (CM ETO 1404, Stack; CM ETO 1685, Dixon). In any event, the court was justified in disbelieving accused's testimony. As both elements of the violation of Article of War 75 were established by competent substantial evidence, the findings of guilty were justified (CM ETO 3196, Puleio, and authorities therein cited).

4. The charge sheet shows that accused is 22 years of age and enlisted 7 January 1941 to serve for three years. (His service period is governed by the Service Extension Act of 1941). He had no prior service.

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

6. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec. VI, as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind. (353)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 NOV 1944 TO: Commanding General, 8th Infantry Division, APO 8, U.S. Army

1. In the case of Private (formerly Private First Class) MARTIN M. FOLSE (14039749), Company L, 28th 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 4093. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4093).

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

Confidential

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

Re-confidential
14 Feb 1946
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TAG - (355)

BOARD OF REVIEW NO. 1

CM ETO 4095

14 NOV 1944

U N I T E D S T A T E S	)	83d INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at APO 83, U. S. Army, 9 September 1944.
Private First Class DANIEL D. DELRE (33369953), Company F, 331st Infantry	)	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class Daniel D. Delre, Company F, 331st Infantry, did, at or near Vge des Saints, France, on or about 24 July 1944, while before the enemy, shamefully run away from his company, and seek safety in the rear.

Specification 2: In that * * * did, at or near Vge des Saints, France, on or about 26 July 1944, while before the enemy, shamefully run away from his company, and seek safety in the rear.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both 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 shot to death with musketry. The reviewing authority, the Commanding General, 83d Infantry Division, approved the sentence, but recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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 due to unusual circumstances in the case, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. Uncontroverted evidence for the prosecution established the following:

(a) Specification 1. On the night of 23 July 1944, Company F, 331st Infantry, commenced an abortive attack against the enemy near Vge des Saints, France (R7, 13). At this time the company was receiving enemy fire (R7). Accused, who was company runner and bugler (R7,10,13), was under the command of the company communications sergeant, whom he accompanied at the start of the attack. Shells fell near them and the sergeant told accused to get into a foxhole and left to procure wire (R13). When he returned accused was absent (R14). The attack was renewed at about 0300 hours on 24 July. Company F "hit a stone wall", assumed a static defensive position, and continued to receive enemy fire (R7,12). The first sergeant wished accused to replace the battalion runner who was wounded on the preceding night, but was unable to find him (R11). A search of the area, conducted by the communications sergeant, failed to reveal accused's presence, although all of the 14 other men under the sergeant were located (R14). Accused had no permission to leave his company (R8,11,15). He did not return until 26 July to the company area, where he was seen about noon on that day (R11,14). This area was the position from which the attack of 23 July had been launched. In reply to the communications sergeant's demand for an explanation of his absence, accused

> "told me he couldn't return because the shelling was very heavy and then he told me he was just no damn good, that's all".

The sergeant told him to "stay around the area" so that he might report, as required, to the company commander (R14).

Specification 2. On 26 July 1944, Company F was in the same geographical and tactical position as on 24 July (R8,12)(see supra), and was still receiving enemy fire (R15). About dinner time on 26 July the company commander sent for accused, but he was again missing (R8,14). In his foxhole were his carbine, equipment and almost all of his personal belongings (R14), but a search of the area failed to reveal his presence (R15). His absence was unauthorized (R8,15) and continued until 31 July, when he arrived at the company

area on a kitchen truck (R8,12). The company at this time were "back in the rear area, taking it easy" (R9) and were not engaged in combat (R15). The company commander summoned accused and warned him of his rights (R8), but accused refused to make any statement in explanation of his absence other than "that his head hurt" and "things were mixed up in his head" (R9-10).

(b) With regard to accused's physical and nervous condition, there was testimony that on 31 July he appeared to be physically normal (R15), calm, peaceful, very quiet and "generally" normal and did not appear to be wounded (R9). The company commander testified that prior to 24 July accused showed more fear under fire than other soldiers on the line. "We couldn't get him out of his foxhole." He either stayed there or "took off to the rear".

> "He showed more fear than the average person and he didn't control himself."

In witness' opinion accused was rational, knew the difference between right and wrong, and could determine between them under fire (R10). The first sergeant testified that accused's actions were not normal under fire (R12), but that in his opinion he could tell right from wrong (R13).

(c) The official investigating officer in the case testified that after he warned him of his rights, accused signed a statement. It was admitted in evidence without objection by the defense (R17; Pros. Ex. 1) and reads as follows:

> "I left the company area 24 July 44 and stayed near the Battalion Aid Station for a day and a half. Then I came back to the company but left again that afternoon and did not return until 31 July 1944. I can give no explanation for my absence except that I cannot stay on the front line when there is firing going on."

4. (a) For the defense, evidence was introduced that although accused appeared normal when there was no shelling (R20), his reactions under fire

> "were of a more gripping fear than seemed to grip the average man."

When shelling commenced he would be the first to climb into a foxhole, where he would lie and "whimper just like a puppy". He could not control himself and trembled "like a leaf". On 23 July accused accompanied a severely shocked man from the line back to the aid station and "they were both crying like children". Accused stated, on his return to the rest area (on 31 July), that he had gone from the aid

station to the kitchen and there joined the group. He was not authorized to remain in the rear (R18-19).

After his rights were explained to him, accused elected to make an unsworn statement, in pertinent part as follows:

> "Well, just like they said, we went into the attack. We were all right before when we first invaded France, and when we made the attack before July 24th. When we made the attack we were all doing our duties. I was doing mine. And then after a period of time we kept on going and we were moving along; I was only a little jittery and I wasn't having much trouble. And then on the night of July 23d -- that is the night we were on the attack -- and after we got up so far they started shelling us, and then we all got in our holes. Near the hole where we were, were these two guys I took back to the Aid Station, and then just before that the shell landed on the opposite side of our hedgerow and that is what jolted us. * * * After that shell I just couldn't get enough nerve with me to get back. I tried all that I could. And then after the following day, when I came back, I was told I was to see the Company Commander and I wanted to see the Company Commander, and while I was waiting in the hole they started shelling us again and I just couldn't keep hole of myself or my wits. Something kept going through my mind and then after that I went back to see Captain Crest and when I went back to the Aid Station I told him and he didn't say nothing to me because he realized that I tried to do my best. And I didn't have no intention of staying there -- after I got my wits together I came back to the outfit and I have been with the outfit a long time and never did intend to be away from the outfit. I have had a chance to get transferred out of the outfit but I wouldn't take it." (R20-21).

Asked by defense counsel what he meant by his complaint of "something happening in his head", accused stated:

> "It was just something that upset me -- it happened the night after the 23d -- there wasn't nothing I could do about it -- it made me cry like a baby" (R21).

(b) In rebuttal, the prosecution offered a stipulation between the defense, accused and the prosecution as follows:

"That if Captain Crest was present in Court and sworn to testify as a witness, he would testify that he has no record showing the accused, Private First Class Delre, having ever been sent to him for medical attention or treatment of any kind" (R21).

The company commander testified that on several occasions when the company was in action, accused was not available (R21), and that the only explanation was that he was scared and "pulled back". He was supposed to be immediately available and when absent he could not have been on some other mission (R22).

5. (a) The record shows (R2) that the trial took place one day after the charges were served on accused. In the absence of objection and of indication that any of accused's substantial rights were prejudiced, the irregularity, if such it were, may be regarded as harmless (CM ETO 3475, Blackwell, et al; CM ETO 3937, Bigrow).

(b) Major Norman P. Cowden, Assistant Adjutant General of the 83d Infantry Division, by command of the division commander, signed a letter to the Commanding Officer, 331st Infantry (accused's regiment) directing corrective action with respect to the official investigation of the case and thereafter referred the case to the trial judge advocate for trial. Major Cowden was duly appointed and sat as a member of the court herein. In the absence of challenge (R3) and of indication of injury to any of accused's substantial rights, this irregularity also may be regarded as harmless (CM ETO 3828, Carpenter, and authorities therein cited).

(c) The record of trial abounds in hearsay evidence. As it was received without objection by the defense and as there was ample evidence upon all issues, it may be concluded that accused's substantial rights were not injured (CM ETO 4122, Blevins).

6. (a) The evidence is full and clear that accused at the times and place alleged, while before the enemy, ran away from his company and sought safety in the rear. Both elements of the offense in violation of Article of War 75 were fully established as to each Specification (CM ETO 3196, Puleio, and authorities therein cited).

(b) The defense evidently attempted to establish the fact that accused was suffering from "combat anxiety" at the time of his running away, as a defense to the specifications. Whether or not he "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior", which would constitute a defense (Winthrop's Military Law and Precedents, Reprint, p. 624) was essentially a question of fact for the determination of the court. In view

of substantial, competent evidence that accused suffered from lack of self control and self discipline, albeit to an aggravated degree, in trying circumstances, rather than from illness or disability, the court's determination of the issue against him in its findings of guilty will not be disturbed upon appellate review (CM ETO 1663, Ison; CM ETO 1693, Allen).

7. The charge-sheet shows that accused is 22 years, nine months of age and was inducted 21 October 1942 at Allentown, Pennsylvania. No prior service is shown.

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

9. The penalty for misbehavior before the enemy is death or such other punishment as the court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec. VI, as amended).

_____ Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private First Class DANIEL D. DELRE (33369953), Company F, 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, 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 4095. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4095).

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

(Sentence as commuted ordered executed. GCMO 112, ETO, 23 Nov 1944)

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

BOARD OF REVIEW NO. 2

CM ETO 4102

3 NOV 1944

U N I T E D S T A T E S)	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
)	Trial by GCM, convened at Rennes, Brittany, France, 10 September 1944.
Second Lieutenant WILLIAM P. SAVAGE (O-1592027), Headquarters 53rd Quartermaster Base Depot, Quartermaster Corps.)	Sentence: To be dismissed the service.

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

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

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

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

Specification: In that Second Lieutenant William P. Savage, 53rd Quartermaster Base Depot, having received a lawful command from Colonel I. S. Dierking, 53rd Quartermaster Base Depot, his superior officer, to keep himself available for duty at all times and under no circumstances to leave the depot area, did, at or near L'Hermitage, Brittany, France, on or about 20 August 1944, willfully disobey the same.

CHARGE II: Violation of the 96th Article of War.
(Finding of Not Guilty.)

Specification: (Finding of Not Guilty.)

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He pleaded not guilty, and was found "Of the Specification, Charge I: Guilty, except the words, 'and under no circumstances to leave the depot area, did, at or near L'Hermitage, Brittany, France, on or about 20 August 1944, willfully disobey the same,' substituting therefor respectively the words, 'and under no circumstances to leave the depot area without proper authority, did, at or near L'Hermitage, Brittany, France, on or about 20 August 1944, fail to obey the same'. Of the excepted words, not guilty. Of the substituted words, guilty. Of Charge I: Not guilty, but guilty of violation of the 96th Article of War" and not guilty of the Specification, Charge II, and Charge II. Evidence was introduced of one previous conviction by general court-martial for being drunk in uniform in a public place, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding Officer of Brittany Base Section, Communications Zone, European Theater of Operations, approved only so much of the sentence as provided for dismissal from the service and forfeitures of all pay and allowances due or to become due, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, United States Army, confirmed the sentence as approved but remitted that portion thereof adjudging forfeiture of all pay and allowances due or to become due and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence shows: That the organization of which accused was a member was at the time in question stationed near L'Hermitage, Brittany, France. At about 1900 hours, 19 August 1944, accused's commanding officer, Colonel Irwin S. Dierking, who was also commanding officer of the depot, sent for accused to perform a mission but he could not be found and word was left for accused to report to him the next morning. When accused reported at 0900 hours the next morning, 20 August, Colonel Dierking

> "warned him and told him that everybody was on duty twenty-four hours a day and that it was very important that everyone should be available. That he was not to leave the depot area without proper authority and to obtain permission from either myself, the executive officer or the adjutant".

Accused was normal, said he understood the order and was sorry that he had not been available the night before. The depot area consisted of a number of buildings and a bivouac area rather difficult to designate with exactness but roughly comprising the area within a radius of 500

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yards of the headquarters building (R11,12,19,31,44,48,54). At about 1645 hours, 20 August, Colonel Dierking issued an order for an officers' meeting at 1900 hours that evening and, accused being absent, the Officer of the Day was sent to look for him (R11,13,22,26-27). At about 2030 hours First Lieutenant Albert Hyman, the Officer of the Day, saw accused standing in the door of a cafe known as "Noc Diole" about a half mile, roughly, from headquarters (R14-15,19) and ordered accused to report to Captain Alan D. Porter, adjutant of the depot (R15-16,20,27), to whom accused reported at about 2045 hours on 20 August (R20). The adjutant instructed accused to report to Lieutenant Colonel Ralph M. Bauknight, the depot executive officer (R21), who testified that accused was staggering, was intoxicated and his speech was incoherent. Accused admitted he had gone into a public place to secure a drink. The executive officer ordered him placed under arrest in quarters and it was necessary for the adjutant to assist accused (R29). Neither the adjutant nor the executive officer had given accused permission to leave the depot area (R22,30) and, while the area included warehouses 6 and 7, they could be reached by a short footpath and it was only when going to them by vehicle that it was necessary to go down past Noc Diole and turn back toward the area on another road (R24,32,40). A notice on the officers' bulletin board placed Noc Diole off limits (R27-28). The adjutant had not notified accused individually of the officers' meeting (R25) but he announced it to the officers at mess at 1800 hours (R24). A memorandum had been issued to the effect that the normal working day at the depot was from 0800 hours to 1800 hours but that the officers were to be available 24 hours a day (R27). The officer who investigated the charges testified that accused stated to him that he felt the "heat" was being put on him, that he had no definite task assigned to him and would just as soon return to civilian life (R34). He stated that he had not been advised of this meeting or told what the depot limits were (R35). A diagram showing the approximate depot limits and the location of Noc Diole, prepared by the executive officer (Pros.Ex. 1), and a German map of the depot area (Pros.Ex.2) were admitted in evidence (R38,56). Noc Diole is shown west of the depot area in Prosecution's Exhibit 1; warehouses 6 and 7 were to the northeast. Noc Diole was too far away to be reflected on the maps left by the Germans (R39).

4. Accused was the only defense witness. He testified that he had had three or four assignments but had never worked in any of them, being attached but not assigned to Headquarters 53rd Quartermaster Depot, at the time in question (R42-43). He was out walking the evening of 20 August and heard no announcement of the meeting at dinner (R43-44,52). He walked some distance past Noc Diole and returned (R45, 51, 54-55). When the Officer of the Day told him to report to headquarters he did so and was ordered to return to his quarters, which he did. He denied that anyone accompanied him (R46-47). He testified that when he saw Colonel Dierking the morning of 20 August he was told to "be around here twenty-four hours a day and to let someone know when

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you are leaving", and that "we were on duty twenty-four hours a day". He understood that he was to remain in the depot area, that is, "the area that comprised the buildings and the bivouac area where the troops were" (R48). Colonel Dierking did not "say depot area, he just said to keep myself around there". Accused did not understand it to be an order (R50).

5. Accused was convicted of failing to obey an order to keep himself available for duty at all times and under no circumstances to leave the depot area without proper authority. He admitted being told that he should be available for duty 24 hours each day but contended he was not forbidden to leave the depot area but simply to notify someone if he left. The meaning of the order was in the sole province of the court to determine, which it has done. The order was reasonable and proper and apparently made to prevent a repetition of previous occurrences. Accused does not claim that he had permission to leave the area as was required, and it is clear that none was given. He did not claim to have notified anyone of his absence though he stated he walked the half mile to Noc Diole and an equal distance beyond there and returned the same way, an undertaking that would require a substantial period of time. Noc Diole was "off limits" which indicates that it was not part of the depot area.

6. The charge sheet shows that accused's enlisted service covered a period of 11 months and that he was commissioned a second lieutenant, Army of the United States, 14 May 1943. He was 40 years and 11 months of age.

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 confirmed. Dismissal is authorized upon conviction under Article of War 96.

[signature] Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Benjamin R Sleeper Judge Advocate

1st Ind. (367)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 3 NOV 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant WILLIAM P. SAVAGE (O-1592027), Headquarters 53rd Quartermaster Base Depot, Quartermaster Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4102. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4102).

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

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

BOARD OF REVIEW NO. 1

20 JAN 1945

CM ETO 4119

U N I T E D S T A T E S	SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	Trial by GCM, convened at Heathfield Camp, Honiton, Devonshire, England, 28 July 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DAVID D. WILLIS (38164122), Company H, 2nd Replacement Battalion (Provisional)	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private David D. Willis, Company "H", 2nd Replacement Battalion, Provisional, did, at Broom Hills Camp, Devon, England, on or about 1 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Elaine Frampton.

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the words "forcibly and feloniously, against her will", and add at the end thereof the words, "a female under sixteen years of age". Of the excepted words not guilty; of the substituted words guilty; of the Specification as amended guilty; of the Charge not guilty but guilty of the violation of

the 96th Article of War. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be 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 three years. The reviewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations (successor in command) on 15 October 1944, 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 $50\frac{1}{2}$.

3. The prosecution's evidence clearly established the fact that accused and a young English girl, Miss Elaine Frampton, engaged in sexual intercourse on one or more occasions on the night of 1 June 1944. The copulation occurred in a Nissen hut located in Broom Hills Camp, in or near the town of Honiton, Devonshire, England. The fact of penetration of the girl's genitals by accused's penis was proved beyond doubt. The issue in the case revolved about the question whether intercourse was obtained by accused by use of force and violence against the will and without the consent of the young woman or whether she was a willing and cooperative party to the sexual transactions.

A most casual reading of the record of trial, makes it obvious that at the conclusion of Miss Frampton's testimony the prosecution sensed the fact that it was not successfully sustaining the burden of proving beyond reasonable doubt that accused "forcibly and feloniously" and against the will of the girl engaged in sexual intercourse with her. The trial judge advocate thereupon offered in evidence a "Certified copy of an entry of birth" of one "Elaine Frampton" which was certified by the Registrar of Births and Deaths as being a true copy of the entry No. 110 in the Register Book of Births for the sub-District of Portsmouth and Mid-Southsea in the County of Portsmouth C.B. (Pros. Ex.D). No further authentication appeared thereon. This certificate allegedly shows that Miss Frampton was born on 8 December 1928, thereby making her age on the date of the alleged offense (1 June 1944) 15 years, 5 months and 23 days. The defense made timely and vigorous objection to the admission in evidence of the document. The objection was overruled and the purported certificate was admitted in evidence (R28,29). The ruling of the court was manifest error. The purported birth certificate was not authenticated by a consular officer of the United States as required by Act/June 20, 1936, c.640, sec.6; 49 Stat.1563; 28 USCA sec.695e so as to entitle it to be introduced in evidence in a United States Court (CM ETO 2663, Bell and

Kimber; Military Justice Circular No.7, Branch Office of The Judge Advocate General with European Theater of Operations, 15 August 1944, par.7). For this reason alone highly prejudicial error was committed by the court in admitting the document in evidence. However, the objection of the defense to the admission in evidence of this purported birth certificate raised a more formidable question, which in the opinion of the Board of Review is the critical one in this case. It is evident that defense counsel understood clearly the effect upon the issues of the case of the use of such document. He did not consent to its admission in evidence. Rather the record shows that the objection was urged with unusual emphasis.

Accused was arraigned and tried upon the Charge of rape under the 92nd Article of War. The Specification followed that prescribed by Form 87, Appendix 4, MCM, 1928, and charged that accused did

> " * * * forcibly and feloniously, against her will have carnal knowledge of Miss Elaine Frampton".

The above Specification charged rape as known at the common law (MCM, 1921, par.442, pp.408,411) to wit:

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

The court, being unwilling to find accused guilty of rape as charged because of the inherent weakness of Miss Frampton's testimony on the issue of her consent and the force and violence visited upon her by accused, evidently seized upon the birth certificate as a way out of its dilemma and found accused guilty by an exception and addition of the crime of carnal knowledge of a female under the age of 16 years. The Specification as adjusted to the findings reads as follows:

> "in that [accused] * * * did * * * on or about 1 June 1944 have carnal knowledge of Miss Elaine Frampton, a female under sixteen years of age" (Underscoring supplied).

4. The legal effect of this finding above set forth produced the vital question in the case, viz, whether the crime denounced by Congress as "carnal knowledge of a female under sixteen" years of age (sec.279 Federal Criminal Code; 35 Stat. 1143; 18 USCA 458) (hereinafter for convenience designated "carnal knowledge") is a lesser included offense of the crime of common law rape denounced by the 92nd Article of War. Sec. 279 Federal Criminal Code provides as follows:

> "Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years".

a. It has been determined that the crime (a felony) of carnal knowledge of a female under sixteen years of age is punishable by the United States military courts as a "crime or offense not capital" under the 96th Article of War (CM ETO 1366, English; CM ETO 3044, Mullaney).

b. As a preliminary matter a sharp distinction must be made with respect to two situations which arise in connection with the instant problem. The first relates to the situation where the allegations of the indictment or specification are sufficiently broad to include all of the elements of the common law crime of rape and also all of the elements of the statutory crime of carnal knowledge. The second pertains to the situation where the indictment or specification contains allegations which charge only the crime of common law rape.

In connection with the first class, in the absence of an objection on the grounds of duplicity, the Supreme Court of the United States has declared:

> "It is next objected that the indictment is bad, inasmuch as it contains the double charge of a rape at common law and of the statutory offense under the Act of February 9, 1889; and it is quite obvious that both these offenses can be made out from the language of the indictment, which is in a single count. The allegation that the offense was by violence and against the will of the woman, with the other allegations in the indictment, describe the offense of rape. The allegation that the defendant had carnal knowledge of a female under sixteen years of age makes out the offense under the Statute of 1889. But the view of the court was, that the allegation that the carnal knowledge was against the will of the woman may be rejected as surplusage, and the rest of the indictment be good under the Statute referred to. And, as the court instructed the jury in accordance with that

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view of the subject, and as the jury found the prisoner guilty not of the crime of rape but of the smaller crime of carnal knowledge of a female under sixteen years of age, the action of the court on that subject was probably correct. At all events, the court had jurisdiction of the prisoner, and it had jurisdiction both of the offense of rape and of carnal knowledge of a female under sixteen years of age. It was its duty to decide whether there was a sufficient indictment to subject the party to trial for either or for both of these offenses. As no motion was made to compel the prosecuting attorney to elect on which of the charges he would try the prisoner, we think that there was no error in its rulingson this subject. If there were, it was not an error which went to the jurisdiction of the court to try and sentence the prisoner.

It is urged that there is an indictment now pending against the prisoner for the same offense, charged only as carnal knowledge of a female under sixteen years of age, and that the present indictment is so ambiguous that the trial and conviction under it would be no bar to the proceeding under the second indictment. We do not think the proposition is a sound one, as the prisoner was clearly convicted of the same offense which is charged in the second indictment" (Ex parte Lane, 135 U.S. 443,448; 34 L.Ed. 219,221).

The doctrine of the Lane case was adopted by the Board of Review (sitting in Washington) in its opinion in CM 209548, Jones, 9 B.R. 77, 93-95. The Lane and Jones cases are undoubtedly sound in principle. It is desirable to note,however,that the rule which permits an accused to be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or specification (R.S. 1035, 18 USCA 565; MCM 1928, par.78b, p.65) ordinarily has no application in this class of cases. The problem presented in cases of the first class is fundamentally one of pleading. While duplicity in pleading is not to be approved or condoned (Winthrop's Military Law and Precedents - Reprint -pp.143,144), in the absence of objection specifically directed against the imperfection it is not a fatal error (Ex parte Lane, supra, CM 209548, Jones, supra). The instant case is clearly not within the first class and therefore the principle of the Lane and Jones cases is not

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relevant. Had the Specification contained all of its original allegations plus the addition supplied by the court, viz., "a female under 16 years" these authorities would be controlling.

The instant case belongs to the second class. The Specification upon which accused was arraigned and tried included only allegations charging common law rape.

c. The application of the doctrine of "lesser included offenses" is stated thus by Wharton in his classical demonstration which is often quoted:

> "The first line of cases of this class we have to notice iswhere one offense is an ingredient in another, an assault in assault and battery, manslaughter in murder, and larceny in burglary. Several of such concentric layers may successively exist. Thus, we may take the case of an assault, enveloped by a battery, and this by manslaughter, and this by murder. Add the blow to the assault and it becomes assault and battery. Add a killing to assault and battery, and it becomes manslaughter. Add malice aforethought to manslaughted, and it becomes murder. Or, to take the converse, strip from murder the malice aforethought, and it becomes manslaughter. Strip from manslaughter the death of the party assaulted, and the offense becomes assault and battery. Negative the battery, and the case is one of assault. Now this rejecting of successive aggravations is a function open to juries in all cases where there is presented to them one offense in which another is inclosed.
>
> The jury may acquit of murder, and convict of manslaughter; or, as the practice is, convict of manslaughter, which operates as an acquittal of murder. Or the jury, on the same prosecution, may convict of the assault, and thereby acquit of the manslaughter and the murder" (1 Wharton's Criminal Law - 12th Ed. sec.33, pp.50,51).

Congress has provided with respect to Federal Civil Criminal Courts:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may

> be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense" (R.S. 1035; 18 USCA 565).

In applying the foregoing statute the United States Supreme Court commented:

> "Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, and if the evidence permitted them to do so, to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged" (Sparf v. United States 156, U.S. 51,63; 39 L.Ed. 343,347).

Interpreting a statute of Utah identical in purpose, substance and effect as R.S. 1035 supra, the Utah Supreme Court wrote:

> "The statute allows conviction for any lesser offense necessarily included in the offense charged in the indictment or information, but does not allow conviction of any lesser offense stated in the indictment unless it is necessarily included in the greater offense. The lesser offense must be a necessary element of the greater offense and must of necessity be embraced within the legal definition of the greater offense and be a part thereof" (State v. Woolman, 33 Pac (2nd) (Utah) 640, 93 ALR 723,731).

With respect to the application of the foregoing principle to military courts the Manual for Courts-Martial, 1921, contains the following:

> "If the evidence proves the commission of an offense which is included in that with which the accused is charged the court may except words of the specification, and if necessary substitute others instead, pronounce the innocence and guilt of the excepted and substituted words, respectively,

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and then find the accused either guilty of the charge or not guilty of the charge, but guilty of a violation of another proper article of war as the finding on the specification may require" (MCM, 1921, par.298, p.239).

"It is a peculiarity of the finding at military law that a court-martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, excepting the remainder; or, in finding him guilty of the whole (or any part), to substitute correct words or allegations in the place of such as are shown by the evidence to be incorrect.

* * *

But the authority to find guilty of a lesser included offense, or otherwise to make exceptions and substitutions in the findings, does not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged, thus 'selling' and 'through neglect losing' property are separate offenses though each is a violation of A.W. 84" (Ibid, par.299, pp.239,240).

"Finding of Guilty of Lesser Included Offense.--Substitution of the General Article or Other Special Article.--The specification apprises the accused of the allegations against him. He is therefore put on trial as to all the allegations in the specification. If but a part of such allegations be proved he may be found guilty of such part, provided it constitutes an offense at military law. Thus, on a specification alleging desertion for a certain period, where the evidence proves an absence without leave for all or a part of such period, but does not prove desertion or an attempt to desert, the court may find the accused guilty of absence without leave for such period or part thereof as may be proved. Likewise, where a specification of misbehavior before the enemy under the seventy-fifth article alleges that the accused was absent without authority from his organization or post of duty for a certain period and the evidence proves that he was so absent but does not prove the other elements necessary to constitute the misbehavior denounced in the seventy-fifth article of war, the accused

may be found guilty of absence without leave for the period charged and proved. And on the same principle manslaughter or assault and battery may be found on trial for murder (Par.377). Indeed, in any case where such parts of the specification as are proved constituted an offense denounced in a special article of war, or a disorder or neglect to the prejudice of good order and military discipline as denounced in the general (ninety-sixth) article of war or a crime or offense punishable under that article, a finding of guilt may be made under the appropriate article. An attempt to commit a crime, since it is an element of the crime, may be found on a specification alleging such crime" (Ibid., par.300, pp.240-241).

The Manual for Courts-Martial, 1928 adopted the foregoing principle (MCM, 1928, par.78c, p.65).

d. A comparative analysis of the elements of the crime of common law rape and of the statutory crime of carnal knowledge shows that they possess but one common denominator, viz., sexual penetration of the genitals of the female, and it is plain that the crime of carnal knowledge contains one element which is not contained in that of common law rape, viz., that the female was under 16 years of age. It is vital in the former; it is immaterial in the latter. If the Wharton "concentric layer" test (supra) is applied to the elements of the crime of rape it will be noticed that there is a point reached in the "stripping" process where a vital element of the crime of carnal knowledge is missing. Remove the element of non-consent of the victim and only the act of intercourse remains. Proof of the act of intercourse is also fundamental in a carnal knowledge charge but it only becomes a crime (in connection with present considerations) when there is added to it the extrinsic element that the female was under 16 years of age.

The original Specification in this case did not allege that the victim was under 16 years of age. The finding of the court did allege such fact. It, therefore, added this new extrinsic element which was not in the original Charge. This latter fact is not in the concentric layers of the elements of proof of common law rape; hence it follows that the statutory offense of carnal knowledge cannot possibly be a lesser included offense of the crime of common law rape.

"There can be no conviction for rape unless its accomplishment is by force and without the consent or against the will of the female. Therefore, except for statutes of

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> the kind now under consideration, a person who has carnal knowledge of the female, however young in years, cannot be punished if the act was committed with the consent of the female" (44 Am.Jur. sec.17, p.912).

> "The elements of statutory rape are the facts of intercourse and the age of the prosecutrix. Force is not such a necessary ingredient of the offense, but the fact that the act was accomplished by force will not prevent a conviction under such statutes. The non-consent of the female is not an essential ingredient, nor is consent a defense. The law declares her incapable of giving consent" (44 Am.Jur. sec.18, p.913).

In general the authorities sustain the conclusion herein reached. However, in some jurisdictions (Cf: 1 Wharton's Criminal Law - 12th Ed. - sec.684, p.919, footnote 3) the form of statutes denouncing the two crimes and constitutional provisions have led to opposite conclusions. Within this category is Arkansas, (Rose v. State, 122 Ark. 509, 184 SW. 60,61, 20 W and P Perm. 451); Kentucky, (Nider v. Commonwealth 140 Ky 684, 131 SW 1024, cited in 1 Wharton's Criminal Law, sec.711, p.956; Eads v. Commonwealth 162 Ky 89, 172 SW 104,119 ALR. 1207) and South Carolina (State v. Haddon, 49 S.C. 308, 27 SE 194, 119 ALR 1207 and 81 ALR 590). However, the preponderance of the authorities support the view that a conviction may not be sustained for the crime of carnal knowledge upon an indictment or information which charges common law rape alone. A valuable collection of precedents is found in the annotation in Vol.119 American Law Reports, appended to the opinion in State v. Winger (Minnesota) at pages 1202-1207.

Bishop announces the rule as follows:

> "One cannot be convicted of this offense /carnal knowledge of a female under 16 years of age/ on an indictment in the ordinary form as for a rape on an adult. There must be an allegation of the age, which means the age at the time of the commission of the offense, not at the time of the finding of the indictment. Such averments as 'with force,' 'against her will,' and 'ravish' are unnecessary; though, if inserted, they may be treated as surplusage. In other respects the statutory words should be pursued according to the rules governing other indictments on statutes, and no more will be required" (Bishop on Statutory Crimes - 3rd Ed. sec.486, p.413).

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Wharton states:

> "By statute the carnal abuse or knowledge of a female child under a specified age, with her consent, is made a statutory crime, which constitutes a new and distinct offense from the ordinary crime of rape. Some of the cases - they are a minority, and not supported by the better reason - hold that there is but one crime denounced. In those jurisdictions where the better rule prevails and the statute is held to create a distinct crime, on an indictment for rape the accused cannot be convicted of the statutory offense, and vice versa" (1 Wharton's Criminal Law - 12th Ed - sec.684, pp.918,919).

As a corollary to the conclusion that the offense of carnal knowledge is not a lesser included crime of common law rape the following proposition is relevant:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other" (Morey v. Commonwealth, 108 Mass. 433).

The foregoing excerpt was quoted with approval of the United States Supreme Court in Gavieres v. United States 220 U.S. 338,342, 55 L.Ed. 489,490 and Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306,309.

The Board of Review therefore is of the opinion that the record of trial is legally insufficient to sustain the findings of the court that accused was guilty of the crime denounced by Congress as "carnal knowledge of a female under the age of 16 years".

5. There remains for determination the question as to whether the court's findings that accused did "have carnal knowledge of Miss Elaine Frampton" constituted a finding that accused committed some offense other than common law rape or statutory rape, which is punishable under the Articles of War.

The word "Miss" contained in the finding connotes that Elaine was an unmarried woman

> "An indictment charging that the defendant unlawfully and by virtue of a feigned promise of marriage, has carnal knowledge of Miss C,

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> a female over the age of 18 years, of previous chaste character, sufficiently charges that the promise was made to a single woman. State v. Tingle 60 So. 728,729, 103 Miss. 672".
>
> "'Miss' is commonly used to designate a woman who has never been married, and as used in an indictment states that fact at least inferentially; and in an action for criminal slander, on the prosecution of a female, the prefix 'Miss' used in mention of her name shows that she was unmarried. State v. Buck 43 Mo. App.443,447" (27 W and P Perm. p.362).

The expression "carnal knowledge" means "sexual intercourse" (6 W and P Perm. pp.160-163). It will be noted that the marital status of accused is not given and the finding must therefore be considered without regard thereto. Therefore the findings were equivalent to the statement that accused

> did engage in sexual intercourse with Elaine Frampton, an unmarried female.

The question thus presented is this:

> Is it an offense under the Articles of War for a soldier, married or unmarried, to engage in sexual intercourse with an unmarried woman?

The offense at civil law most nearly related to accused's conduct is fornication. Fornication is not a misdemeanor at common law, but is of statutory creation (2 Wharton's Criminal Law - 12th Ed - sec.2103, pp.2411,2412). In general the term designates sexual intercourse between an unmarried man and unmarried woman (Ibid., secs.2104,2105, pp.2412,2413; 26 CJ sec.4, pp.987,988) although some statutes do not confine the offense to single persons (26 CJ sec.4, p.988). Congress has not denounced the offense in statutes of general application (Cf: 18 USCA secs.451-468 and Ex parte Isojoki, 222 Fed (9th Cir) 151,153). It has however, made fornication an offense in territories (sec.318, Federal Criminal Code, 18 USCA 518). In the District of Columbia, Congress has denounced fornication as a misdemeanor (District of Columbia Code sec.22-1001 (6:176a)). Both of these statutes provide:

> "If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months" (Underscoring supplied).

Under these statutes the accused must be an unmarried man or woman in order to commit the offense denounced.

There is no specific Article of War making sexual intercourse between a male member of the military forces and a female not his wife an offense. It is believed, however, that Congressional policy, as to irregular or illicit sexual relations is definitely indicated by its statutes applicable to territories and the District of Columbia above cited and that it is consistent with this policy to conclude that irregular or illicit sexual relations indulged in by military personnel, whether married or unmarried, may be an offense under the 96th Article of War. It can be said, with confidence that promiscuous, illicit sexual intercourse of married or unmarried military personnel, although only practiced occasionally and at intervals, carries a train of consequences and results of a most disconcerting and demoralizing nature. It is almost the sole cause of the spread of venereal diseases. Pregnancy of the female involved begets serious legal questions and complications as to support of the mother during pregnancy and confinement and of the child upon its birth, and these require both administrative and disciplinary action on the part of the military authorities. The Army of the United States should not give its tacit approval to conduct on the part of its personnel that is productive of such results. Illicit sexual relations maintained by military personnel whether married or unmarried may logically be considered as both "conduct of a nature to bring discredit upon the military service" and also as a disorder "to the prejudice of good order and military discipline" under the 96th Article of War. This case caused an immediate investigation and a train of circumstances which definitely brought discredit on the service.

6. The Table of Maximum Punishments contains no provision for the punishment of the offense of the nature hereinabove described, nor does it indicate the punishment of a closely related offense. "Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service" (MCM, 1928, par.104c, pp.96-101)). Both the District of Columbia Code (sec.22-1001 (6:176a)) and the provisions of the Federal Criminal Code applicable to territories (sec.318, Federal Criminal Code; 18 USCA 518) provide that the punishment for fornication shall be a fine of not more than one hundred dollars or imprisonment of not more than six months. Using these Congressional declarations by way of analogy and as a measuring rod, it appears to the Board of Review that the maximum legal punishment upon conviction for the offense herein determined by a military court is confinement at hard labor for not more than six months and forfeitures of two-thirds of an accused's pay and allowances for a like period (MCM, 1928, par.104c, p.96).

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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, except as herein noted. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty by exception and addition as involves findings that accused engaged in sexual intercourse at the time and place alleged with Elaine Frampton, an unmarried female, an offense under the 96th Article of War and only so much of the sentence as adjudges confinement at hard labor for six months and forfeitures of two-thirds of the accused's pay and allowances for like period.

8. The charge sheet shows that accused is 31 years ten months of age and that he was inducted at Houston, Texas, on 27 June 1942 to serve for the duration of the war plus six months. He had no prior service.

9. Confinement of accused should be in such proper place as the reviewing authority shall direct.

_____ Judge Advocate

_____ Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 JAN 1945 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S. Army.

1. In the case of Private DAVID D. WILLIS (38164122), Company H, 2nd Replacement Battalion (Provisional), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty by exception and addition as involves findings that accused engaged in sexual intercourse at the time and place alleged with Elaine Frampton, an unmarried female, an offense under the 96th Article of War, and only so much of the sentence as adjudges confinement at hard labor for six months and forfeitures of two-thirds of accused's pay and allowances for a like period, 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 4119. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4119).

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

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

BOARD OF REVIEW NO. 2

CM ETO 4121

18 NOV 1944

U N I T E D S T A T E S	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private FRANK L. TERRACHONE (6812935), Casual Detachment, 10th Replacement Depot.	Trial by GCM, convened at London, England, 3 October 1944. 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. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

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

Specification: In that Private Frank L. Terrachone, Casual Detachment, 10th Replacement Depot, European Theater of Operations, United States Army, did, at Litchfield, England, on or about 23 March 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at London, England, on or about 15 July 1944.

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

Specification: (Finding of Not Guilty.)

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He pleaded guilty to the Specification, Charge I, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from", and "without leave", of the excepted words not guilty, of the substituted words guilty; not guilty to Charge I, but guilty of a violation of Article of War 61; and not guilty to Charge II and its Specification. He was found guilty of Charge I and its Specification in accordance with his plea, and not guilty of Charge II and its Specification. Evidence was introduced of one previous conviction by special court-martial, for wrongfully striking a constable on the head with his fist, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for ten years. 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. By competent evidence, the prosecution showed that accused, a private in the United States Army (R15), absented himself without leave from the Casual Detachment, 10th Replacement Depot, then stationed at Litchfield, England, from 22 March 1944 until he surrendered himself to military jurisdiction in London on 15 July 1944 (R5; Pros.Ex.1).

4. Accused, advised of his rights, elected to remain silent.

5. The evidence showed accused guilty of absence without leave, in violation of Article of War 61, as found by the court by exceptions and substitutions under Charge I and its Specification. To this offense accused had pleaded guilty.

6. The charge sheet shows that accused is 34 years old. He enlisted 22 November 1928, at Philadelphia, Pennsylvania, for three years. He was discharged 29 November 1931. He re-enlisted 10 February 1932, at Fort Howard, Maryland, for three years. He was discharged 12 December 1935. He re-enlisted 2 June 1941 for the duration of the war plus six months.

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

ten years is authorized for violation of Article of War 61. 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 Sep 1943; sec.VI, par.2a, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(388) 1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 18 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U. S. Army.

1. In the case of Private FRANK L. TERRACHONE (6812935), Casual Detachment, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4121. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4121).

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

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

BOARD OF REVIEW NO. 1

CM ETO 4122

22 NOV 1944

UNITED STATES	UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS, successor to SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS
v.	
Private JOHN N. BLEVINS (37449570), Detachment Medical Department, 186th General Hospital	Trial by GCM, convened at 186th General Hospital, APO 63, U. S. Army, 18 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private John N. Blevins, Detachment Department, 186th General Hospital, did, at or near Mawley Farms, Gloucestershire, England, on or about 15 July 1944, with intent to commit a felony, viz, rape, commit an assault upon Edith Wearing by willfully and feloniously throwing her to the ground, tearing her clothing and underclothing, and attempting to have sexual intercourse with the said Edith Wearing.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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3. The court before which accused was arraigned and tried was appointed by the Commanding General, Southern Base Section, Communications Zone, European Theater of Operations on 19 July 1944. Southern Base Section was dissolved and United Kingdom Base Section, Communications Zone, European Theater of Operations succeeded to its command at 0001 hours 1 September 1944 (GO 42, 31 August 1944, Communications Zone, European Theater of Operations). The accused was tried on 18 September 1944. Upon authority of CM ETO 4054 Carey et al and CM ETO 3921 Byers the function and jurisdiction of the court is sustained.

4. It was established by undisputed evidence that on the evening of 15 July 1944 accused was present at a "garden fete" at Quenington, Gloucestershire, England. Upon his calling a colored soldier a Jap, he was knocked down and rendered temporarily unconscious (R11-12,13,14). Upon regaining consciousness, he sat in a chair where he was attended by Nurse Edith Wearing, 22 Hatherop, near Fairford, Gloucestershire. His breath smelled of beer (R15,21-22). She remained with him until most of the soldiers left the party and then accompanied him on his way to camp about a mile and a half away (R14,22). They met two soldier acquaintances of accused with whom he talked normally and rationally. When the soldier left, accused asked how she happened to be with him. She explained that she was the District Nurse and had come to help him, telling him he had been hit at the garden fete at Quenington. He asked where that was and when she said it was the next village over, he still "couldn't figure out where it was." When they came to some woods, he said "we will go in there". As she refused, he picked her up and threw her "in the hedges" (R23). She described in detail the manner in which he threw her down, tore her clothes and endeavored without success to have sexual intercourse with her against her will (R23-26; Def.Ex.1). She escaped from him by taking off her shoes, running and hiding (R24). On 17 July 1944 she made a report of the attack to a Police Sergeant of the Gloucestershire Constabulary (R7-8,24). Major Ian P. Rak, Medical Corps, Chief Neuropsychiatrist, 186th General Hospital, attended accused for neurotic observation in his department for a period of ten days and in his opinion "no disease was found" (R28).

Major Rak was cross-examined at length by the defense with reference to effects of a blow on the head and the nature of pathological intoxication and pathological amnesia (R28-30), from neither of which, in the witness' opinion, the accused suffered (R30).

5. The evidence for the defense showed that accused was a "quiet" type and was never in any trouble before. He was married (R32). He was a very good worker, served as a ward attendant at the 186th General Hospital and as to women made "no advances at all" (R33).

After his rights were explained to him, accused elected to be sworn and testify in his own behalf (R34). He stated:

"There were five of us boys, who went out on pass from camp. We were in our own enlisted men's pub on the camp drinking beer for a while. Then we went to Fairford for a while and we got a ride into Quenington and I had some more drinks - beer and wine - and then we went to this other town to a dance and I danced once with a girl there and my buddies were talking to some colored fellows there. I asked what the trouble was and this fellow knocked me down and I do not know anything more" (R34).

Staff Sergeant Vincent G. Pollock, 186th General Hospital, testified that on the morning of the 16th he was "charge-of-quarters" when accused came into the orderly room, awakened him, asked him to sign accused in and mentioned a fight in which he was involved with some colored boys (R39). Aside from a scratch on his face, accused "was in good condition" (R40).

6. Three prosecution witnesses were allowed to testify without objection to the good character of the victim, Nurse Wearing (R8,12,14). The admission of this evidence was clearly erroneous (1 Wharton's Criminal Law, sec.732,pp.992-993; CM 240788, JAG, March 1944, Vol III,No.3, sec. 395 (8), pp.95-96). Under certain circumstances it has been held that 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 (CM 201710, Reynolds; CM 190259, Sheffield). However, the Board of Review is of the opinion that in the instant case accused's guilt of the offense alleged was so convincingly established by the evidence that such erroneous admission of evidence as to Nurse Wearing's reputation did not injuriously affect his substantial rights within the purview of the 37th Article of War (CM ETO 1069, Bell).

7. Considerable hearsay testimony was admitted in evidence without objection (R8,9,10,11,32,33), but as the matters therein covered were proved by competent evidence in other parts of the record no substantial right of the accused was thereby injuriously affected.

8. The evidence with inherent integrity substantially supports the finding that accused, at the time of the assault upon his victim, Nurse Wearing, entertained the specific intent to rape her. The findings of guilty were fully warranted (CM ETO 2500, Bush; CM ETO 3093, Romero; CM ETO 3163, Boyd, Jr; CM ETO 3255, Dove).

9. The charge sheet shows that accused is 26 years ten months of age and was inducted at Fort Crook, Nebraska, 11 July 1942, to serve for the duration of the war plus six months. He had no prior service.

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

rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

11. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and section 276, Federal Criminal Code (18 USCA 455). However, prisoners under 31 years of age and with sentences of not more than ten years, will be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir 229, WD, 8 June 1944, sec II, pars. 1a (1), 3a).

[illegible] Judge Advocate

Edward W. Sargent Judge Advocate

Edward L. Stevens Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 22 NOV 1944 TO: Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, APO 413, U.S.Army.

1. In the case of Private JOHN N. BLEVINS (37449570), Detachment Medical Department, 186th General Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 4122. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 4122).

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

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

BOARD OF REVIEW NO. 2

20 NOV 1944

CM ETO 4127

U N I T E D S T A T E S	BRITTANY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade EDWARD L. DANIELS (36790403), 4012 Quartermaster Truck Company.	Trial by GCM, convened at Rennes, Brittany, France, 28 September 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technician Fifth Grade Edward L. Daniels, 4012 Quartermaster Truck Company, did at approximately one (1) mile South of Isigny, France, on or about 14 August 1944 with intent to do him bodily harm, commit an assault upon First Lieutenant George E. Keck, 4012 Quartermaster Truck Company, by cutting him in the left shoulder with a dangerous weapon, to wit, a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal

Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution discloses that about 2300 hours on August 14, 1944, accused returned from a detail to get water for the mess and found First Lieutenant George E. Keck and another officer in the mess hall drinking coffee. Accused asked Technician Fourth Grade Bernard Campbell, a cook, if he could have some. Keck started questioning accused about his going on the water detail and so missing convoy duty (R5) and accused became annoyed at the questioning. Keck ordered accused to leave and go to bed and repeated the order when he failed to go. Accused then started towards his tent saying something about Keck hiding behind his bars so they couldn't fight it out man to man. Keck then walked towards accused saying something "If I was a civilian" and struck accused knocking him backwards several feet and onto his back where he lay for a short time. Accused yelled, "He hit me. I'll kill him" (R6). "The German hit me. I'll kill the German" (R9). When accused got up he had a knife in his hand and he struck Keck on the left shoulder with it. Keck then ran off (R6). Keck and accused had both been gone the preceding three days and nights on convoy duty (R7,16) and Keck had stated that he (Keck) was nervous and had been unable to sleep the night before (R8). Accused ran to his truck yelling that he was going to get his carbine (R12). Campbell succeeded in quieting accused who went to his quarters sobbing and quite hysterical. The carbine was not loaded (R12,15). The knife was not found. Keck was of German descent and Lieutenant Reitz testified that he "was known to have had not exactly pro-German sympathies, but at least felt sorry for the plight Germany was in" (R13). Accused was known in his company as a good worker and had been promoted about a week before (R9).

4. Accused, being advised of his rights as a witness, remained silent and no evidence was offered by the defense.

5. The charge sheet shows that accused is 22 years old. He was inducted in the army 30 July 1943, without prior service.

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

7. Confinement in a penitentiary is authorized for the crime of assault with intent to do bodily harm with a dangerous weapon (AW 42; Federal Criminal Code, sec.276 (18 USC 455). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 NOV 1944 TO: Commanding Officer, Brittany Base Section, Communications Zone, European Theater of Operations, APO 517, U. S. Army.

1. In the case of Technician Fifth Grade EDWARD L. DANIELS (36790403), 4012 Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I deem it my duty to call to your attention certain facts about this case for your further consideration. The accused, Daniels, a colored soldier, has served 15 months without trial. He was rated a good worker and had recently been promoted to Technician Fifth Grade. His company commander and the investigating officer both noted that he should not be eliminated from the service.

Both he and Lieutenant Keck had returned the day before from a three day convoy and Lieutenant Keck had stated that he was nervous the night before this occurrence and been unable to sleep. Daniels returned about 11:00 p.m. from a trip hauling water for the mess and had gone to the mess tent for a cup of coffee, where Lieutenant Keck and Lieutenant Reitz were drinking coffee. Keck began questioning Daniels about why he was hauling water and had missed the convoy, and an argument resulted. It appears, however, that Daniels volunteered to haul water at the request of the cook, which was the usual custom, and that he did not know there was to be a convoy that day. Daniels was impertinent but had not made any assault upon Lieutenant Keck who, without warning, struck him a hard blow and knocked him down ten feet away. The evidence shows that Keck is a powerfully built man weighing 220 pounds, while Daniels is shorter and weighs about 165 pounds. When Daniels arose after some minutes, he had a pocket knife in his hand and cut Keck in the left shoulder. Daniels then ran to his truck and got his carbine which was not loaded. He was sobbing and hysterical and it took some time to quiet him down. A question as to Lieutenant Keck's attitude toward colored troops was not answered.

It must be said that there was considerable provocation for Daniels' actions though not legal excuse. In view of the racial issue involved, it is doubly necessary to do even handed justice. This case would be vulnerable if the prisoner is returned to the United States for confinement as contemplated. I suggest that, because of the racial

circumstances referred to above, the dishonorable discharge be suspended and the Seine Disciplinary Training Center be designated as the place of confinement. The record of trial is returned for your use. If you take supplementary action, please attached it to the record.

A report of Lieutenant Keck's action will be made to the Commanding General, European Theater of Operations.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 4127. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 4127).

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

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