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HOLDINGS OPINIONS AND REVIEWS

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VOLUME 4 B.R. (NATO-MTO)
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NORTH AFRICAN THEATER OF OPERATIONS

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Volume 4 B.R. (NATO-MTO)

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
9 June 1944.

Board of Review

NATO 2221

U N I T E D S T A T E S	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 7 March 1944.
	)	As to each: Dishonorable discharge and confinement for life.
Privates JOHN W. HARRIS (14 067 743), EDDIE R. RAY (34 067 629) and LEO PATTERSON (14 067 740), all of 86th Quartermaster Company (Railhead).	)	U. S. Penitentiary, Atlanta, Georgia.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class John W. Harris, Eighty-sixth Quartermaster Company (Rhd), Private Eddie R. Ray, Eighty-sixth Quartermaster Company (Rhd), and Private Leo (NMI) Patterson, Eighty-sixth Quartermaster Company (Rhd), acting jointly and in pursuance of a common intent, did, at Naples, Italy, on or about 6 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Bert (NMI) Raby, a human being, by shooting him with a pistol.

Each pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions as to accused Harris and

Patterson was introduced. As to accused Ray, evidence of one previous conviction by summary court-martial for being drunk in a public place in violation of Article of War 96 was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved each of the sentences, designated the U. S. Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1700 hours on 6 December 1943, in Naples, Italy, "five or six colored soldiers" including the three accused went into a dance hall where "the lady who ran the place" asked Corporal William Kenyon, 36th General Hospital, "Private Bert Raby" and a soldier named Sapp to request the colored soldiers to leave. She explained she did not like negroes "mixing in with white people at the dance" (R. 6,13). Kenyon testified that Raby "went out in the dance hall and was talking to one of the fellows"--not one of the accused--who responded, "We don't want to be any place we are not wanted" (R. 13,19). Harris walked up to where Raby was talking and said "I want to talk to the mother-fucking woman. I am a citizen, and I can talk to the mother-fucking woman if I want to" (R. 13,16). To this "everybody said yes, he did, but they might as well leave" (R. 14). Kenyon also testified that he also talked with accused Patterson who in the meantime happened to turn his back and as he did so witness heard a "click" which he "very much distinguished as inserting a shell in a Beretta or an automatic" and which caused him to keep his "eye on all of them as much" as he could to see that they "didn't pull no gun or start using it" (R. 14). Kenyon testified further that the colored soldiers left, and that about an hour and a half later witness heard a commotion at the door, and "Sapp, Raby, and I" looked out the door to see what the trouble was. Witness and his companions were about ready to leave. They went to the door and witness heard one of the colored soldiers whom he thought was Harris say, "There they are. That's the man we want", or something to that effect. The man who made the remark was by the door "on the first step, just outside of the door". Witness continued:

> "At that time, Ray started through the door, and Patterson was standing in back of him.***So, they started through the door, the three of the fellows, and Bert Raby hit Ray in the mouth and knocked him and another fellow back out of the door, and I grabbed one of the fellows and pushed him back out the door. We immediately closed and bolted the door shut, and I told Raby to get away from the door and leave them alone. Then I walked into the dance hall and I wasn't gone long, I don't know how long, but just a matter of a few seconds or so, maybe, and I came back to the door. Bert Raby was standing there with the door open, and arguing with the colored fellows outside. When I walked over towards the door, I seen a fellow poke a revolver out of his pocket. My closest recollection of the man was Harris. He had hold of a gun" (R. 14).

He testified further that,

> "Raby reached out of the door to try to pull the gun away from Harris***Harris pulled the gun out of Raby's hand, and during that same instant, I glanced and seen another gun, which I just glanced at a second, which I thought was Patterson had that gun. Well, I closed the door when Harris jerked the gun out of Raby's hand*** We was both leaning on the door with our hands to hold it shut. Then the shots were fired. I heard three shots, and somebody in the room by me at that time, Raby, hollered and said, 'Bill, I'm hit.' He turned away from the door and started walking back towards the back end of the hallway and Sapp***laid him down on the floor of the kitchen*** and somebody hollered, 'Stop shooting, you have killed somebody.' They was running downstairs.***I sent a fellow after an ambulance or somebody to take Raby to the hospital. They came within ten or fifteen minutes. Raby was dead before we carried him down the steps" (R. 14,15).

A medical officer testified that in his opinion, Raby's death was caused by "a gun-shot wound of the chest" (R. 6).

Kenyon testified that he did not identify the three accused "positively" but he "was reasonably certain that they were the ones". He explained that he "distinguished" Patterson from his height, his "tone of voice" and from "my looking at him three or four times during the evening when he was standing with his hands in his pocket in which I knew there was a gun". He recognized Harris "on account of the size of his large nose", the "tone of his voice" and his constant use of a certain vulgar "slang word" (R. 16,73). Kenyon testified respecting his identification of Ray that

> "I am not positive, except that when I was to go and identify Ray, he had a swollen lip at the time, and he said himself that he recognized me and that he was hit by Raby at the door" (R. 73).

Kenyon testified further that he was positive enough of his identification of accused that he

> "picked them out of approximately one thousand different negro(e)s I looked at, and they admitted being there and being upstairs the night of the shooting" (R. 74).

During the day of the shooting, Kenyon and Raby each had six or seven glasses of cognac, each glass containing a little more than an ounce (R. 17, 18). It appeared to Private First Class Robert Lundy, Jr., 86th Quartermaster Company (Railhead), who saw them, that Raby "was under the influence of whiskey or some kind of drink" but that Kenyon "seemed to be pretty sober" (R. 20,21,22).

(4)

Lundy, accused Ray and another man were in the house where the argument arose when the other two accused entered. Lundy testified that the members of the party were drinking, and that they went upstairs and "the argument started". Witness testified:

> "this white person came up and says, 'The lady don't want you up here.' Harris says, 'What? Where's the lady? I want to talk to her.' The fellow asked Harris if he called him a damned liar. Harris says no, he didn't say anything to him. This fellow he just keeps talking. He says, or asks, 'Does anybody want to fight? I'll fight. I'll fight anybody, and don't pull a knife because I have one scar on my shoulder now from a knife wound where I was cut.' A nigger cut him in French Morocco. I tells him, 'Well, fellow, we were going down now.' This white corporal up there tells him, the other fellow, to keep quiet. These fellows is getting out now. This Corporal says, 'Here, you fellows come back up', and we goes downstairs, and gets a couple of drinks, and I tells the fellows I am going back. I was supposed to be back at six o'clock, and then we starts talking and Patterson***says, 'I can't understand why these folks wants a Jim Crow place here.' Harris says, 'Yes.' He hadn't done anything to him. 'We just wanted to find out why the lady didn't say anything up there.'" (R. 21,22).

Lundy testified that Ray was upstairs "when the first argument started" (R. 69) and that while the colored soldiers including the three accused were "sitting around talking" in the tavern after having left the dance hall, "somebody" proposed that they go back upstairs "and straighten this thing out". Patterson at the time asked Lundy "did I have a gun, and I told him no" (R. 24). Lundy also testified that the following morning at breakfast, Patterson, who was his tentmate, said, "I went back upstairs there last night and knocked on the door, and they opened it and at that time pulled one of the boys in and shoved him back out, and the boys started blasting" (R. 23), meaning "shooting" (R. 25). Lundy testified he had seen the three accused at breakfast but he did not know whether Ray and Harris were present during this conversation with Patterson (R. 23).

During the afternoon preceding the shooting, Harris showed one of the colored soldiers who was with him a "gun" which he had in his possession and both Patterson and Ray told this soldier they also were armed (R. 27,28). This soldier testified that he had been drinking in the tavern and began to "feel bad" so he "dropped off to sleep". He testified he did not feel like he

> "had gotten to sleep no time before these kids down there and the lady that runs the house were trying to wake me up, and there was a rumbling from upstairs. I walked out the door, and someone else ran out, too, and I finally got out to the street, and walked out on the street. I heard someone call

the name of 'Floyd Gippings', or something like that, and I called Patterson, and he says, 'Come on up here. We are up here.'"

This soldier testified that Patterson, Harris and Ray were together and when they got out in the street the witness asked them what happened "upstairs there", and Patterson

"said, 'Oh, nothing, nothing. You weren't up there, were you?' I said, 'No.' He said, 'Let's go back to camp.' We turned around in the street and rode off. Going to Aversa, this guy, I don't know exactly who it was, ran up behind us with a flashlight and asked the question, 'Are you the guys that fired the pistol back there in the house?' Patterson said, 'No.' Then I asked Patterson again what house they were talking about a pistol being fired in, and what happened. And Patterson said, 'Nothing. Nothing. Go on to camp'" (R. 27).

After having been informed "of his rights under the 24th Article of War" and told that he did not have to make a statement and if "he volunteered to do so, whatever he might say would be used for or against him", Harris made a written statement on 12 December 1943, which was introduced in evidence "insofar as it applies to the accused, Harris" (R. 7,8,9,11,69,70, 71; Pros. Ex. 1). He stated that after he, the other accused and two other soldiers had been drinking in a tavern during the afternoon in question, they went upstairs "where they had dancing and quite a few girls". He stated further that there was a "big white fellow" there who said "the lady didn't want no niggers in there". Harris told Patterson

"'Let me speak to the house lady. I can talk a little Italian myself.' All the boys came over. This white soldier said, 'What do you think, I am telling a Goddamn lie? You can't believe me?' I replied to him, 'You are not any woman, I want to speak to the woman.' He asked me, he said, 'One of you niggers stabbed me once before;' he said, 'this time you can't do it.' He asked me did I want to fight. I told him, 'No, I don't want to fight.' He said, 'Pull your knife out, I'll make it too late for you.' Lundy came up and said, 'There's no use in that.' Another soldier came up and said, 'He's from the South, and he is drunk; don't pay any attention to him;' he said, 'we all can have fun right here.' And I told him, 'No, we'd better go. He don't want us in here.' And this other big white fellow, he came over and shook our hands and said everything was all right, that we could come back when we got ready."

Harris also stated that he and his companions went downstairs and after drinking more, decided to return to the dance. Harris stated that "Patterson, Ray and Lundy, and one or two fellows from another company were with

us"; that someone knocked on the door of the dance hall and

> "The door was partly open and the big white soldier come to the door and when he saw it was us colored fellows, he slammed the door on one of the boys. He got out of the door and the door was closed. Patterson was ahead of me and Ray was behind me, and Thomas was near the door, of the other apartment. The door into where they were dancing opened again and the white soldier argued some more and slammed the door again. Somebody fired a shot to let them know some respect for us colored boys as soldiers in the Army. Then some more shots were fired. I don't know who fired. Patterson had a .32 automatic; I had a .32 automatic; and Lundy had a gun. Ray had an automatic and I don't know what size it was. The other two boys who joined us, they had guns to(o). I didn't fire my gun, which was loaded with a full clip. We all ran down and started home. The next day me and Patterson, Dorsey, Green, and Alexander went back that way to pick up one of the boy's overseas cap which he had dropped the night before at this house. The M.P.'s arrested me and found the gun which I carried" (Pros. Ex. 1).

Patterson was likewise "warned that under the 24th Article of War he need not make a statement, but if he volunteered to do so, whatever he might say would be used against him, should the investigation result in a trial" (R. 11). After being thus warned, Patterson made a written statement on 16 December 1943, which was "admitted into evidence insofar as it pertains to the accused, Patterson" (R. 11,12; Pros. Ex. 2). In the statement he related details of the argument between Harris and "this white fellow" substantially in agreement with what Harris had stated. After the argument had ended, the soldiers went downstairs and bought another bottle of cognac. Patterson stated that

> "We drank about half the bottle of cognac and two more soldiers came in. They had a drink with us. I don't know who they were. One was low and one was kinda tall. They said 'Let's go upstairs' and then they went upstairs in front of us. Me, Harris, and Ray went up behind them. They knocked on the door and the door opened and they pulled the little guy inside. They had a rumpus in there. About that time the door opened again. The little guy staggered out. When he staggered out, he staggered back off the door and shot" (Pros. Ex. 2).

Ray was warned in substantially the same language as was Patterson. After being so warned, he made a written statement on 14 December 1943, which was admitted in evidence "insofar as it applies to the accused, Ray" (R. 12; Pros. Ex. 3). He stated that he went to town armed "that morning",

had some drinks and then went to "the place where the trouble happened", where he and his companions drank and talked. Then they went up to the "dancing place" where he thought he saw "Harris & Patterson, and two or three white fellows". He stated further there "wasn't any argument while we were there". Ray returned to the tavern, had some more drinks and talked to a girl in the hallway. He stated that then "some soldiers came in and said it looks like they're going to have a fight up there" and that he left by himself and went back to camp (Pros. Ex. 3).

For the defense, a pistol taken from Harris the day after the shooting and another which Patterson admitted he had borrowed were introduced in evidence (R. 31,33; Def. Exs. B,C). Three other pistols were recovered in the course of a search of the belongings of members of the 86th Quartermaster Company (Railhead) and were also introduced in evidence (R. 31,33,34; Def. Exs. D,E,F). This search was made "at least a week" after the shooting occurred (R. 33,34). A ballistics expert testified that the bullet which was taken from Raby's body was not fired from any of the five pistols which were introduced in evidence (R. 29,30,31,32). The prosecution announced that it "will stipulate that the bullet taken from the body of the deceased was not fired from the weapons that were recovered" (R. 30). In explanation of this stipulation the prosecution also stated

> "that it is not in a position of admitting that they are the only guns at the scene. The stipulation is to the effect as to the guns recovered. We don't take the position they were the only guns there at the particular time" (R. 31).

Witness upon visiting the scene of the crime found that "three shots had been fired. Examining the door, I found two bullets in the door. One in the frame, and one in the side of the door***I have recovered those two bullets" (R. 30). The door itself showed a hole caused by a bullet (R. 32).

The day following the shooting, some articles of clothing including an "overseas cap" with the word "Gippings" on the inside of its band were recovered at the scene of the crime (R. 35).

It was stipulated at the request of defense counsel that the prosecution had no evidence of previous convictions as to the accused Harris and Patterson and evidence of only one previous conviction against Ray, which was by summary court-martial for being drunk in a public place (R. 36).

Accused Harris testified to substantially the same facts preceding the shooting he had related in his pretrial statement (R. 36-51). He testified that when he returned downstairs "some men came in the room" where "we were drinking". They were invited

> "to have a drink. They takes a drink of cognac. The little one says, 'Let's go upstairs.' I said, 'O.K. Go ahead. Go on. We'll be up.' Patterson, me and Ray.***I started to go back to the dance. Just then, I seen somebody tussling out

at the door. It was dark, and I couldn't make out who it was. I knew it was those guys that came up with us. As I saw the tussling in the door, the door opened and then the door closed. As the door closed, one guy, the small fellow, he fell back out of the door. Then I could see the reflection from the gun when the fellow shot. Then we all ran downstairs. We ran down stairs and got out and Bing Crosby called Patterson. Patterson went out. That's all I know about the shooting" (R. 37).

He testified that to "my knowledge" only one shot was fired (R. 43) and that "I don't know" about his written statement that "there were some more shots fired" (R. 50). Accused also testified that he included in his statement the language that "Somebody fired a shot to let them know some respect for us colored boys as soldiers in the Army", because the Criminal Investigation Division agent to whom he made the statement "made me say that. He said to put that in" (R. 41). He also testified that he was standing 12 or 14 feet from the door where the shooting occurred and that his "frie(n)ds weren't doing no shooting" (R. 38,42). He did not know the "other two boys" who had joined them (R. 39,47,48), but that "we went up behind them" (R. 50). He admitted that he "really did" deny being at the scene of the shooting when his pistol was taken from him the next day and that it was about a day and a half or two days before he decided to admit he had been "up there" (R. 50,51). He denied knowing anything about an "overseas" cap or going after it the next day (R. 38).

Accused Patterson testified to substantially the same version of the shooting as he had related in his pretrial statement (R. 51-62). In his testimony, he added that during the argument in the dance hall, he went outside and borrowed a pistol from one Freddy Thomas after which he returned and found "Harris and the men still talking" (R. 52,53,55). He explained that he had borrowed the weapon because "it was getting late***and we had to walk to camp, and we had to have some protection" (R. 53,54). Patterson also testified that when the shooting started, he was about "fourteen feet from the door" and Harris was standing opposite and Ray behind him (R. 56, 57). He did not know the "small guy" and "can't describe his appearance" (R. 59).

Accused Ray also testified, corroborating in substance what he had related in his pretrial statement (R. 62-66). He testified that he was armed on the day of the shooting and had borrowed the weapon he had from Freddy Lee Thomas. He explained having armed himself by testifying "there were a lot of German spies around town, and a lot of trouble in town among the Italians, and you know, I heard a lot about spies, and I heard a boy say that a fellow got killed by spies about a week before we moved here" (R. 63). Ray also testified that he was not in the dance hall at any time and "never got hit or in no arguments of any kind" that night (R. 62,63,76).

For the prosecution, the Criminal Investigation agent who had taken Harris' pretrial statement, testified that he had not told Harris to include

in that statement the language "Somebody fired a shot to let them know some respect for us colored boys as soldiers in the Army" (R. 69,70).

4. There is evidence that at the place and time alleged a bullet from the pistol of one of the three accused, fired through a closed door, mortally wounded Private Bert Raby, the person named in the Specification. Three shots were fired, one of which penetrated the door, and struck Raby in the chest.

It happened at the entrance to a dance hall in a bawdy house, accessible through an Italian tavern which was on the floor below. About an hour prior to the time the shooting occurred the three accused, with one or two other colored soldiers, entered the dance hall and were told by Raby that the woman who "ran the place" did not like negroes "mixing in with white people at the dance". One of the soldiers, other than the accused, expressed a willingness to leave but accused Harris retorted saying, "I want to talk to the mother-fucking woman. I am a citizen, and I can talk to the mother-fucking woman if I want to". Raby, somewhat under the influence of liquor, took offense at this remark and asked Harris if he "called him a damned liar" and also dared any one of them to fight, adding that he had once been stabbed by a "nigger" and would "make it too late for" anyone to use a knife on him. Ray and Patterson were present at this altercation during which the latter surreptitiously loaded a pistol he had on his person. The argument however ended and the colored soldiers including the three accused left the hall and repaired to the tavern where they sat talking and drinking. Comment was made by Patterson about their having "a Jim Crow place here".

Finally someone proposed going upstairs to "straighten this thing out", and at this point Patterson asked a fourth soldier, who refrained from engaging in the proposed venture, if he had a gun. Harris and Ray were also armed. Together the three accused ascended the stairs, got near the door to the dance hall and when it opened and they could see inside, one of the accused was heard to say "That's the man we want", whereupon Ray, followed by the other two, started to enter. Raby met them at the door and hit Ray "in the mouth". He forced him and another of the accused outside into the hallway and after Raby's companion had ejected the third one the door was closed and bolted. Raby however reopened the door and stood arguing with the accused. A scuffle ensued in the course of which a witness saw at least two of the accused, identified as Harris and Patterson, each with a pistol in his hand. The one in the hand of Harris was seized by Raby but the former recovered it. Raby and his companion then succeeded in closing the door and while they were leaning against it, the three shots were fired.

The defense proposed to show that the shooting was done by one of "two other boys" who had entered the tavern while accused were there and had been invited to a drink. They later went upstairs followed by

accused and when, according to Harris, the "small fellow" was pushed away from the door as he tried to enter the dance hall "I could see the reflection from the gun when the fellow shot". Patterson's account was similar, testifying that he could not describe the appearance of the "small guy" and stating that of the two soldiers, "one was low and one was kinda tall". Ray, contrary to other evidence, denied ever having been in the dance hall and, though he was later found with a swollen lip and had admitted to a witness that he had been hit by Raby at the door, testified he "never got hit or in no arguments of any kind" that night.

The court was justified in believing the evidence adduced by the prosecution. A rationalistic view thereof compels the conclusion that the accused resented their exclusion from the dance hall and singled out Raby as an object of special enmity. For more than an hour while together downstairs they rankled over what had occurred. And before returning upstairs "to straighten this thing out", significant reference was made to their possession of firearms. None of the pistols recovered in the subsequent investigation was found to have been a weapon used in the shooting, but this fact has no material significance except as it demonstrates a deliberate and concerted effort on the part of the accused to evade responsibility for their acts. The conclusion is inescapable that they acted jointly and in pursuance of a common intent. Every circumstance tends to show that their purpose was unlawful and, to the knowledge of all of them, attended with dire consequences. By thus joining in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involved the contingency of taking human life, all of the accused became responsible for the homicide committed by one of them while acting in furtherance of that common design. It is of no material importance which one of them fired the fatal shot. The shooting was deliberate and wanton, and done without legal justification or excuse. Malice is fairly inferable from the use of a deadly weapon and the other circumstances in evidence. Each accused was properly found guilty as charged (NATO 1470, Hall et al; 18 U.S.C.A. 550; 26 Am. Jur., Homicide, secs. 58,60,64,66; 29 C.J. p. 1073 et seq.).

5. The charge sheet shows that accused Harris is 24 years old. He enlisted in the Army 28 March 1942, and had no prior service. Accused Ray is 30 years old. He was inducted into the Army 13 February 1942, and had no prior service. Accused Patterson is 20 years old. He enlisted in the Army 27 March 1942, and had no prior service.

6. The court was legally constituted. 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 as to each accused and the sentences. Confinement in a penitentiary is authorized by Article

of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Samuel E. Klugman, Judge Advocate.
Gordon Simpson, Judge Advocate.
Donald K. MacKay, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
23 May 1944.

Board of Review

NATO 2225

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 306, U. S. Army, 26 April
Private WILLIAM H. TOW	)	1944.
(14 019 802), Company B,	)	Dishonorable discharge and
57th Signal Battalion.	)	confinement for 20 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 86th Article of War.

Specification: In that Private William H. Tow, Company B, 57th Signal Battalion, being on guard posted as a sentinel at Company B, 57th Signal Battalion, two (2) miles Northwest of Nettuno, Italy, on or about 8 April 1944, was found drunk upon his post.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions, two by summary court-martial for wrongfully discharging a rifle from a train and for being drunk in uniform in a public place, both in violation of Article of War 96, and one by special court-martial for two absences without leave in violation of Article of War 61, for being found drunk in uniform in a public place in violation of Article of War 96, for using insulting language toward a non-commissioned officer then in the execution of his office, in violation of

Article of War 65, and for behaving himself with disrespect to a commissioned officer in violation of Article of War 63, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, but reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 8 April 1944 accused, a member of a guard, at 1930 hours passed inspection at guard mount and that at 2240 hours he was posted by the corporal of the guard on "post number two" (in the Anzio Beachhead), his tour on duty running until midnight. The corporal of the guard who posted accused testified the latter was sober both at guard mount and when he was posted but "showed signs of drunkenness" at 2335 hours (R. 7,8,9).

The sergeant of the guard testified that about 2330 he was inspecting the guard and did not find accused on "post number two", but after a five minute search found him sitting on the ground, his helmet off, his rifle on the ground and a cup "right next to him". Witness testified he could smell wine on accused's breath, and knew he had been drinking. Accused was told to return to his post and a few minutes later his relief arrived, accompanied by the corporal and sergeant of the guard (R. 10). The corporal of the guard testified accused had "halted" him at a distance of 35 feet (R. 8). Accused was relieved about 2355 hours and was taken "to the Medics" by the sergeant of the guard who testified accused did not have anything to drink from the time he was relieved until he was examined by "Captain Kearney" about 0030 hours on 9 April (R. 10,11). The area was subjected to some shell fire after the time the sergeant found accused sitting on the ground but before he was relieved (R. 11,12).

Captain Edward P. Kearney, Medical Detachment, 57th Signal Battalion, stationed on the Anzio Beachhead, testified he examined accused. He testified

> "his mind was over-active, he tried to be humorous and he was over-loquacious and a bit over-friendly perhaps, and in the course of the physical examination, I discovered the odor of liquor on his breath. I tested his reflexes and he had a positive bumper. He had apparent lack of efficient balance, but upon walking, appeared to be relatively good" (R. 13).

Witness concluded accused was suffering from acute alcoholism and was not "quite fit" to fulfill all the duties of a guard. He also testified accused was moderately drunk (R. 13,14).

Accused testified that on 8 April he had three quarters of a canteen of wine before supper but none after that, and that the day before he had

been drinking "a pretty good bit" (R. 16,17,18). He testified further that on that date he was posted as a sentinel on post number two, "more or less a wandering post" around some radio trucks, under orders "to wander in around the kitchen to see if anything came up" (R. 15,17). He testified

> "I walked for a while and decided to get a drink of water. ***When I got down there, I was kneeling down pouring out a cup of water. I heard someone walking and I saw it was*** Sergeant of the Guard. I sat down. He came up and said, 'You are sleeping on guard'. I got up and said, no sir, I was not asleep. I had never taken the drunk and got up and walked my post. He never looked into the cup. He was never close up enough.***a shell or two came in. The first one wasn't too close but the second was within twenty-five or thirty yards away. The shell exploded before we could all hit the ground. All of us were nervous" (R. 15,16).

He testified further that at the "Medics" tent

> "I said, 'Doc, they think I am drunk and not able to pull duty'. I had to walk from corner to corner of the tent to test my balance. My eyes, they were red, because I was nervous. I then went to the company area and went to bed" (R. 16).

4. It thus appears that accused, when on guard and posted as a sentinel at the time and near the place alleged, was found drunk upon his post. That accused was duly posted as a sentinel was not controverted. There was evidence that the incident occurred on the Anzio Beachhead which the court judicially knew embraced Nettuno, Italy. A corporal of the guard testified that when he saw accused on his post at 2335 hours he showed signs of drunkenness. The medical officer who examined accused shortly thereafter found him to be "moderately" drunk and "not quite fit" to be on guard as a sentinel. There is ample evidence to justify the court in finding accused guilty of the offense charged (MCM, 1928, par. 146a).

5. The charge sheet shows accused is about 26 years old. He enlisted in the Army 2 September 1940, and had no prior service.

6. The court was legally constituted. 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 and sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
2 July 1944.

Board of Review

NATO 2238

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at APO 464, U. S. Army, 30 March 1944.
Private WALTER S. PAYNE (13 118 146), 3641st Quartermaster Truck Company.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Simpson, Mackay and Irion, 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 92d Article of War.

Specification: In that Private Walter S. Payne, 3641st Quartermaster Truck Company did, near Vairano Caianello, Italy, on or about 27 February 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private first class Prescott P. Ringold, 3641st Quartermaster Truck Company, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by (summary) court-martial for insubordination and disrespectful language toward a noncommissioned officer in violation of Article of War 65, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and

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confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that after dark on the evening of 27 February 1944, near Vairano Caianello, Italy, deceased was playing cards in a tent which he occupied with five other soldiers, including accused, all members of the 364lst Quartermaster Truck Company (R. 12,13,17,18). Candle light coming from a table near the door was the only illumination (R. 15,21,23,24). Accused entered the tent about 2100 hours and sat on deceased's bed which was in the front part of the tent. Deceased told accused "he should get off his damn bed and go on down to his own and get on it". There was no argument between them, "they just had one or two words". Accused got off deceased's bed and, going to his own which was in a rear corner of the tent, sat down. Shortly accused got up from his bed, obtained a rifle, and again seated himself on his bed with the weapon across his lap. (R. 13,17,18,20, 22,27) Deceased left the tent but returned to his bed in two or three minutes. Shortly thereafter he walked toward a heater in the middle of the tent and, when about six feet away, spoke to accused, the stove being between them. (R. 13,19,20)

Technician Fifth Grade Lonzey Townsen, 364lst Quartermaster Truck Company, testified that deceased, speaking loudly enough for everybody to hear, said "'you drawed your rifle on me and didn't shoot, but you might just as well had of' or something like that". According to this witness, accused replied "Well, I will", whereupon the gun was fired. (R. 13,16) Private James L. Moore, of the same organization, testified that after deceased got up he heard deceased say "Have you got your gun", and that deceased also said "You've got your gun. Now shoot me" and that accused "just got up and shot him". This witness noticed particularly that deceased did not have his hand in his pocket. (R. 19,22) Townsen testified he did not pay particular attention to what deceased said as "he was always doing a lot of cussing around there" (R. 16).

Technician Fifth Grade Aldon T. Perry, also of the same organization, testified that he had been asleep in the tent but was awakened by loud talk on the part of the deceased and by deceased shouting at accused. When deceased first started talking, he was near the door of the tent, where a card game was in progress. Witness did not pay any attention to the remarks as "we were always carrying on and talking", and the only thing he heard deceased say was "This mother fucker drawed a rifle on me and I don't like it a bit". (R. 25,26) Witness testified that he thought accused was sitting on "Roan's" bed in the rear of the tent, adjoining that of deceased (R. 26,27). Witness told deceased to "cut that noise out" so he could go back to sleep, but he was unable to get to sleep because "the fellows ***were playing cards and carrying on". A little later witness was awakened a second time when deceased again spoke to accused and thus called witness' attention to the people in the tent. Witness did not know if this was the

time he saw deceased on "Roan's" bed - "I don't remember. You see, sir, we carry on like that so much until I don't pay much attention". (R. 26) This witness testified that the second time his attention was attracted by deceased's voice, it was "pretty loud" but he did not see deceased or pay any attention to where he was. He also testified he did not hear deceased get up and move about. (R. 27)

A noncommissioned officer who went to investigate the shooting met accused as the latter came out of the tent with a rifle in his hand. This witness took the weapon from accused and asked what had happened. Accused replied he had shot deceased (R. 28,29) and said "he was arguing". Witness also testified "If he said he threatened his life I didn't pay attention to it". Witness also testified that on 28 February he stated to his company commander accused had said to him "He threatened my life and I shot him" but further testified accused did not in fact make that statement to him. (R. 30) Witness saw a wound in deceased's right arm that went through the arm and "into his stomach" (R. 49). Over the objection of the defense, witness was permitted to testify that on entering the tent (R. 28), he saw deceased

> "lying there holding his stomach and he said, 'Private Payne shot me.' He said, 'Private Payne shot me in the stomach.' I said, 'What for?' He said, 'He shot me for nothing'" (R. 29).

This statement was made about five or ten minutes after the shot was heard by witness (R. 28). Deceased at the time was on the ground, to the rear of the stove, his head to the left and his feet to the right, as viewed from the entrance, and his head was farther to the rear than his feet (R. 54).

Deceased was taken to the 11th Evacuation Hospital where, at about 2150 hours on 27 February 1944, while "in a state of collapse or shock" and "in a moribund condition", he was interviewed by a medical officer who was permitted to testify over objection by the defense, that deceased said accused had shot him and that he further said "He shot me for nothing". Deceased did not give any indication that he thought he would live or die as a result of his injury. He expired between four and five hours later. (R. 33,34) Another medical officer, who performed an autopsy upon the body of deceased, which he identified by "his identification tags and by information that was on the medical record which accompanied the body", testified that deceased

> "had died as a result of an injury from a bullet wound having passed through his right arm, into his stomach entering his liver and pancreas and perforating three loops of the small intestines". (R. 11)

Accused's company commander and first sergeant, called as defense witnesses, testified that accused had been a truck driver and was a good worker, his work always having been satisfactory. He had a good reputation for being peaceful, quiet and inoffensive. (R. 35,48)

Accused testified in substance as had the witnesses for the prosecution. He testified that after he had gone to his own bed when deceased had told him to get off his bunk, deceased started swearing, got up and left the tent. Thereupon accused loaded his rifle which was beside his bed, inserted a clip, and laid the rifle "by" the bed, beside him. Accused believed there was a round in the chamber and did not think the rifle was "on safety". He loaded the rifle because he "didn't know why he went out there" and because he knew "he generally had a pistol", though that evening accused did not see a pistol in deceased's hand or pocket. (R. 37,39,40) Accused testified he did not see deceased when he re-entered the tent in about ten or fifteen minutes. After deceased had laid down on his bed for a few minutes, he got to his feet and went toward the middle of the tent. Accused saw deceased come around the left hand side of the stove, advancing toward accused, with his left arm raised and his index finger pointing toward accused who was about six feet away. Deceased, whose right hand was by his side, by his right pocket, was saying something about "You've got your rifle, shoot me". Accused testified that deceased "said he didn't want to hurt me". Accused picked up his rifle and held it horizontally at hip level, his right hand on the trigger housing, his left hand below the lower band. Accused also testified he had a hand "on the trigger". The gun "went off". (R. 38-41) Accused further testified he had known deceased since they arrived overseas, about ten months before, and that they had not had any quarrels or fights prior to the killing, that he had never had any trouble with deceased, that the latter had never pointed a gun at him, never "pulled a knife" on him and never threatened him, except that on the night of the killing deceased threatened accused saying "something about fucking up. He said he was going to fuck me up and all like that". Accused could not "say what he said. It's just the way he was talking". (R. 36,40,41)

4. It thus appears from uncontradicted evidence that at the place and time alleged in the Specification, accused shot "Private First Class Ringold" with a rifle and mortally wounded him. There is evidence that deceased left the tent where he and accused had engaged in an acerbic though inconsequential quarrel and that deceased threatened to "fuck" accused "up". While deceased was gone, accused secured and loaded his rifle. Shortly, after returning to the tent, deceased portentously advanced toward accused and stated in substance "You've got your rifle, shoot me". Thereupon accused fired once from hip level, inflicting a wound from which his victim died a few hours later. Deceased was not armed. There was testimony that sometime prior to the shooting deceased had expressed resentment toward accused, saying "This mother fucker drawed a gun on me and I don't like it a bit". Accused testified that his victim had advanced upon him with his left arm raised and index finger pointing at accused, his right arm by his side and right hand by his right pocket, and that deceased was about six feet away when the rifle was fired. However, the bullet from the weapon passed through deceased's right arm and into his abdomen, demonstrating that his right hand was not by his pocket as accused had claimed. Accused also testified that deceased "said he didn't want to hurt" him just before the shooting. The court was warranted in concluding from these and the other circumstances in evidence that there was no excuse or justification for the fatal assault.

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Accused contended he did not intend to kill his victim and implied that his weapon was inadvertently discharged. This testimony was for the court to evaluate and it was warranted in concluding that the weapon was fired intentionally. The evidence shows that accused pointed his rifle at his victim and fired at close range. The death of deceased was a natural and probable consequence of this act, a consequence accused is presumed to have intended. There was no legal justification or excuse. A finding of the requisite malice to characterize this homicide as murder was justified from accused's fatal use of a deadly weapon and the other circumstances in evidence. He was properly found guilty as charged. (MCM, 1928, pars. 112a, 148a)

5. Accused was alleged to have killed "Private first class Prescott P. Ringold". Deceased was identified by the proof as only "Private Ringold" and "Private First Class Ringold". The identity of deceased as the person named in the Specification was sufficiently established by the proof of his surname and occupation (NATO 965, Saunders).

6. Prior to arraignment the defense stated it wished to enter a "plea of insanity" and suggested an inquiry into the mental condition of accused at the time of trial and at the time of the commission of his offense. The court adjourned on 30 March 1944 in order that the inquiry might be made (R. 3,4).

The court reconvened on 15 April 1944, whereupon Captain James B. Conner, Medical Corps, Chief of the Neuropsychiatric Section, 262d Station Hospital, testified for the defense that he had examined the accused on 31 March 1944 and thereafter and had formed the opinion that accused was sane at the time of the examination and at the time of the commission of his offense. Witness expressed the view that at the time of the commission of his offense accused was suffering from mild psychoneurosis, a fear or panic reaction and emotional instability. Witness was of the opinion that at the time of the commission of his offense accused could distinguish between right and wrong; that he "could, with difficulty, adhere to the right"; and that his ability to adhere to the right "was not as strong as would be that of a normal individual" (R. 7-9). A written report of the psychiatric examination by the witness, dated 6 April 1944, and setting forth conclusions as indicated above, was received in evidence (Def. Ex. A).

Following the reception of Captain Conner's testimony the court found that accused was sane at the time of the trial but deferred findings as to his mental condition and responsibility at the time of the commission of his offense. Accused was then arraigned and the trial proceeded. No further specific findings with respect to the mental condition or responsibility of accused were made by the court. In view of testimony of the psychiatrist it would have been appropriate for the court to have reached findings (MCM, 1928, par. 75a) upon the issues as to whether at the time of his offense accused was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both (a) to distinguish right from wrong and (b) to adhere to the right (MCM, 1928, par. 78a). Although the psychiatrist testified in effect that accused's power to adhere to the

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right was abnormally low, the court was justified, upon all the evidence, in concluding that, in fact, at the time of the commission of his offense, accused was able both to distinguish right from wrong and to adhere to the right. Its conclusion to this effect is implicit in the findings of guilty (Bull. JAG, December 1942, sec. 395 (44a)).

7. The record of trial states that evidence of one previous conviction was admitted as Exhibit "C". That exhibit shows two previous convictions, one of which was committed more than a year prior to the offense here alleged. It is reasonable to infer that the trial judge advocate intended the court to consider only the later conviction and that the court confined its consideration to that one. Regularity may be presumed.

8. The charge sheet shows that accused is about 21 years old, that he enlisted in the Army 2 October 1942, and had no prior service.

9. The court was legally constituted. 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 and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Irvin Simpson, Judge Advocate.

Donald K. MacKay, Judge Advocate.

Walter R. Grow, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
29 May 1944.

Board of Review

NATO 2277

UNITED STATES	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 45, U. S. Army, 6 May 1944.
Private WILSON G. DISHER	)	Dishonorable discharge and
(14 053 339), Company A,	)	confinement for 50 years.
157th Infantry.	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

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

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

Specification 1: In that Private Wilson G. Disher, Company "A", 157th Infantry, did, in the vicinity of Venafro, Italy, on or about 13 December 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat duty against the Axis Forces, and did remain absent in desertion until he surrendered himself at Venafro, Italy, on or about 3 January 1944.

Specification 2: In that Private Wilson G. Disher, Company "A", 157th Infantry, did, in the vicinity of Anzio, Italy, on or about 14 March 1944, desert the service of the United States by absenting himself without proper leave from his organiza-

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tion with intent to avoid hazardous duty, to wit: Combat duty against the Axis Forces, and did remain absent in desertion until he was apprehended in the vicinity of Anzio, Italy, on or about 17 March 1944.

Specification 3: In that Private Wilson G. Disher, Company "A", 157th Infantry, did, in the vicinity of Anzio, Italy, on or about 23 March 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Combat duty against the Axis Forces, and did remain absent in desertion until he surrendered himself in the vicinity of Anzio, Italy, on or about 28 March 1944.

CHARGE II: Violation of the 86th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specification 1 thereunder; guilty of Specifications 2 and 3, Charge I, in each case, "except the words 'Desert the service of the United States by absenting' and 'With intent to avoid hazardous duty, to wit: Combat duty against the Axis Forces', and 'in desertion', substituting for the 1st and 3rd exceptions respectively, the words 'absent' and 'without leave'. Of the excepted words, Not guilty and of the substituted words, guilty", and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 50 years, three fourths of the members of the court present concurring. 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 under Article of War 50½.

3. As to the Specifications, Charge I, the evidence shows that accused, a member of Company A, 157th Infantry, absented himself therefrom without leave on 13 December 1943 and remained so absent until 4 January 1944 (Specification 1). He again absented himself without leave on 14 March 1944 and remained so absent until 17 March 1944 (Specification 2). He absented himself without leave a third time on 23 March 1944 and remained so absent until 28 March 1944 (Specification 3) (R. 4,5,6,7,9; Pros. Ex. A).

The evidence further shows that on or about 13 December 1943, accused was returned to his company which was "up on the other side of Venafro". An attack on the enemy was being planned (R. 6). The next evening after accused's return his platoon sergeant reported that he "left to go back to the hospital" (R. 7). The "aid station was just below the C.P. and he never came down there" (R. 7). Accused had "never said anything" to the first sergeant of his company about going to a hospital (R. 6). When next seen

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by the first sergeant accused was "at the rest camp at Naples" and when asked what he was doing there replied he was "on pass from the 182nd Station Hospital" but upon being pressed admitted he had no pass (R. 6,7). A sergeant from accused's company saw him at the Fifth Army Rest Center in Naples every day from 26 December to 31 December 1943 (R. 9). Accused voluntarily returned to his company 4 January 1944 (R. 7).

The evidence further shows that on or about 14 March 1944, accused was returned to his organization which was in a rest area or division reserve within the Anzio Beachhead. At the time "an attack across the diagonal Road by Padiglione" was being planned (R. 4). It was stipulated that the company was then in a combat zone and in a position to be immediately disposed tactically against the enemy (R. 5). Some shells landed in the area that night, there were a few casualties, and the next morning accused was missing (R. 4,7). The "area was very small and a very thorough search was made" for accused and "he was nowhere to be found" (R. 7). Accused "was returned by the Military Police about three days later, about 17th March 1944" (R. 5,7).

The evidence further shows that on the night of 21 March 1944 the planned attack was canceled and the next night accused's company was "ordered to relieve the 30th Infantry" (R. 5) and "moved up into the line" (R. 7). Accused moved up with the company (R. 7). He was "in house 6 up by the Tomb" and remained there all that day and the next night. The next night a search was made for him and he could not be found (R. 9).

Accused at his own request was sworn and (with reference to the Specifications and Charge I) testified as to the absence alleged in Specification 1, Charge I:

> "At the time I left, I think we were on Hill 740, I just came back to the hospital for about two hours. I had been sick and was still sick, and ever since the day my best friend got killed up there I have never been worth a damn any more. I left the hill and went back to Naples to the Hospital for treatments and they would not put my name on record. I came back up I think on January 3rd and came to the hill to the company where they were and went up on the line for four days until we got relief and pulled back to Piedmonte" (R. 18).

As to the absence alleged in Specification 3, Charge I, accused testified:

> "We left the area about six that night and went to relieve L Company of the 30th Infantry, 3rd Division. We went up to relieve them and went to within half a mile of the front. A man fell out and sprained both ankles. I pulled the man out and took him to the hospital. While back there the Mess Sgt. came over and asked me to carry rations every night to the front and I said I would and planned going up there the following night. I stayed there and carried rations up five nights until Major Kruger sent for me. I came up and went to house No. 6 and reported to

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Sgt. Bruenell and stayed there the first night and then went back to the hospital. In the meantime I was hauling rations up in a peep. I asked permission to go to the hospital and went to the Medics and was told by a Captain to come back. I went back and stayed about three days and then went back to the hospital and when I returned I returned to the Pines" (R. 15).

Accused testified further that he did not get permission "from anyone" to accompany "that man" to the rear (R. 17) and that he had had "an operation for appendix" and "It hurt me ever since on account of wearing a cartridge beld" (R. 18).

4. It thus appears from the uncontradicted evidence that at the time and place alleged in Specification 1, Charge I, accused absented himself from his organization without leave and remained unauthorizedly absent until on or about 4 January 1944. He left his command when it was preparing to go into action against the enemy and remained absent for 20 days. The circumstances and the testimony of accused justify an inference that accused quit his organization with intent to avoid the hazardous duty of combat. The evidence supports the finding of guilty of desertion as charged (MCM, 1928, par. 130a).

An extract copy of the morning report of accused's organization, which was introduced in evidence without objection, showed that he absented himself without leave and remained unauthorizedly absent for the periods of time alleged in Specifications 1 and 3, Charge I. Moreover, accused corroborated the proof of his absence on the dates alleged in these Specifications. The court as to Specifications 2 and 3 of Charge I found accused not guilty of absenting himself with intent to avoid hazardous duty but guilty of absence without leave. The finding as to each Specification is supported by the evidence.

5. The charge sheet shows that accused is 20 years old. He enlisted in the Army 7 November 1941 and had no prior service.

6. The court was legally constituted. 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 and sentence.

Donald P. Chaney, Judge Advocate.
Gordon Simpson, Judge Advocate.
Donald W. MacRae, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
24 June 1944.

Board of Review

NATO 2295

UNITED STATES	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at S. Leucio, Italy, 19 November 1943.
Private FRANK E. LAVENDER (6 361 336), Headquarters Company, 30th Infantry.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 92d Article of War.

Specification: In that Private (then Staff Sergeant) Frank E. Lavender, Headquarters Company, 30th Infantry, did near Bellona, Italy on or about 16 October 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Master Sergeant Richard Koenig, Headquarters Company, 30th Infantry, a human being by stabbing him in the abdomen with a dangerous weapon, to wit, a hunting 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 dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing

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authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1400 hours on 16 October 1943, accused and Sergeant Richard Koenig, friends of long standing and both members of Headquarters Company, 30th Infantry, stationed in Italy, went to Caserta with a truck and driver to get some wire and batteries (R. 35,36,38,65,66). During the first part of the trip Koenig and the driver were alone in the driver's seat and accused, who had a bottle of cognac from which he drank frequently, rode in the rear. The driver took a drink from the bottle and found it "strong". Koenig had one drink before leaving but did not do any drinking en route (R. 36,38,39,40,41). Before reaching Caserta accused got in the front seat to show the driver the way. Accused became ill and "threw up", hanging out the window of the truck (R. 40,41). At Caserta accused drank some "vino" but Koenig had none (R. 39). On the return trip accused rode in the rear of the truck and continued to drink cognac. He was drunk and the driver testified that he "couldn't reason with him" (R. 37,41). It was after dark when they returned to the company area and the truck was parked some 200 yards from the "CP" with accused asleep in the rear (R. 37). Without waking accused Koenig and the driver started walking toward the "CP" when accused awoke and came after them (R. 37). As to what then occurred the driver testified:

> "After we saw Sergeant Lavender ... he was walking toward the C.P. The C.P. was about 200 yards away from where the truck was. We were walking toward the C.P. and as we got to the C.P. the guard halted us and we stopped and Lavender and Koenig had a little argument and scuffle there and I seen Koenig fall along a culvert and after that argument I got disgusted and said 'To hell with you, I am going to bed'. Then I left and went to the C.P." (R. 37,38).

Witness left before completion of the argument and scuffle and did not hear accused make any threats about using a knife, nor did he see a knife in the possession of either accused or Koenig (R. 38,40,41). Asked if he knew what caused Koenig to fall, witness replied "Well, it was dark and I saw Lavender and Koenig close together and Koenig fell," and "it was muddy and slippery" (R. 40).

A soldier who was on guard at a road intersection near the "C.P." testified that about 2000 hours he halted accused and Koenig and that accused answered with the correct countersign. As they approached witness they were not arguing, but after they had passed him he saw Koenig, who was on accused's right, fall or "slide" down. Koenig arose, joined accused, and the two "turned around and came back past" his post. He did not hear accused say anything and did not see them again that evening (R. 42,43,44).

Another witness testified he was on guard at the "C.P." on 16 October 1943 and at about 2030 hours heard accused and Koenig arguing and went to

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investigate. He asked what the trouble was, but as they did not reply witness concluded nothing was wrong and returned to his post. Later accused passed this witness and went to the switchboard alone (R. 44,45).

A soldier who was on duty at the switchboard, about ten yards from the "C.P.", testified that at about 2030 hours accused asked him about the lines and "if the linemen were out on them". Accused then asked witness if he could sleep there in the switchboard room and upon receiving permission lay down. Accused "was loud and was using vulgar language" and told the witness "of his argument with Sergeant Koenig and his fight and of hitting him". Witness was of the opinion accused was drunk and testified accused said "he had come back bringing wire and had gotten into an argument with him sir and that he had hit him" (R. 46,47,48).

First Lieutenant John E. Dwan, of accused's company, testified that sometime around 2000 hours on 16 October 1943, Koenig came to the "C.P." and requested witness "to go outside with him" and handed him a knife. Koenig was not drunk but gave witness the impression of "excitement, his hair was mussed, he was sweating and out of breath***he had no headgear and was dressed in only shirt and trousers". Lieutenant Dwan took Koenig to "the small room in the stone building" and brought Major John H. Darrah, Medical Corps, to see him. Major Darrah had Koenig lower his trousers and open his shirt and witness saw several wounds in Koenig's abdomen, one of which was bleeding freely. About ten minutes later Major Darrah asked Koenig to get up and get in a jeep and as Koenig attempted to do so he fainted. At the trial Lieutenant Dwan identified a knife as the one given him by Koenig and testified he and Major Darrah examined the blade of the knife carefully, but were unable to find any blood because of mud on it, "the type of foreign matter that was found around the C.P. that night as it had been raining". Shortly thereafter Major Darrah had Koenig placed in a jeep to be taken to the clearing station (R. 48,49,50).

A sergeant in accused's company testified he had been in the wire section with accused for a little more than a year and in close contact with him and that accused had a knife which he customarily carried. He described it as having a blade about four inches long with a corrugated piece at the top and white rings with two brass brads to hold the handle in place. He testified that the knife shown him at the trial "looks like it to me***from the way the handle is constructed" (R. 52,53).

The first sergeant of accused's company testified he had known accused since 1939 and that he had a bone-handled knife with a blade four and one-half or five inches long which he carried in a leather scabbard and a knife shown him in court was accused's knife (R. 62,63). This witness testified further that about 2100 hours on 16 October he looked for accused and found him asleep in the switchboard room, awakened him and "stood him against a wall", whereupon accused asked "What's the matter, Johnny?" Witness then took accused to the "War Room", and searched him. Accused was wearing a belt with a heavy leather scabbard but there was no knife in it. Witness noticed accused's knife on a table in the War Room and that it had wet mud on it.

The knife and scabbard were identified by the witness and introduced in evidence. (R. 63,64,66). Witness then took accused "by jeep" about 20 miles to a stockade and during the trip accused did not "say anything", however, when they arrived, accused asked "how bad Pete (Koenig) was cut" and requested witness to take care of "his" mail. Witness testified that accused had been drinking and while it was possible he was drunk when witness awakened him, he was sober when they arrived at the stockade. (R. 64,65)

A witness for the defense testified that he saw accused and Koenig "in the afternoon" of 16 October 1943, that accused had been drinking but witness did not notice any unfriendliness between them, and after dark Koenig appeared normal and

> "came over where I was sleeping and told me...We asked him to get some radio parts and he said he had gotten them and dropped them by the truck and told us to get them in the morning" (R. 56).

This witness testified further that Koenig was wearing a jacket at the time of the conversation and that the next morning it was found on his bed near that of witness. He did not see accused when talking to Koenig. (R. 56,57)

Major John A. Darrah, Medical Detachment, 30th Infantry, testified that about 2000 hours on 16 October 1943, "just across the Volturno River", he dressed a stab wound in Koenig's abdomen. (R. 6,7) The wound was about one inch long, one and one-half inches deep, about even with a line drawn down from the collar bone and about two and one-half inches below the ribs, on the right side. He noted vein and arterial bleeding. (R. 7,8) Koenig was not "in very good shape at the time" and his face was "grayish in cast" (R. 8). Witness inserted a small steel probe and met an obstruction about one and one-half inches in. The probe was quite blunt and it is not possible that it penetrated anything beyond the wound. As the wound did not appear to be a major one, he stopped, not feeling any extensive exploration was particularly indicated. (R. 10) Witness then took Koenig to a clearing hospital. Major Darrah testified further that Koenig, shortly after he first saw him, produced a knife which in his opinion could have caused the wound and at the trial identified a knife as being identical with the one he saw. (R. 8,9) In his opinion the cause of death was:

> "The paralytic ileus or the gangrenous bowel" and the stab wound was "the cause which set in motion the chain of events that resulted in the death of Sergeant Koenig" (R. 28).

Witness gave as his reason for this opinion that:

> "In the first place there would have been no operation required had it not been for the wound. In the second place because of his unfavorable reactions to the attempt made to repair his body from the injuries it had received. Further attempts were necessary to all of which he responded unfavorably and eventually died." (R. 28)

Asked his belief as to the cause of the gangrenous condition of the small bowel, he testified:

> "Several explanations present themselves. The most common was the actual thrombosis. A clot breaks loose in the body and goes elsewhere where it does build up an embolism and plugs a vessel. Naturally, if there isn't any way for the blood to get around the block by some means that part dies for the want of blood just the same as if a water line went out and there is no way around the block to supply that part of the city." (R. 28)

Asked if such a clot would "operate independant of the wound", witness replied:

> "Yes and no. You have to get a man sick before those clots form in his body. They don't happen in healthy people walking around."

Witness further testified:

> "Another cause - since there was no clot demonstrated - was that there was a kink of the bowel which wrapped around one of these attachments and therefore applied pressure to the wall of the blood vessel and pinched it off from the outside.***I have never seen an actual volvulus in a person." (R. 29).

A third possible cause of the gangrene was pointed out by this witness, who stated there

> "are the motor control areas that also supply blood vessels in the same area. Irritation could so stimulate these automatic nerve centers so that there was a constriction of the walls of the vessel***A disturbance in that area can very well have caused a constriction of the superior mesenteric artery sufficient to cause the death of that part. Such a constriction probably had already occurred on about the 7th post operative day when the patient showed signs of a coronary heart disease. This cause did not show in the autopsy. This cause would not show after death because nerve control would cease and the vessels would restore to normal***The man might have just pinched himself from his own autointoxication. It nevertheless followed as a direct result of the injury from external force." (R. 29,30)

Captain Glen H. Gummess, Medical Corps, 94th Evacuation Hospital, witness for the prosecution, testified that he saw Sergeant Koenig when he entered the hospital on the 16th or 17th of October and that his examination disclosed that Koenig's

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"abdomen was moderately distended with no paristalsis. He had mild generalized tenderness but no spasm. Damage within the abdominal cavity was indicated."

that

"Upon opening the abdominal cavity we noticed a large amount of blood therein. I would estimate that he had roughly two quarts of free blood within the peritoneal cavity";

and

"a laceration measuring 2 centimeters in width on the anterior superior right lobe of the liver, which was oozing blood in a mild amount." (R. 13)

Witness continued that Koenig:

"did moderately well for the first few days after operation and***about the 7th post operative day he went into a sudden severe collapse. **Without any warning he developed low blood pressure and a cold clammy skin, vagueness, restlessness and a peripheral cyanosis which is simply a dark bluish discoloration of the skin which is an indication of poor circulation or insufficient aoration of his lungs***He continued in about this same condition approximately 48 hours and then seemed to come out of it more or less spontaneously." (R. 14,15)

However, on the tenth post operative day the sutures were removed, the wound seemed well healed, and:

"a few hours later he apparently had an attack of coughing and gagging which did not seem to upset him a great deal and a few minutes after that I discovered he had split his wound wide open."

Koenig was taken to the operating room and the wound "freed up", and witness found:

"Presented into the wound itself was a loop of the small bowel which appeared to be moderately irritated but at the time appeared to be completely viable" (R. 16);

that

"The second day after the second operation I found that he was draining a moderate amount of vile smelling purulent matter from the lower end of the incision. At that time I thought he was developing a fecal fistula which was later confirmed" (R. 16,17).

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and that

> "Since he reached the fatal stage his wound was, at the lower one-half, infected from the contents of the intestine draining into it.***There was nothing we could do to avoid the situation" (R. 17).

Witness testified he was present at the autopsy and:

> "In the abdomen we found that the entire small bowel was completely gangrenous as well as was the ascending colon and the approximate one-third of the transverse colon.*** In the terminal portion of the small bowel there was a perforation which was inherent to the original incision and which was the source of the drainage which I referred to" (R. 18).

Witness then testified:

> "Q: After having attended Master Sergeant Koenig from the time of his entry into the 94th Evacuation Hospital, on 16 October, 1943, up until the time of his death which occured, as you testified, on or about the 2nd or 3rd of November, 1943, what, in your opinion caused the patient's death?
> A: The primary cause of death was gangrene of the bowel.
>
> Q: When Master Sergeant Koenig entered the hospital did he have a wound in his abdomen?
> A: Yes sir.
>
> Q: Could that wound have been caused by a knife?
> A: Yes sir.
>
> Q: Could that particular wound....Was this wound which Master Sergeant Koenig suffered, in your opinion, the cause which set in motion the chain of events that you have testified to the court, that resulted in the death of Sergeant Koenig?
> A: I believe it did.
>
> Q: Would you, in your opinion, say that these intervening causes which you described to the court, were links in a chain of causation relating to Master Sergeant Koenig's death, set in motion by this wound?
> A: Yes, I believe it did." (R. 19)

Witness testified further that he observed the original wound, that the knife "contacted" Koenig's liver and:

> "It is possible that it also contacted and perforated the

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bowel.***The stab wound, I would say, entered roughly half way between both these areas and it could easily have penetrated the small bowel" (R. 20).

Witness testified further that a man having gangrene of the bowel will die whether stabbed or not and that it was "conceivable" that the gangrene of the bowel could have been caused by something other than the stab wound (R. 22,23). He also testified that Koenig was 41 years of age and received normal and reasonable treatment (R. 26,27).

A defense medical witness, Lieutenant Colonel Everett C. Drash, Medical Corps, 8th Evacuation Hospital, testified it seemed to him the only possible explanation for the gangrenous condition of the bowel was thrombosis. He observed that "the gangrene was limited to the exact area that was supplied by the upper mesenteric artery". He felt volvulus was "extremely unlikely", as it "almost never occurs unless there is some congenital abnormality present" and "none was found". (R. 31) Witness also testified:

> "As far as the nerve influence is concerned I think that again, is very unlikely because the same mechanism exercises in every patient who has peritonitis irritation, whether from blood in the peritonial cavity or peritonitis from any cause. If that were true any patient with peritonitis irritation would be liable to have gangrene of the bowel. This is quite rare and in my experience I have never seen it. Gangrene of the bowel is quite rare and almost never occurs associated with peritonitis. For these reasons we will fall back to the first possibility. That the gangrene of the bowel which is supplied by the superior mesenteric artery must have been due to some block in the artery and which was not discovered at autopsy" (R. 31,32).

He thought the wound was "a part of the complete picture", that it would have been very unlikely that death would have occurred "in this way" if deceased had not received the original wound. The wound had "an indirect connection", "not very direct" with the thrombosis as that is very unusual in a person who is up and around. It tends to occur in a patient who is usually "bedfast". Koenig had gone through two operations and was a bed patient for 16 days before he died. Asked if he could clarify the relationship of the gangrene as the cause of death to the original wound this witness replied:

> "Yes, I think it was a part of the complete picture. In other words I think it very unlikely that death would have occurred in this way had not he received the original wound." (R. 32)

Another defense medical witness, Major Maurice L. LeBreauer, Medical Corps, of the 8th Evacuation Hospital, testified that in his opinion the

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gangrene could have occurred if Koenig had not been stabbed and that the gangrene was indirectly, not directly related to the wound. Asked if "in this particular case" he thought the knife wound "had any effect on causing the gangrene" witness replied:

> "It would be difficult to place the blame on the knife wound. Indirectly it is entirely possible to say it (the gangrenous condition of the bowel) was related to the knife wound but not directly." (R. 33,34)

Lieutenant Colonel Drash and Major LeBreauer were present during the second half of Captain Gummess' testimony and most of Major Darrah's testimony. They were advised that they could use the facts disclosed thereby as a basis for their testimony. (R. 31,34)

Accused elected to remain silent (R. 67).

4. It thus appears from the evidence that on the night of the date alleged in the Specification accused, while drunk, had an argument with Sergeant Koenig, the person named in the Specification, and shortly thereafter Koenig, with a knife identified as accused's in his possession, sought and received medical attention for a stab wound in the abdomen. It further appears that later when accused was about to be confined in the stockade and was sober he asked how badly accused was cut. There is substantial evidence to warrant the inference that accused stabbed Sergeant Koenig as alleged. Koenig died some 18 days later.

The record presents a question as to whether in legal contemplation the evidence discloses a sufficient causal connection between the stab wound and Koenig's death. That Koenig received prompt, normal and approved medical attention and that the immediate cause of death was gangrene of the small bowel was not disputed. There is no evidence of malpractice or negligence on the part of any of the medical personnel who attended him. The surgeon who attended Koenig from the time he entered the hospital, performed the operations on him and witnessed the autopsy, testified that the stab wound was the cause which set in motion the chain of events which resulted in his death. This opinion was concurred in by another surgeon who attended accused. One of the defense medical witnesses testified he thought the stab wound was "a part of the complete picture" and that it was "very unlikely that death would have occurred in this way had not he received the original wound". The other defense medical witness testified that indirectly it was "entirely possible to say it (the gangrenous condition) was related to the knife wound, but not directly".

As to whether this evidence is sufficient to support the included finding of causation must be determined by the established rules of causal connection as applied in homicide cases. Following are authorities in which rules pertinent to the instant case are announced:

29 Corpus Juris, Homicide, Section 55, page 1080:

"Death Resulting from Disease Caused by Injury. If a wound

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or other injury causes a disease, such as gangrene, empyema, erysipelas, pneumonia, or the like, from which deceased dies, he who inflicted the wound or other injury is responsible for the death."

The following illustration of the above rule is set forth under Section 55, supra:

"'Where pistol shot wounds inflicted by defendant on a pregnant woman cause a miscarriage, and the miscarriage causes septic peritonitis, and the septic peritonitis thus induced causes the death of the woman shot, defendant is guilty of the homicide. Peo. v. Kane, 213 N.Y. 260, 107 NE 655, LRA1915F 607, AnnCas1916C 685, 32 N.Y. Cr. 365.'"

26 American Jurisprudence, Section 52, page 195:

"Disease or Physical Condition Resulting from, or Co-operating with, Injury.--One who inflicts a blow or wound upon another, which devolves into or initiates an affliction or disease, is criminally responsible for the death of such person ultimately resulting from the affliction or disease. It is not indispensable to a conviction that the wounds be necessarily fatal and the direct cause of death. It is sufficient that they cause death indirectly through a chain of natural effects and causes unchanged by human action. This rule is applied not merely where the consequential development is in the form of an immediate infection of the wound itself, such as erysipelas, septicemia, or blood poisoning, but also where the condition developing is anatomically dissociated from the mere external wound, as in the case of miscarriage or pneumonia, or where blows cause congestion of the brain resulting in death, or in exposure which causes death. It is equally well settled that the consequences of an act which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the pre-existing physical condition of the person killed, at the time the act was done, or by his low vitality, which rendered him unable to withstand the shock of the wound inflicted, and without which predisposed condition the blow would not have been fatal, if a causal connection between the blow and the fact of death is made to appear."

Wharton's Criminal Law, 12th Edition, Section 201, pages 259,260):

"No defense that death was caused by disease induced by wound. Where a wound, in its regular course, induces a fever which leads to death, the party inflicting the wound is responsible for the consequences. Even if a man is laboring under a mortal disease, those who hasten his death

are responsible for the homicide. Nor is it any defense that the constitution, age, or habits of the deceased made him peculiarly susceptible to such disease as the wound inflicted would probably engender. But it is easy to imagine a case in which a slight scratch, by producing local inflammation, might terminate in death; and in such case it would seem hard, at the first view, to charge the defendant with a result which would not under ordinary circumstances follow from such a wound. Yet if the defendant intended to take life, and in shooting, for instance, inflicted a wound which, though not ordinarily dangerous, in the particular case produced lockjaw, we cannot say that the deceased's death did not ensue in the ordinary course of events from the shooting. The difficulty arises where a scratch is negligently given by a nonlethal instrument. Here we can truly say that as the death was not an ordinary consequence of the negligence, there is no imputability of murder. Supposing, however, a person negligently uses a dangerous instrument, then we must hold he is liable for the consequences, peculiar as they may be, which wounds from this instrument produce. For it is in accordance with the ordinary course of events that a dangerous instrument, if negligently used, should produce dangerous results."

Following are some comparatively recent decisions from representative jurisdictions dealing with the question of causation in homicide cases:

Where a dangerous wound is wrongfully inflicted, although of such character not necessarily calculated to cause death, yet by reason of infection does result fatally, it is sufficient to sustain prosecution for homicide (Commonwealth v. Kilburn, 34 S.W. (2) 728, 236 Ky. 828).

Generally, one inflicting injury, which combined with disease, caused victim's death or accelerated death from disease, is criminally liable therefor (Rutledge v. State, 15 P. (2) (Ariz) 255).

If wound causes disease which produced death and there is no evidence of gross neglect or improper treatment, death is imputable to wound (Moore v. State, 71 S.W. (2) (Tex.) 531).

One who inflicts injury on another is guilty of homicide if injury contributes mediately or immediately to other's death, and the fact that other causes contribute to death does not relieve other of responsibility (State v. Luster, 182 S.E. (S.C.) 427).

Where act of defendant accused of homicide contributed to death of victim, causal relation between unlawful act of defendant and death is made out, notwithstanding other independent causes also contributed (People v. Freeman, 60 P. (2) (Calif.) 333).

One who inflicts an injury on another is deemed by law to be guilty of

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homicide if injury contributes mediately or immediately to other's death, notwithstanding that other causes also contribute to death (Hicks v. State, 11 N.E. (2) (Ind.) 171).

If person dies by action of wound and by medical or surgical action, jointly, wound must be regarded sufficiently a cause of death, and wound need not even be concurrent cause, much less the next proximate cause, for if it is the cause of the cause, no more is required (Taylor v. State, 101 S.W. (2) (Ark.) 956).

As respects guilt of homicide, where wound causes disease which produces death and there is no evidence of gross neglect or improper treatment, death is imputable to the wound (Franklin v. State, 128 S.W. (2) (Tex.) 389).

One who inflicts a dangerous wound upon another is held for consequences flowing from that injury, whether sequence is direct or through operation of intermediate agencies dependent on and arising out of original cause (Rucker v. State, 129 S.W. (2) (Tenn.) 208).

If person inflicts a wound with deadly weapon in such manner as to put life in jeopardy and death follows as consequence of such felonious act, it does not diminish its criminality to prove that other causes cooperated in producing death (Commonwealth v. Giacommazza, 42 N.E. (2) (Mass.) 506).

When examined and appraised in the light of the above authorities, it is clear there is substantial evidence to warrant the conclusion that Koenig's death resulted from or was caused, in the legal sense, by the stab wound inflicted by accused.

5. The charge sheet shows that accused is 36 years old. He enlisted in the Army 5 June 1939 and had prior service from 10 October 1928 to 9 September 1931; from 31 July 1934 to 23 September 1936; from 25 September 1936 to 1 December 1937 and from 2 December 1937 to 5 May 1939.

6. The court was legally constituted. 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 and sentence. A sentence of death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

(absent), Judge Advocate.

Gordon Simpson, Judge Advocate.

Robert W. Mackey, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
31 May 1944.

Board of Review

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UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, U. S. Army, 12 May 1944.
Private LLOYD F. HANSON (17 001 150), Company G, 157th Infantry.	)	Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 Lloyd F. HANSON, Company "G", 157th Infantry, did, at Gioia, Italy, on or about 19 January 1944, without proper leave, absent himself from his organization until on or about 23 January 1944.

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

Specification: In that Private Lloyd F. HANSON, Company "G", 157th Infantry, did, near Gioia, Italy, on or about 23 January 1944, desert the service of the United States with intent to avoid hazardous duty, to wit: Combat duty against the Axis Forces, and did remain absent in desertion until he was apprehended near Naples, Italy on or about 14 February 1944.

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He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of three previous convictions by summary courts-martial, two for being drunk in uniform in a public place in violation of Article of War 96, and one for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for "the rest of" his natural life, three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "Eastern Branch of The United States Disciplinary Barracks, Greenhaven, New York", as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 19 January 1944 at a rest area at Gioia, Italy, accused absented himself without leave from his company and was brought back to his organization 23 January 1944, by members of the military police (R. 5,6,8). Asked by his company commander where he had been, accused replied "he had been in some little town" (R. 6). When he was returned to his company, at the same place, the company was preparing to go "to the staging area and had already struck tents" (R. 5). The company had been "alerted" and the company commander testified that "it is a common assumption that when you go to a staging area, sooner or later you will get" into action against the enemy (R. 6). This officer also testified that when accused was brought back on 23 January, he

> "went AWOL an hour after he came back. It was the 23rd. We searched for the man, I myself, and sent searching parties looking for him. The company moved and came to the Beachhead without him. He was apprehended by the Military Police and we got notice of it on 14 February" (R. 5).

Accused reported back to his company on "the Beachhead" about 1 March 1944 (R. 5,8).

Accused remained silent (R. 8).

4. It thus appears from uncontradicted evidence that at the place and time alleged in Charge I and its Specification, accused absented himself from his organization without proper leave and remained unauthorizedly absent until 23 January 1944. He was properly found guilty as here specified (MCM, 1928, par. 132).

It further appears from uncontradicted evidence that at the place and time alleged in Charge II and its Specification, accused again absented himself without leave from his organization and remained absent until on or about 14 February 1944. There is evidence that when accused was returned to his command on 23 February, he found it alerted and preparing to move to a staging area from where it was reasonably to be anticipated the organization would go into action against the enemy. It did, in fact, promptly enter combat in the Anzio Beachhead. Accused, who had been brought back to

his command by military policemen, remained there for only about an hour when he again unauthorizedly absented himself. The court was warranted in concluding that accused was motivated by the specific intent of avoiding the hazardous duty of participating with his organization in action against the enemy when he so absented himself and in finding him guilty as here charged (AW 28; MCM, 1928, par. 130a).

The termination of the absence alleged in the Specification, Charge II, was established by hearsay testimony but the time and manner of termination of accused's absence were immaterial, the gravamen of this offense being the quitting of his command with the intent to avoid hazardous duty (AW 28).

5. The charge sheet shows that accused is 24 years old. He enlisted in the Army 12 July 1940, and had no prior service.

6. The court was legally constituted. 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 and sentence.

Judge Advocate.

Gordon Simpson, Judge Advocate.

Donald W. Mackay, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
1 June 1944.

Board of Review

NATO 2329

UNITED STATES	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Anzio Beachhead, Italy, 12
Private SAMUEL C. HIMES	)	May 1944.
(33 139 153), Company B,	)	Dishonorable discharge and
180th Infantry.	)	confinement for life.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 Samuel C. Himes, Company B, 180th Infantry, did, without proper leave, at or near San Salvatore, Italy, absent himself without proper leave from his Company from on or about 17 October 1943 to on or about 24 October 1943.

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

Specification: In that Private Samuel C. Himes, Company B, 180th Infantry, did, at or near Valle, Italy, on or about the 17 December 1943, desert the service of the United States by absenting himself from his organization without proper leave with intent to avoid hazardous duty, to wit:

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Combat operations against elements of the German Army, and did remain absent in desertion until he surrendered himself at Caserta, Italy, on or about the 17 January 1944.

ADDITIONAL CHARGE

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Samuel C. Himes, Company B, 180th Infantry, did, at or near Padiglione, Italy, on or about 27 February 1944, desert the service of the United States by absenting himself without proper leave from his Company with intent to avoid hazardous duty, to wit: Combat operations against elements of the German Army and did remain absent in desertion until he was apprehended at or near Anzio, Italy on or about 29 April, 1944.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by special court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the "balance of his natural life", three fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "Eastern Branch of The United States Disciplinary Barracks, Greenhaven, New York" as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to Charge I and its Specification, the evidence shows that on 17 October 1943, in the vicinity of San Salvatore, Italy, accused absented himself without leave from his organization and remained absent until 24 October 1943 (R. 4,5; Ex. A).

As to Charge II and its Specification, the evidence shows that on 17 December 1943, near Valle, Italy, accused again absented himself without leave from his company and remained absent until 17 January 1944 (R. 4,5,8; Ex. A). When accused so absented himself, his "company was in an assembly area" and its members were "on the alert to move out on very short notice", "preparing to go on the front lines" (R. 5,8). When the company "pulled out that night" accused was not present (R. 6). The second night after it had moved "into position", the company came under enemy artillery fire and suffered some casualties (R. 7).

As to the Additional Charge and its Specification, the evidence shows that on 27 February 1944, near Padiglione, Italy, (in the Anzio Beachhead) accused again absented himself without leave from his organization and remained absent until apprehended the latter part of April 1944, approximately two or three weeks before the day of the trial (12 May 1944) (R. 1,4, 12,13; Ex. B). On 27 February, patrols of accused's company were in contact with the enemy and the unit was under enemy mortar, artillery and small

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arms fire and was suffering some casualties (R. 7). On that date, accused was on a patrol which captured some prisoners of war. These prisoners were taken to the battalion command post in charge of accused and another soldier. Accused never returned to his command until his subsequent apprehension (R. 6,9,10,11,14).

Second Lieutenant Robert W. Hamilton, Headquarters 180th Infantry Regiment, testified he saw accused "around the middle of February" and asked him if he had deserted his company to which accused replied "no". This officer then "took him back to his battalion CP" (R. 11,12).

First Lieutenant Sam Doering, Headquarters VI Corps, testified that about the "latter" part of April, he had some information that "some American soldiers had been staying with some colored soldiers in another unit". He made a search and found accused "sitting on the bed there playing cards with some of the colored soldiers" (R. 12). Accused claimed he was from the "10th Barrage Balloon company". Lieutenant Doering took accused and another soldier he had also apprehended into custody and took them to their company commanders for identification. This officer testified:

> "After we started down the road, I don't know which one of them it was but he made it clear that they were stragglers and had been just staying around in various places. They said they had been staying in caves and so on around the place and went over there to play cards occasionally" (R. 13).

On or about 9 May 1944, after the investigating officer had warned him of "his right to remain silent or to make a statement with knowledge that if he did so choose to make a statement, it could, and probably would, be used against him in the event of trial", accused stated orally that he left his company sometime in February, 1944, when he had been instructed to take "some prisoners back to the rear" and when "he got these prisoners back there, something happened that he couldn't get back up to his company" so he went to the "Cannon Company of the 180th Infantry and stayed there for a few days" (R. 13,14). Afterwards he "went up around Campo Morto where he had been picked up by some MPs". He stated further that

> "he talked with Lt. Hamilton of our regimental MPs who told him to go back to Company B which was his company. He said that he went back by Cannon Company and that he intended to go to his company but they started shelling, or some activity anyway, and instead he went down around the coastal towns here and he stayed there until he was picked up" (R. 14).

Accused remained silent.

4. It thus appears from uncontradicted evidence that at the place and time alleged in Charge I and its Specification, accused absented himself without proper leave from his organization and remained unauthorizedly absent

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until on or about 24 October 1943. He was properly found guilty as here charged (MCM, 1928, par. 132).

It also appears from uncontradicted evidence that at the place and time alleged in Charge II and its Specification, accused again absented himself without proper leave from his organization and remained unauthorizedly absent until on or about 17 January 1944. There is evidence that when accused so absented himself, his company was on the "alert" to move out on short notice. The evidence indicates that shortly the command actually moved into combat position, came under hostile gunfire and suffered casualties. The accused was then absent from his unit and the circumstances warrant the inference that when he absented himself accused was actuated by an intent to avoid the hazardous duty of engaging in "combat operations against elements of the German army" as here averred. The court was warranted in finding him guilty as charged. The place and manner of accused's return to military control does not appear nor is it of any importance here where the gravamen of the offense charged is the quitting of his command with the intent to avoid hazardous duty (AW 28; MCM, 1928, par. 130a).

It also appears from uncontradicted evidence that at the place and time alleged in the Additional Charge and its Specification, accused absented himself without leave from his command and remained unauthorizedly absent until on or about 29 April 1944. Accused was a member of a combat patrol which had taken enemy prisoners. He was directed to take them to the rear. At the time accused's company was under enemy fire and was suffering casualties. When accused reached the battalion command post with the prisoners, he failed to rejoin his unit but straggled with another organization. He stated that at one time he was about to rejoin his own unit but "they started shelling, or some activity anyhow" and instead he continued his straggling around coastal towns until his apprehension. It is fairly to be inferred from these and the other circumstances in evidence that accused absented himself without leave from his organization with an intent to avoid the hazardous duty of "combat operations against elements of the German army", as averred. He was properly found guilty as charged (AW 28; MCM, 1928, par. 130a).

5. Accused stated he is 24 years old. He was inducted into the Army 7 February 1942. No prior service is shown (R. 15).

6. The court was legally constituted. 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 and sentence.

Samuel E. Gluyas, Judge Advocate.

Gordon Simpson, Judge Advocate.

Donald K. MacKay, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
15 June 1944.

Board of Review

NATO 2371

UNITED STATES	)	XV AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Bari, Italy, 21 March 1944.
	)	
Major HAROLD W. NEWMAN (0 338 485), Headquarters and Headquarters Squadron, 43d Service Group.	)	Dismissal and confinement for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

The record of trial in the case of the officer named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Samuel E. Holmgren, Judge Advocate.
Lawrence Simpson, Judge Advocate.
Donald K. MacKay, Judge Advocate.

NATO 2371 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army,
15 June 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Major Harold W. Newman (0 338 485), Headquarters and Headquarters Squadron, 43d Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally

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NATO 2371, 1st Ind.
15 June 1944 (Continued).

sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2371).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 40, NATO, 16 Jun 1944)

Board of Review

15 June 1944.

NATO 2371

MEMORANDUM:

SUBJECT: Record of trial in the case of Major HAROLD W. NEWMAN (0 338 485), Headquarters and Headquarters Squadron, 43d Service Group.

1. It was alleged in the Specification, Charge I, that at Cerignola, Italy, on or about 12 February 1944, accused did "willfully, feloniously, and unlawfully" kill Staff Sergeant Warren E. West, 737th Squadron, 454th Bomb Group, by shooting him with a pistol. The court found accused guilty as specified.

2. There is evidence that at the place and time alleged in the Specification, Charge I, accused and an enlisted man went to an officers' mess where they found 15 or more Italians "right up to the door" of the building (R. 72). Accused and the soldier "began chasing them away" and at this time accused discharged his pistol (R. 73). He entered the officers' mess and said that "he had just fired a gun and it scared hell out of some civilians" (R. 63,66). The soldier accompanying accused testified that the latter "stated that he fired over a truck in an attempt to slow it down" (R. 81). Accused testified that a speeding truck was passing and

> "There were several civilians there. I got off the curb and was standing in the street and out away from the civilians to try to slow down this truck. I had my yellow gloves on and thought it would make it more plain to him. He made no attempt to slow down,***so I pulled the gun out, pulled the slide back and pulled the trigger" (R. 115).

Accused testified further he was positive the pistol was pointed in the air when he fired (R. 116).

The officers' mess in front of which the shooting occurred was on Via Roma, the main street in Cerignola, Italy, where both vehicular and pedestrian traffic was, as a rule, "very heavy" (R. 6,8,9,75).

There is also evidence that the bullet fired by accused ricocheted in the course of its flight and struck and killed Staff Sergeant West who at the time was walking along Via Roma about 100 yards from where the pistol was discharged (R. 6,7,11-14,17-19,24,25,27-29,33-37,39,41,42,44-48,55-60, 88,90; Exs. B,D,E,F,H).

3. By the findings of the court, accused stands convicted of the offense of voluntary manslaughter.

In considering the elements of voluntary manslaughter, Wharton's

Criminal Law (12th Edition), Section 426 (page 660), announces that:

> "Negligently handling loaded gun or pistol, causing death, constitutes the crime of voluntary manslaughter at common law; as where a recklessly fired shot results in a homicide, without an intention to kill; or pointing a loaded pistol, believing it would not be discharged; or attempting to shoot over the head of another, knowing that thereby the life of such person was endangered, death resulting, the crime is voluntary manslaughter, although the act was simply a reckless one and without malice",

and the intent and willfulness involved in voluntary manslaughter are treated in 29 Corpus Juris, Pages 1128 and 1129, as follows:

> "While a specific intent to kill is not an essential element of manslaughter, although it may be present, nevertheless, to constitute voluntary manslaughter, the killing not only may, but must, be willful or intentional. An intention to kill may be inferred from the willful use of a deadly weapon; but, if the weapon is not deadly, the intent to kill cannot be inferred, but must appear from the evidence. There is also authority to the effect that one may be guilty of voluntary manslaughter by shooting in a wanton, reckless, and careless manner, or by the reckless and careless use of a deadly weapon, and thereby killing a person, or causing death by other acts manifestly dangerous to life, but this on principle can only be on the ground of an inference of actual intent to do harm, and if there was in fact no intent, the killing is either murder or involuntary manslaughter".

Illustrative of the theory that death ensuing from the negligent use of firearms may be voluntary homicide, the Supreme Court of Kentucky announced that it was established by a long line of cases that

> "where one kills another by the wanton, reckless, or grossly careless use of firearms, the offense, if without malice aforethought, is voluntary manslaughter, although he had no intention to kill. (citing authorities). These opinions rest on the common-law principle that a man must be held to intend the necessary consequence of his act" (Ewing v. Com., 129 Ky. 237,242, 111 SW 352, cited in footnote 18, 29 C.J. 1129).

Even malice aforethought, the intent involved in murder, the higher degree of unlawful homicide, may be implied from conscious recklessness. As stated in the Manual for Courts-Martial, malice aforethought (which includes willfulness) may exist when there is

"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" (par. 148a).

The circumstances of the instant case warrant the conclusion that accused's act in discharging the pistol was unlawful and likely to endanger life, thus appropriately excluding the hypothesis that the resultant homicide constituted merely involuntary manslaughter (MCM, 1928, par. 149a). It can reasonably be said that the act of discharging the deadly weapon under the conditions and circumstances shown, was reckless or grossly careless and that accused must be held to have intended the consequence of his act. Contravening accused's claim that he fired the pistol in the air, is evidence indicating that the bullet ricocheted upon a hard surface before it struck Sergeant West. The conclusion reasonably follows that accused recklessly fired the pistol in a manner predictably calculated to endanger life and that the court was justified in finding as it did that accused's conduct was in legal effect willful.

Judge Advocate.

Judge Advocate.

Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
16 June 1944.

Board of Review

NATO 2373

UNITED STATES	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 36, U. S. Army, 5 April 1944.
Privates SEBASTIAN J. DI MAURO (31 325 678), VESTER JOHNSON (34 253 788) and JASPER L. RINE (35 037 711), all of Company F, 143d Infantry.	)	As to each: Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

2. Accused were jointly tried upon separate Charges and Specifications, as follows:

DI MAURO

CHARGE I: Violation of the 75th Article of War.
(Finding of guilty disapproved.)

Specification: (Finding of guilty disapproved.)

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

Specification: In that Private Sebastian J. DiMauro, Company F, 143rd Infantry, did, at or near Paestum, Italy, on or about 11 September 1943, desert the service of the United States, by quitting his organization, and did remain absent in desertion until he was apprehended at or near Paestum, Italy, on or about 1 March 1944.

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JOHNSON

CHARGE I: Violation of the 75th Article of War.
(Finding of guilty disapproved.)

Specification: (Finding of guilty disapproved.)

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

Specification: In that Private Vester (nmi) Johnson, Company F, 143rd Infantry, did, at or near Paestum, Italy, on or about 11 September 1943, desert the service of the United States, by quitting his organization, and did remain absent in desertion until he was apprehended at or near Paestum, Italy, on or about 1 March 1944.

RINE

CHARGE I: Violation of the 75th Article of War.
(Finding of guilty disapproved.)

Specification: (Finding of guilty disapproved.)

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

Specification: In that Private Jasper L. Rine, Company F, 143rd Infantry, did, at or near Paestum, Italy, on or about 11 September 1943, desert the service of the United States, by quitting his organization, and did remain absent in desertion until he was apprehended at or near Paestum, Italy, on or about 1 March 1944.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced. Each was sentenced to be shot to death with musketry, all of the members of the court present concurring. The reviewing authority approved each sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, disapproved the findings of guilty of Charge I and its Specification in the case of each accused, confirmed each sentence but commuted each to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the morning of 9 September 1943 accused's organization, Company F, 143d Infantry, participated in an amphibious landing at Paestum, Italy, and engaged with the enemy (R. 11,18). An assembly point had been designated and each of the accused had been instructed as to its location. They were carrying ammunition which they were

"supposed" to carry forward, "out to the battalion" (R. 14,19). The boat on which accused Rine and Johnson came ashore was 15 minutes behind those carrying the other members of their organization (R. 14). After landing, the occupants of the boat immediately started to join their organization as directed but they were met by their battalion supply officer who told them they could not reach their company and not to go forward that day because of a tank engagement (R. 11,14,15,18). The next morning they went to the division headquarters where they were joined by accused DiMauro when they were about to have lunch. While they were eating, a sergeant from their battalion talked with Technician Fifth Grade George Scott, a member of accused's company, who was in the group. Scott testified that the sergeant showed him where the battalion was located. He further testified the group were "all standing together when this sergeant talked" (R. 12,19). He also testified "We could see the mountain and he showed us pointing about where the company was" and that at that time each of the accused was present (R. 20). Scott and another member of the group were picked up in a "jeep" by the sergeant and Scott returned to his company (R. 12,19). This witness also testified neither he nor anyone he knew gave accused permission to remain absent from the organization on 10 September or 11 September (R. 19).

Technician Fourth Grade Flavius B. Hall, also a member of accused's organization and the senior noncommissioned officer present with the group, testified that after eating lunch he left accused telling them he was "going out and find the Regiment". He learned the location of the Service Company where a "straggler line" was maintained for troops "who didn't know where to go", and a warrant officer told Hall to take the other men and report to that company (R. 12,14). Hall returned to get the accused and heard one of them say "I like this place just fine" (R. 13). Hall testified that then

> "I told them I found the place where we could go and told them to go with me and they looked at each other and were slow about moving and that is why it seemed they had some little discussion between them while I was gone" (R. 15).

He further testified that the accused refused to go and that they all said they would not go (R. 13,15,16); that

> "I put back my pack real slow and took about ten steps and asked them two or three times to follow me. They didn't make any move at any time to leave and I left them, all three of them. They distinctly knew that I knew where to go. I believe they knew that so they sat there and didn't make any attempt to go farther" (R. 16).

This witness did not say anything further, but joined the Service Company and subsequently his own organization (R. 13,16).

Another noncommissioned officer, a member of the 36th Division Military Police Platoon testified he apprehended the three accused on or about 1 March 1944 in a house in the town of Martinelle, near Paestum (R. 21).

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An extract copy of the morning report of Company F, 143d Infantry, was admitted in evidence, "as it applies to each of the accused", the defense stating it had no objection (R. 17; Pros. Ex. 1). It contained the following entries:

"11 Sept 43
34253788 - Johnson, Vester (NMI) Pvt
35037711 - Rine, Jasper L. Pvt
31325678 - DiMauro, Sebastian J. Pvt

Above 3 EM fr Dy to MIA near Paestum, Italy.

2 Oct 43

34253788 - Johnson, Vester (NMI) Pvt
35037711 - Rine, Jasper L. Pvt
31325678 - DiMauro, Sebastian J. Pvt

Above 3 EM fr MIA to Drop fr Rolls of this organization.

1 Mar 44
34253788 - Johnson, Vester (NMI) Pvt
35037711 - Rine, Jasper L. Pvt
31325678 - DiMauro, Sebastian J. Pvt

Above 3 EM fr Drpd fr Rolls to Pr Conf as of 1 Mar 44" (Pros. Ex. 1).

The certificate of authenticity states that the entries are copies of the part of the morning report "which relates to Pvt Vester (NMI) Johnson".

Accused DiMauro testified that he had been designated to act as an interpreter for a Captain Bayne and was to find him on the beach, but that though he waited there three hours he did not see the officer. The next day after DiMauro met Johnson, Rine, and Hall at the division "CP", Hall left saying he was going to find the organization and he did not see Hall thereafter. On 11 September 1943, they went to Capacchio where witness "presumed" their company was located, but they did not find any of their elements there and that they went up a mountain to about the place the "CP" was supposed to be and there learned their "outfit***had moved up" (R. 22,23,25). He further testified that

> "We asked a lieutenant about our outfit, if he knew anything about it. As far as he knew they were still on the front lines and the best thing to do was to wait until they got back and join up with them then" (R. 23),

and "There was nothing to do but to wait" (R. 25). He heard fighting going on but "didn't go up there" (R. 27). He attempted to learn the whereabouts of his division by asking "an artillery and antiaircraft outfit", two

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military policemen in Naples, some paratroopers, a sergeant in a motor pool, at a ration dump, and "soldiers at the air corps" (R. 24). Accused did not try to see anyone at the division headquarters and about 20 November 1943 went to Martinelle and in February went to Naples but returned to Martinelle (R. 25,27). DiMauro testified that during the period from 11 September 1943 until 1 March 1944 they obtained food by going to an Air Corps base, where "no questions were asked", but living "was pretty bad" (R. 26,28).

Accused Rine testified that he landed with Hall and after spending the first night in the town "a little off the beach" they joined a line of stragglers in the vicinity of the division "CP", though at the time they did not know the "CP" to be such. They had been told to join their command at the railway, but when they got there the organization had gone ahead. Hall left to look for the company and did not return (R. 29,30). He looked at some graves near the "CP" with DiMauro, but Rine did not go to the personnel section of his regiment or join the straggler line (R. 32). At about 1100 hours they left the division "CP" and went to Capacchio, where "there was no shooting***not in that direction". This accused further testified that they learned the 143d "CP" was about 15 miles ahead, but they did not start going there because they were ordered by a lieutenant "to wait until they came back for a rest". They stayed there from 11 September to 20 November and then went to Martinelle where they stayed until 1 March 1944. They did nothing, "just sat around" (R. 31,32). Twice they went to Naples looking for their organization "but couldn't find out much". They also tried to go back to division headquarters (R. 30,32). Rine tried to locate the division at least three times between 9 September 1943 and 1 March 1944 (R. 33).

Accused Johnson testified he and Rine did not find any other members of their company at the railway and that Hall did not order him to go with Hall to locate the company. The day after Hall departed, the accused left the division headquarters, but he did not know where they went or in what direction. They learned that their units were about 15 miles ahead of them but a lieutenant told them "to wait there" and they did not go farther. Johnson did not know the name of the lieutenant who told them "to wait there" or whether he was an officer of the company. He did not know the officers of Company F although he had been in that organization "since Camp Blanding, Florida". He did not know how long they remained in the different places they stopped and, though he did not report to anyone, he did try to rejoin his company (R. 36,37). He believed his unit was fighting and he was very anxious to walk "north" but he did not do so and did not know why he did not. He never went back to his division headquarters and stayed with the other two accused all the time, but intended to rejoin his company (R. 38).

4. It thus appears from substantial evidence that at the place and time alleged each accused absented himself without authority from the service of the United States and remained absent until apprehended as alleged. The three accused were within sight of the location of their company on 10 September 1943 and were under competent orders to join it.

Their subsequent failure to report to their organization resulted in an absence without leave from their company (NATO 1087, Lapiska). Similarly, on that same date each accused refused to accompany the senior noncommissioned officer of the group and report to their Regimental Service Company where a "straggler line" was then being maintained for men separated from their units. Also, on 11 September each accused, then at his division command post, left that area and stayed absent from military control for almost six months. Thus it appears each accused absented himself from his company without proper leave as found. As the absences were much prolonged and no satisfactory explanation of them was given, the court was justified in inferring from that and the other circumstances in the case an intent on the part of each accused to remain permanently absent. The only explanation offered by accused for remaining absent, removed from their organization and free from military control, was an alleged order of an unknown and unidentified lieutenant to wait until their organization came back. This testimony as well as that of the accused that they intended to rejoin their company was for the court to believe or reject in whole or in part. The absences occurred in a theater of hostilities and continued for approximately six months though the accused were frequently at or near Army installations at which they might return to military control. The court was justified in concluding that each accused was guilty of desertion as alleged (MCM, 1928, par. 130a).

The extract copy of the morning report showing accused missing in action, which was admitted "as it applies to each of the accused" (R. 17), purports in its certification to apply only to accused Johnson. It is manifest, however, that the exhibit was intended to apply to all accused and the defense stated it had no objection to the admission of the document. The failure to object operated to waive any objection based on faulty authentication (MCM, 1928, par. 116a).

5. Accused were tried jointly upon separate but substantially identical charges and specifications, without their express consent, and, so far as the record shows, in the absence of an order for common trial from the convening authority. None of the accused objected to the procedure, and each was accorded every right and privilege which he would have had if tried separately, including the right of peremptory challenge. In no respect was the defense of any of the accused antagonistic or prejudicial to either of the other accused (MCM, 1928, pars. 49c,71b). While it would have been preferable if the convening authority had directed the common trial and each accused had been asked if he had any objection thereto, it does not appear that any accused was in any respect prejudiced by the procedure.

6. The charge sheets show that accused DiMauro is 21 years old and was inducted into the Army 26 February 1943; that accused Johnson is 25 years old, and his service "Ft. Bragg, N. C. 6 March 1942"; that accused Rine is 24 years old.

7. The court was legally constituted. 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 and the sentences.

Judge Advocate.

, Judge Advocate.

, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
16 June 1944.

Board of Review

NATO 2373

UNITED STATES	)	36TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 36, U. S. Army, 5 April 1944.
Privates SEBASTIAN J. DI MAURO (31 325 678), VESTER JOHNSON (34 253 788) and JASPER L. RINE (35 037 711), all of Company F, 143d Infantry.	)	As to each: Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to support the sentences.

Samuel E. Holmgren, Judge Advocate.
Gordon Simpson, Judge Advocate.
Donald K. Mackay, Judge Advocate.

NATO 2373 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 16 June 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Privates Sebastian J. DiMauro (31 325 678), Vester Johnson (34 253 788) and Jasper L. Rine (35 027 711), all of Company F,

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NATO 2373, 1st Ind.
16 June 1944 (Continued).

143d Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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. After publication of the general court-martial order in the case, 11 copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2373).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as to each accused as commuted ordered executed.
GCMO 41, NATO, 17 Jun 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
14 June 1944.

Board of Review

NATO 2376

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by G.C.M., convened at APO 306, U. S. Army, 14 April 1944.
Second Lieutenant ERNEST A. SHRUM (01 177 976), Field Artillery Section, Headquarters VI Corps.	)	Dismissal and confinement for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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.

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

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

Specification: In that 2nd Lt. Ernest A. Shrum, F.A. Hq, VI Corps, was, at Nisida, Italy, on or about 23 January 1944, found drunk while on duty.

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

Specification 1: In that 2nd Lt. Ernest A. Shrum, F.A. Hq, VI Corps, did, at Nisida, Italy, on or about 23 January 1944 desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of Naples, Italy, on or about 30 January 1944.

Specification 2: In that 2nd Lt. Ernest A. Shrum, F.A., Hq VI

Corps, did, in the vicinity of Naples, Italy, on or about 30 January 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended in the vicinity of Avella, Italy, on or about 3 March 1944.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications. He was found guilty of the Charges and Specifications. The trial judge advocate stated in the presence of the court and accused that he had evidence of one previous conviction but this evidence was not introduced. Accused was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor 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 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence, mitigated the confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 23 January 1944, at Nisida, Italy, accused's battery was "loading on board an LST". In the performance of "his specific duties", accused had gone to the "water-proofing area" before the remainder of the battery and, as assistant "TQM", was helping load the ship and was making arrangements for the battery mess (R. 7,8). Accused had been "drinking a bit" (R. 7) and his battery commander gave him "a direct order to stay in his quarters" in the cabin of the vessel (R. 8). This officer testified that he would say accused "had been drinking too much", that he was drunk (R. 9). He took accused to his cabin to "make sure he got there" (R. 9,10). Accused was not "temporarily" off duty when found drunk, "it was prior to supper and the mess should have been organized and cooking started" (R. 10). Lieutenant Colonel John R. Culleton, Headquarters, VI Corps, another of accused's superior officers, testified that on 23 January 1944, accused "came to my cabin and talked to me. At that time he was drunk" (R. 11). This witness testified that he told accused to go to his cabin and stay there and that he would see him the following morning (R. 12). He further testified that he did not believe accused

> "was in a very rational condition. I don't believe he could have thought out his actions from then on in. He was completely befuddled by liquor" (R. 12).

Accused's battery commander testified that

> "Then we sailed and at that time I didn't see him and as he didn't come to dinner, we had the whole ship searched and he wasn't there***" (R. 8).

Neither his battery commander nor Colonel Culleton saw accused again until

the day of the trial. Both these officers testified accused did not have permission to absent himself from his organization "at any time during that period" (R. 9,11,12).

On 30 January 1944, an officer of the Corps of Military Police, stationed with the rear echelon of the Fifth Army, observed accused with another officer getting into a stolen "jeep" and "took them to the Provost Marshal's Office at Bagnoli", Italy (R. 14). There accused, who was wearing an officer's uniform and insignia, exhibited documents identifying himself and said he was stationed at Nisida with the VI Corps Headquarters. Accused "wasn't charged with anything" and no official record was made at the Provost Marshal's office respecting his detention (R. 14,15). He was released and furnished a driver to take him back to Nisida where accused stated he could be found any time (R. 14,15). On the following day the officer who had taken accused into custody tried without success to locate him at Nisida (R. 14,16).

On 3 March 1944, accused was apprehended in a farmhouse near Avella, Italy. Two "troopers" and a private from the Canadian Army and one private from the American Army were with accused when he was apprehended (R. 17,18, 19). A witness testified that "They had several beds set up and they had their belongings strewn out at the farmhouse" (R. 18). Accused "appeared to be an enlisted man" but he gave his correct name and stated he was an officer when interrogated by an agent of the Criminal Investigation Division (R. 19,20).

Accused elected to remain silent (R. 21).

4. It thus appears from the evidence as well as accused's pleas of guilty that at the place and time alleged in Charge I and its Specification, accused was found drunk on duty. He was properly found guilty as here averred.

It is also shown by uncontradicted evidence that at the place and time alleged in Specification 1, Charge II, accused absented himself without leave from his organization and that seven days later he was taken into custody by military police, near Naples, Italy. Accused effected his release from this custody by representing that his station was at near-by Nisida and that he could be found there at any time. Instead of returning to that station, he resumed his unauthorized absence, which continued until his apprehension 33 days later, near Avella, Italy (Specification 2, Charge II). Accused was found attired as an enlisted man and living in a farmhouse, where he was consorting with enlisted personnel. These and other circumstances, together with the fact that accused's initial absence was concurrent in point of time with his having been found drunk on duty and had thereupon been ordered by his superior officer to repair to and remain in his quarters on a landing ship, warranted the court's finding that the unauthorized absence set forth in each Specification was accompanied by an intent to remain permanently absent from his command. The findings were justified. While it might be said that the periods of absence set forth by the two

Specifications constituted, in effect, but one continuous absence and hence one act of desertion, the sentence imposed would have been authorized upon the finding of guilty of any one of the Specifications.

5. While the original sentence of the court was that accused be "dishonorably discharged" the service, the court "upon express stipulation by the accused and the defense counsel that there was no objection", reconvened about two hours after adjournment and amended the sentence to provide for the more appropriate sentence of dismissal. The procedure was clearly proper (CM 166782; Dig. Op. JAG, 1912-40, sec. 395 (37)).

6. The charge sheet shows that accused is 23 years old. Accused stated that he enlisted in the 18th Field Artillery 13 March 1939 and was commissioned Second Lieutenant 19 February 1943 (R. 23).

7. The court was legally constituted. 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 and sentence.

Judge Advocate.

Simpson, Judge Advocate.

Donald K. McKay, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
14 June 1944.

Board of Review

NATO 2376

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by G.C.M., convened at APO 306, U. S. Army, 14 April 1944.
Second Lieutenant ERNEST A. SHRUM (01 177 976), Field Artillery Section, Headquarters VI Corps.	)	Dismissal and confinement for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

The record of trial in the case of the officer named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Samuel E. Holmgren, Judge Advocate.

Jerome Simpson, Judge Advocate.

Donald K. Mackay, Judge Advocate.

NATO 2376 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 14 June 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Second Lieutenant Ernest A. Shrum (01 177 976),

(68)

NATO 2376, 1st Ind.
14 June 1944 (Continued).

Field Artillery Section, Headquarters VI Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2376).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as mitigated ordered executed. GCMO 39, NATO. 16 Jun 1944)

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
13 June 1944.

Board of Review

NATO 2377

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 21 March 1944.
Private JOHN J. MURPHY	)	Dishonorable discharge and
(12 063 419), Sixth Port	)	confinement for life.
Headquarters Company,	)	U. S. Penitentiary, Lewisburg,
Transportation Corps.	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 92d Article of War.

Specification: In that Private John J. Murphy, Sixth Port Headquarters Company, Transportation Corps, did, at Valle di Maddaloni, Italy, on or about 30 January, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Caterina Vigliotta, a human being by kicking her about the head and body.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by special court-martial for larceny in violation of Article of War 93, was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming

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authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1000 hours on 30 January 1944, accused, who was then working at a stone quarry near Maddaloni, Italy, was observed following Caterina Vigliotta, a small girl, ten or eleven years old, away from the quarry "in the direction of the railway station" (R. 13,14,26,27). He returned to the quarry after an absence of about a half an hour (R. 27, 29). What happened in the interim was told in a written statement accused made on 2 February 1944 after being warned that "under the 24th Article of War, he didn't have to make a formal statement and that if he did, it might be used against him". Accused was asked if he "would wish to make a statement, and he said he would" (R. 21). He stated:

> "On Sunday morning, 30 Jan 44, I met a little girl.
>
> "I seen her once before.
>
> "She was walking alongside the road, near the quarry.
>
> "She walked down into the sunken lane. She followed me. I offered her some candy.
>
> "She came near me. When I offered her the candy she said the Americans were no good. She started to holler & I hit her in the mouth.
>
> "She hollered & I kept on kicking her until she stopped hollering. I left her laying face down on the ground.
>
> "I went back to the Quarry. I took my truck to the village and ate in a restaurant. I finished and took my truck back to Naples.
>
> "When I returned Tuesday morning to the Quarry I was arrested by the MP's. When I was arrested I had on the same pants and shoes that I wore on the day I killed the girl.
>
> "I got excited when I saw the girl bleeding & I was afraid to let her go" (R. 22; Pros. Ex. 2).

A ten-year old Italian girl testified that she observed accused about 1000 hours on 30 January 1944 at a point about 50 meters from where the lifeless body of Caterina Vigliotta was subsequently found (as related below) and that he attracted her attention "because his jacket and his coat that he had on seemed to have bloodstains on them" (R. 24,25,26). A woman who

worked at the stone quarry testified that when accused returned, she saw blood on his overcoat (R. 26). An American soldier on duty at the quarry at the time testified that another enlisted man asked accused "What's that on your face, Murphy? Did you have a bloody nose?" and that accused then wiped his face with a borrowed handkerchief. Witness also saw that "The bottom part of his pants legs were wet and muddy-looking, dark and dirty-looking" and that accused appeared to have been running (R. 28,29). Afterwards at a restaurant where the soldiers had their noon meal, one of them testified that he noticed when accused "went to wash, and, after taking his glove off, the hand had a look like a dirty red look, it looked like it was covered up with dirt almost over the hand, but it was too dark for mud" (R. 30). Two days afterwards when he was arrested, accused had stains on the cuffs of his trousers which had the appearance of blood. The trouser "cuffs" were inside accused's shoes and his socks were rolled up over the "cuffs" (R. 12,13).

Late in the day of 30 January 1944 the body of Caterina Vigliotta was found in a ravine a quarter to a half a mile away from the quarry (R. 13,14, 17,25). An Italian physician examined the child's body the following day (R. 16,17). He testified he found

> "injuries in the back of her head. There was a cut. There was one finger that was practically smashed**** (R. 17),

and that there was a "very slight hole" in the back of her head which he "would estimate" was caused by a weapon of some kind (R. 17). This hole was the "size of a sewing needle" and in the opinion of the doctor, extended entirely through the bone structure (R. 19). There was no physical evidence of any attempt to "violate this girl sexually" (R. 18). The physician testified that the girl "was in a struggle and that was the cause of death" (R. 17,18).

Accused testified that on 30 January 1944, he secured permission to leave Maddaloni quarry where he worked and after he "went to the bathroom" he decided to take a "little walk" (R. 31). He went toward a ravine between the railroad tracks and the road, and

> "When I got into the ravine, this little girl in back of me***She called me. She asked me if I had any candy. She said 'caramella', in Italian. So, I put my hand in my pocket, and offered her some. She came running down to me. When I gave it to her, she hesitated. She didn't take it from me. She started saying, 'Americans no buono'. I asked her why. Then she started pointing around the sections that were bombed. Then I got made and I hit her with my hand***In the mouth" (R. 31,32).

He testified further that when he struck her, she began to bleed and

> "I wanted to leave her alone, and I heard some kind of a

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voice that told me to keep on hitting her. I started kicking her" (R. 32).

He testified he did not stop striking her because he could not, that

> "This voice was telling me to keep on going. After she just laid there, I just stood there looking at her, as if I didn't do it, as if I just passed by and seen her laying there. I stood there a while, looking at her as if I never did anything like that in my life. Then, I went back to the quarry. The people looked at me kind of strange, as if I had been drinking. All the American boys said that I had blood on my face. He asked me 'Did I have a bloddy nose?' I said, 'No'. Then I asked for a handkerchief to wipe it off. After that, I just went on with my work" (R. 32).

He described the voice as "like angels on one side and devils on the other. This voice kept on saying keep on going". During the time he was being examined at the hospital, he did not tell Major Erickson about the voices he heard; he meant to tell him but "just couldn't recall it". He had heard these voices "quite a few times" before. Accused never had any intention of "bothering" the child sexually (R. 32,34).

4. When accused was arraigned, defense counsel announced that the "accused, at this time, pleads not guilty by reason of insanity at the time of the commission of the alleged offense" (R. 5). The prosecution stated to the court that "this particular case has been referred to a board of medical officers and they have observed the accused, and at this time, the chairman of that board is present, and with the approval of the court, the prosecution will call as its first witness a medical officer who has conducted an examination as to the mental condition of the accused" (R. 6). Thereupon, Major Clifford O. Erickson, Medical Corps, Chief of Neuropsychiatric Section, 36th General Hospital, stipulated to be a qualified expert (R. 6,9,10), testified for the prosecution that accused had been a patient in the Psychiatric Section of the 36th General Hospital from 2 February 1944 until 8 March 1944 and that in the opinion of this officer, accused "at the present time" is sane and that "he was probably sane" at the time of the commission of the offense charged although he might have been "under the control of his emotions to a large extent rather than his judgment". This officer also testified that, at the time of the commission of the offense, he was of the opinion accused "was capable of distinguishing right from wrong" and "in general" was capable "of intelligently conducting and cooperating with his counsel in his defense". Major Erickson testified further that he "could not be one hundred per cent certain" that accused was able to distinguish between right and wrong at the time of the homicide but it was his opinion that accused "probably could" (R. 6,7). He testified that, "The only finding of significance on the physical examination was the shape of the patient's head, which would indicate that he probably had what we call hydrocephalus, or in lay terms, had water on the brain at the time he was born which influenced the shape of his head" (R. 7).

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A test "showed there was some decrease in the size of the brain, probably due to old pressure from hydrocephalus". A psychiatric examination "gave him an intelligence quotient of 89, or a Mental Age of 13.3 years, which would fall in the low normal, or border-line group" (R. 8).

Major Erickson also testified that from

> "questioning the patient and conversation with him and observing his behavior during this period of time, I felt his judgment was somewhat defective, but not so marked as to constitute insanity***I felt that he suffered from constitutional psychopathic state, as a primary diagnosis, associated with borderline intelligence, and an old hydrocephalus, mild" (R. 8).

He testified also that "I believe that likely there could be occasions" on which accused could not control his actions (R. 8).

A written report of the psychiatric examination of accused made by Major Erickson was introduced in evidence (R. 9; Pros. Ex. 1). In addition to matters cumulative to the officer's testimony, the report includes his statement that "there is no delusional thought content present" and an expression of opinion that accused was suffering from a defect of reason resulting from a disorder of the mind (constitutional psychopathic state--emotional instability and inadequate personality) at the time of the alleged offense but that this "defect did not prevent him from knowing the nature and quality of the act he was doing" nor did it "prevent him from knowing the consequences of such an act" and further that his mental state was not such that he was unable to refrain from the act (Pros. Ex. 1).

The defense did not at this stage of the proceedings offer any evidence in support of its plea of "not guilty by reason of insanity". At the conclusion of the evidence elicited from Major Erickson, the court "denied" the plea (R. 10).

5. The uncontroverted evidence shows that at the place and time alleged, accused killed Caterina Vigliotta, the person named in the Specification, by kicking her about the head and body. In his pretrial statement, he admitted having made the fatal assault and while there were no eyewitnesses other than accused, the discovery of the lifeless body of the girl where accused stated he had assailed her, his bloodstained appearance after the homicide and proof of his presence about the time and near the place where the killing occurred, sufficiently corroborate the confession which his voluntary statement contained. The physician who examined the body of the victim did not categorically testify that death was caused by the assaults, but testified that it was caused by a "struggle". This testimony, together with the circumstances in proof, sufficiently establishes that death was in fact caused by the blows struck by accused. The court was warranted in concluding that the killing was unprovoked and done without legal justification or excuse. Malice aforethought was properly inferable

from the deliberate, vicious and wanton attack accused made upon his helpless victim. He was properly found guilty as charged (MCM, 1928, par. 149a; NATO 218, Kendrick).

6. The issue raised by accused's initial plea of not guilty by reason of "insanity at the time of the commission of the offense" was fully met by the testimony adduced by the prosecution that accused was sane and could distinguish between right and wrong and had the mental power to adhere to the right when he committed the offense. This was supplemented by the admission in evidence of the official report of the psychiatrist, made at the conclusion of an extended observation of accused, which stated that while accused at the time of the commission of the offense was suffering from a disorder of the mind resulting from a defect in reason (constitutional psychopathic state, emotional instability), such defect did not prevent him from knowing the nature, quality and consequences of his act in fatally assaulting his victim nor materially affect his ability to refrain from the act. The psychiatrist found no evidence of delusions as suggested by the testimony of accused. Upon all the evidence the court was justified in concluding that accused was so far free from mental defect, disease, or derangement as to be able, concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. That the court reached such a conclusion appears from the findings of guilty (Bull. JAG, December 1942, sec. 395 (44a)).

7. Defense counsel objected to the introduction of accused's pretrial statement because it was not "freely and voluntarily made" (R. 21,22). The evidence shows that on 2 February 1944 accused was questioned in the "M.P. jail house" at Maddaloni and then denied he knew why he was arrested. He was taken by the officer who interrogated him to the place where the body of the girl was found and asked "about the blood on his pants and shoes, which he failed to explain" (R. 20,21). This officer testified that he

> "asked him if he had ever done anything like this before. He said, 'No, I have not.' Then he told me exactly what happened" (R. 21).

Up to that time accused's "rights under the 24th Article of War" had not been explained to him. But the officer testified that

> "Then I told him that under the 24th Article of War, he didn't have to make a formal statement and that if he did, it might be used against him. I asked if he would wish to make a statement, and he said he would. I took out a pad and pen and took down this statement" (R. 21).

This officer also testified that he told accused "he didn't have to say anything. If he did say something, it might be used against him" (R. 20). Accused's written statement included the language "I make this statement of my own free will" (Pros. Ex. 2).

The warnings thus given accused were both timely and adequate. He could not have been misled nor does it appear that any advantage was taken of him in connection with the obtaining of the statement. It was properly received in evidence as having been voluntarily made.

8. The charge sheet shows that accused is about 22 years old. He enlisted in the Army 21 April 1942, and had no prior service.

9. The court was legally constituted. 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 and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Samuel P. Holmes, Judge Advocate.

Simpson, Judge Advocate.

Donald W. MacKay, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
13 June 1944.

Board of Review

NATO 2377

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 21 March 1944.
Private JOHN J. MURPHY	)	Dishonorable discharge and
(12 063 419), Sixth Port	)	confinement for life.
Headquarters Company,	)	U. S. Penitentiary, Lewisburg,
Transportation Corps.	)	Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

NATO 2377 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 13 June 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private John J. Murphy (12 063 419), Sixth Port Headquarters Company, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved.

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NATO 2377, 1st Ind.
13 June 1944 (Continued).

Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2377).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 36, NATO, 15 Jun 1944)

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
22 June 1944.

Board of Review

NATO 2435

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 18 April 1944.
	)	Pearson: Disapproved.
Privates WILLARD PEARSON (36 399 290) and JOHN T. ARNOLD (14 122 209), both of 3321st Quartermaster Truck Company, 37th Quartermaster Battalion, Mobile.	)	Arnold: Dishonorable discharge and confinement for ten years. Federal Reformatory, Chillicothe, Ohio.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

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

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

Specification: In that Private John T. Arnold, then Technician Fifth Grade, Thirty Three Twenty First Quartermaster Truck Company, Thirty Seventh Quartermaster Battalion, Mobile, and Private Willard (NMI) Pearson, Thirty Three Twenty First Quartermaster Truck Company, Thirty Seventh Quartermaster Battalion, Mobile, acting jointly, and in pursuance of a common intent, did, at Naples, Italy, on or about 8 February 1944, feloniously take, steal and carry away, twenty thousand pounds of flour and sugar, value about eight thousand dollars ($8,000.00), the property of United States Government, intended for the military service thereof.

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

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Specification: In that Private John T. Arnold, then Technician Fifth Grade, Thirty Three Twenty First Quartermaster Truck Company, Thirty Seventh Quartermaster Battalion, Mobile, and Private Willard (NMI) Pearson, Thirty Three Twenty First Quartermaster Truck Company, Thirty Seventh Quartermaster Battalion, Mobile, acting jointly, and in pursuance of a common intent, did, at Naples, Italy, on or about 8 February 1944, willfully attempt to sell twenty thousand pounds of flour and sugar of the value of about eight thousand dollars ($8,000.00), the property of the United States Government, intended for the military service thereof.

Accused pleaded not guilty to the Charges and Specifications. Accused Arnold was found guilty of the Charges and guilty of the Specifications except, in each case, "for inserting the word 'approximately' immediately preceeding 'twenty thousand pounds', and except the words and figures 'eight thousand dollars ($8,000.00)', substituting therefore the words 'eight hundred dollars ($800.00)'", of the excepted words and figures not guilty, of the substituted words and figures, guilty. Accused Pearson was found guilty of Charge I and its Specification, with exceptions and substitutions as above, and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced as to Arnold. Evidence of one previous conviction was introduced as to Pearson. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Arnold for ten years and Pearson for five years. The reviewing authority disapproved the findings of guilty and the sentence and directed a rehearing in the case of Pearson, approved the sentence as to Arnold, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement in his case and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 8 February 1944 accused Arnold was on duty at the port of Naples, Italy, as a truck driver "on the night shift" (R. 20,26; Pros. Ex. 1). His truck was assigned the "port number" 016 (R. 19,20). About 2215 hours that evening accused's truck and trailer were found parked about half a mile from Punta del Gatta on "this A Port Road". This location was also described as being in the town of Torre Annunziata about 16 miles along the shore out of Naples (R. 10,17). A noncommissioned officer, who had just previously observed black market activities in the neighborhood, about a half mile away, found the parked truck and saw a man, whom he identified at the trial as Arnold, sitting in the driver's seat. Witness asked accused if there was any trouble and the latter replied he was "out of gas". It had been raining for half an hour and the ground under the truck was dry. The noncommissioned officer looked in the gasoline tank and it was full (R. 10,11,14). He testified that accused then said

"he had something wrong with the motor and I asked him to start it up, and it ran OK. I asked what he had on his load, and he said: 'I have nothing now but we were hauling ammunition this afternoon.' So, I said we'll

look in the trailer and it was a full load of flour and suger, a mixed load. I then went back and asked who he was and he said he was Robert James. I looked at his dispatch and the W registration combination to the engine and on the tractor, and I asked him if the dispatch was made out in Arnold's name. Then I asked him his name. He said his name was Robert James."

This witness testified further that accused Pearson then appeared and identified himself by his correct name; that then

"our Captain ordered these men to get in their truck and drive to the 574th Ration Dump after questioning both men. We asked where they were from and they said hauling out of Torre Annunziata to the 574th Ration Dump. They said they were both stationed in Aversa, and were told then to proceed to the 574th Ration Dump" (R. 11).

This ration dump, the witness believed, was located in Naples (R. 15). He also testified that accused's vehicle had Quartermaster markings on it, was a United States Government vehicle and he believed it was "ten ton" (R. 11,12). Further, that the truck was "Entirely loaded with flour and sugar" and there was "a full load on the trailer" which "was loaded completely in the front and sloped to the tail gate" (R. 12,16). He testified he knew "better than one hundred (100) sacks" were on the vehicle (R. 16). The witness further testified that these sacks "had a quartermaster stamp" and contained "U.S. government sugar and flour" (R. 12,13).

It was the duty of Private Joseph P. Sweatoz, 6623d Regulating Company (Provisional), to dispatch "to the right dumps" cargoes unloaded from ships lying at "berths 12 and 14" in the port of Naples (R. 21). Sweatoz identified a ticket dated 8 February 1944, signed by himself, dispatching truck number "016" loaded with 20,000 pounds of flour and sugar from the port to the 574th Ration Dump (R. 21,22,24; Pros. Ex. 2). Sweatoz testified the flour and sugar was in paper sacks, some containing 50 pounds, others 100 and he was not sure how much of the load was flour and how much sugar (R. 24). After making out the dispatch ticket, he delivered it to the driver of the truck who made no objection to the remarks on the ticket (R. 24,25).

The prosecution requested the court to take judicial notice of the "price of flour and sugar as listed by the Quartermaster, Headquarters Peninsular Base Section, wherein flour and sugar is listed at four cents per pound" (R. 25).

After "he was told he did not have to make a statement unless he wanted to and that everything he said would be used against him if there would be a trial", accused Arnold on 23 February 1944 made a statement (R. 6,7,8) which was introduced in evidence (R. 9; Pros. Ex. 1). It states:

"On or about 9 February 1944, I was working in the Port

as a truck driver on the night shift. Willard Pearson, of the 37th QM, was working days but he had stayed on that night and had missed two trucks which had returned to the company area.

"Outside Gate #3 around 6 p.m., I met a civilian who asked me if I would deliver him a load of flour. I said, 'Yes,' and he promised me $4,000.00. I was supposed to meet him on the road just this side of Torre del Greco, and he would tell me where to go.

"I went alone to Berth 12 and got a load of flour and sugar. I was driving a 10-ton truck, marked 016.

"On the docks I met Pearson and he asked me where I was going with the load. I told him. He asked to come along, and I said if he'd help me, I'd split with him half and half.

"We went out to Torre del Greco, but we didn't see any sign of the civilian. Pearson asked me to stop so he could take a crap. So I stopped. I stayed there about twenty minutes.

"Two officers and three soldiers then came up and asked what I was doing. I said I was out of gas. But they checked and found the tank full. Then I told them I had motor trouble, and they started the motor without any trouble. They checked my load of flour and sugar and my dispatch ticket. Then they told me to take my load out to Dump 574, as written on the ticket. Pearson got in and we headed back for the Port. I got another dispatch ticket, because the first ticket showed my time of departure as of 7:00 or 7:30 p.m. I tore up the first ticket.

"From there we went to Dump 574, where we delivered the sugar and flour. I gave the dispatch ticket to an Italian civilian at the gate.

"Pearson stayed on all night in the Port and slept in my truck. I slept in the drivers' shack. I never received any of the $4,000.00" (Pros. Ex. 1).

Accused Arnold elected to remain silent (R. 26).

The evidence directly touching on the complicity of accused Pearson in the offenses alleged is not set out in view of his acquittal of Charge II and its Specification and the disapproval of findings of guilty of Charge I and its Specification in his case.

4. It thus appears from uncontradicted evidence that at the place

and time alleged in the Specifications of Charges I and II, accused Arnold did feloniously take, steal, carry away and attempt to sell approximately 20,000 pounds of flour and sugar of the value of $800.00, property of the United States, intended for its military service, as found by the court.

By his pretrial statement accused in effect confessed guilt of the offenses charged. It was fully corroborated. Instead of transporting the flour and sugar from the pier to the ration dump, which it was his duty to do, accused deviated from his proper course and drove the truck with the subsistence stores thereon to a place some 16 miles away where, when apprehended, as may be inferred, he was awaiting the arrival of the civilian who had agreed to pay him $4,000.00 for the load. He made false statements as to his identity and the reason for his being there. The offense of larceny was complete upon the initial act of asportation accompanied by the fraudulent intent permanently to deprive the government of the property. This offense was separate and distinct from that of the attempted sale, as charged. An agreement to sell had been made. By going to the appointed place with the design of effecting a delivery and sale of the property to a prospective purchaser accused "committed an overt act which if not interrupted by circumstances independent of the doer's will would have resulted in the commission of the offense, as alleged". All the facts and circumstances clearly indicate that accused when apprehended had taken all steps necessary to complete his part of the nefarious agreement and had thus moved directly toward the commission of the offense of selling the specified property. There are also circumstances from which it could be inferred that the consummation of the sale was an apparent possibility. Accused was properly found guilty as charged (MCM, 1928, pars. 149g,150i,152c).

5. Accused Arnold was charged with both the larceny and attempted sale of the same government property. There is no unreasonable multiplication of charges and accused may be punished for both offenses (Bull. JAG, January 1944, sec. 452 (8)).

6. The charge sheet shows that accused Arnold is 22 years old. He was inducted into the Army 24 June 1942 and had no prior service.

7. The court was legally constituted. 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 and sentence as to accused Arnold. Penitentiary confinement is authorized for the offense of larceny here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 87, Title 18, United States Code.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 June 1944.

Board of Review

NATO 2443

UNITED STATES	)	ISLAND BASE SECTION
v.	)	Trial by G.C.M., convened at Palermo, Sicily, 24 January 1944.
Private KESSON W. SIMMONS (34 250 426), Company A, 246th Quartermaster Service Battalion.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Atlanta, Georgia.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 92d Article of War.

Specification: In that Private Kesson W. Simmons, Company "A", 246th Quartermaster Service Battalion, did, at Palermo, Sicily, on or about November 2, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Maria Carollo, a human being, by shooting her with a service rifle.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge and confinement at hard labor for the term of the

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natural life of accused, designated the "United States" Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 2 November 1943, Company A, 246th Quartermaster Service Battalion, of which accused was a member, was stationed at La Favorito Park, Palermo, Sicily, and that the deceased, Maria Carollo, lived with her sister in a house located some 100 feet from the eastern boundary of the battalion area. Parallel to and some 80 feet east of the area boundary was a foot path which after passing the home of deceased curved westward bisecting the boundary. (Ex. 7; R. 9,25,27,35-37,63) At 1515 hours accused, armed with a Springfield service rifle (R. 60), was posted as a sentinel on post number 10, extending along the above path, with orders to prevent soldiers from leaving and civilians from entering the battalion area (R. 5,9,10,36,58-60). Civilians were prohibited from entering the battalion area but were not prohibited from crossing the path into the plot between the area boundary and the path (R. 27). About 1830 hours a shot was heard in the vicinity of post number 10 and immediately thereafter a woman screaming. Within a few minutes the corporal of the guard and several officers from accused's company appeared and found accused on his post and Maria Carollo lying on the kitchen floor of her home, with a "big gashing wound" in her lower abdomen, groaning with pain. (R. 6,8,11-13, 21,23,25,46) She was taken to a civilian hospital (R. 23,46) where immediately following an operation she died at 2230 hours (R. 50,53,55,56).

Maria's sister, an eyewitness to the homicide, testified that on the afternoon in question she and Maria returned to their home about 1700 hours, ate some bread, then went out into the yard and were picking grass when she saw an American colored soldier, whom she identified as accused, approaching (R. 39,40,44). She testified the soldier called her "Senorita" and she replied "No, its signorina" and accused then said "Fickie, Fickie" (R. 40). She walked toward where Maria was picking grass and began picking grass whereupon accused addressed himself to Maria and "kept saying 'Signorina', and asking Maria 'Fickie, Fickie'" (R. 41). She related that she was near the path and called to her sister to come away from accused and come over to where she was when:

> "Maria started to walk toward me when I heard the shot and saw her fall. I kept telling Maria to get away from the soldier; and, while I was telling Maria to get away from him and come up where I was standing, I heard the shot and saw Maria fall" (R. 42).

She testified further that at the time Maria was shot she was picking grass just a few feet off the path, in the unrestricted area between the path and the battalion area boundary, and accused was about two paces from her (R. 42). When she first saw accused he had his rifle slung on his shoulder and when he shot Maria, he had it in his hands "at an aiming position" (R. 42,43). She testified she ran to Maria after she was shot and accused placed his forefinger to his lips and pointed his rifle at her "to keep me quiet" (R. 44). She then dragged Maria into their home (R. 44). On cross-examination the sister said she did not know what the word "Halt" meant, that there were

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no other soldiers around when the shot was fired and a little before that she and Maria had talked "a little bit" with another colored soldier near there (R. 44,45).

One of the surgeons who attended Maria testified he first saw her in the operating room; that she was in a critical condition, having been wounded by gunshot which entered her back and came out her abdomen, the wound in front being much larger than the wound in the back; that her intestines were "hanging out" but that she was conscious and spoke clearly and was "worrying about dying" and said "I am dying" (R. 49,50). Over objection by defense this witness was permitted to testify that while Maria was on the operating table he asked how she received her injury and she replied:

> "***that while she was picking grass near the La Favorito an American negro soldier came up to her and asked if she wanted to engage in a loving match and she refused. He took his gun from his shoulder and shot her" (R. 54).

Another surgeon, who operated on Maria, described her condition at the time as "very critical" (R. 55).

A medical officer who observed Maria on the kitchen floor of her home testified she had a "big gashing wound" and that her intestines were hanging out. He testified a projectile had entered the small of her back, in the region of the base of her spine, and had come out through the lower abdomen. (R. 46)

The guard on post number 11, which adjoined accused's post, testified that just before dark he observed two girls picking grass near his post and stepped in front of one of them and by motioning indicated she could not enter the battalion area whereupon she turned back and continued picking grass. Subsequently they both left in the direction of post number 10 and he saw them picking grass along the path on accused's post. (R. 16,17,19, 20,80,82) He testified that at the time they left his post one could see a person nine or ten paces away (R. 20). About five minutes later, "just a short while" after the girls left the vicinity of his post this witness heard a shot from the direction of accused's post and called the corporal of the guard (R. 13,16,20,82). Preceding the shot this witness did not hear accused call the corporal of the guard or call anybody or challenge anybody nor did he hear anything unusual (R. 16,17,81).

The corporal of the guard testified he was about 200 yards from accused's post at 1830 hours when he heard a shot and a woman scream and went immediately to the scene where accused halted him at about 12 paces and witness advanced to about six paces when accused recognized him (R. 5,6,8,59). Accused was on his post, about 20 feet from Maria's home and about 30 yards from the battalion area. Upon being asked who fired the shot accused replied he had, that "a lady was going into 'C' company area", that he halted her three times and that he "shot at the ground" and did not know he had hit her (R. 8,9,59). Witness said it was dark and accused could not see him clearly (R. 11).

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Another soldier testified he heard a shot and a woman scream and went immediately to the scene where he heard an officer ask accused if he could

> "tell it was a woman, and he said he could. He asked how far away he was, and he said about four or five feet away and that he ordered her to halt". (R. 11,12)

The executive officer of accused's company testified he arrived on the scene a few minutes after the shot was fired and accused pointed out the spot where Maria was when she was shot and that the place indicated was about 25 feet outside the battalion area. He testified accused told him he was about seven feet from Maria when he fired. (R. 25-27) This witness made a special effort to notice the light condition because he "knew it would be an important factor in the case" and that when he arrived "the moon was up and it was clear. You could distinguish a man or woman at a distance of fifty yards". (R. 27,34) He testified further that the direction in which Maria was walking when she was shot, as indicated to him by accused, was not in the direction of the battalion area but would be going away from the battalion area. He also noticed some fresh grass lying on the pathway and some more in Maria's hand when he saw her on the kitchen floor of her home after the tragedy. (R. 32,33)

The battalion chaplain went to the scene immediately upon hearing the shot. He testified, it was not quite dark "because I could see these two figures" (accused and corporal of the guard). He could see them at a distance of about ten or fifteen yards before he reached them. (R. 21,24)

Accused testified:

> "Around six o'clock I was walking around the post. I walked down to No. 11 post and then I heard a noise behind me, and I turned around. I turned around to see what it was. I saw something walk through the bushes. I took the rifle from my shoulder at sling arms, took it down to port arms, and then I said, 'Halt.' I said, 'Halt,' three times and saw somebody walking through the bushes and then decided to shoot into the ground. I took the safety off the rifle, and I shot into the ground" (R. 65).

He said he did not mean to shoot anybody but "meant to" shoot into the ground "for them to stop" (R. 65). He denied ever having previously seen Maria's sister, "the woman who was in here testifying", and said he did not see "any other lady" or have any conversation with two women along his post that evening nor did he see anybody picking grass and that the only conversation he had with anyone was when he "hollered Halt" (R. 65,73,75-78). Looking at a photograph of the scene identified and introduced in evidence accused indicated that he and Maria were on the "left" of the path when he shot her and testified that civilians were allowed on the "left" of the pathway (R. 67-69). He testified he was about seven feet from Maria when he shot her; that she was going toward the area; that she was "near the

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Battalion Area" and walking away from him at an angle and he "couldn't see her very good because it was dark"; that all he "could see was something moving through the bushes" but he "didn't know what it was" (R. 68,69,74-77). He testified that after he fired the shot "she fell down on her knees" and began screaming but he "didn't pay any attention to what she did. She never did anything but holler". He testified he "never knew" he "had hit her" and did not go to her and did not see anyone come to her and thought she was screaming because "she might be scared or something". He paid no attention to who carried her to the house and he "stood there for two or three minutes before" he "walked toward the Park". He "never did anything until the Corporal of the Guard came up" and that all of this occurred about 13 or 14 feet from post number 11. (R. 73,75-78)

The defense presented three officers of accused's company, including the company commander, who testified that accused had a very good record as a soldier, was usually quiet and retiring and had not given any trouble (R. 61-64). On cross-examination the corporal of the guard also so testified (R. 59,60).

Another defense witness, a soldier in accused's company, testified he had been on guard when the company was stationed "in back of Palermo" in November and had "quite a bit" of trouble with civilians "Trying to keep them out of the area", that "the people were awful stubborn about keeping out of the area" and that sometimes the guards would shoot in the air to keep them out. This witness testified he was on company guard, post number one, and not battalion guard and the "accident was on the back of the area" and he "was never on there". (R. 78,79)

4. It thus appears from the uncontroverted evidence that at the place and time alleged accused shot Maria Carrolo, the person named in the Specification, with a service rifle and that in consequence of the injury inflicted the woman died a few hours later. The uncontroverted evidence further shows that accused shot deceased in the back when he was about seven feet from her and at the time she was some 25 feet outside the battalion area and not on the path which was accused's post, nor in a restricted area. There is evidence showing that at the time she was shot deceased was proceeding in the opposite direction from accused and away from the area. Witnesses who arrived upon the scene a few minutes after the shooting testified it was yet light enough to recognize a person at several paces and one of them, who made a special note of the fact, stated one could distinguish a person at 50 yards. There is no evidence that accused was other than sober. Accused's testimony that he challenged deceased three times before he shot her is entirely uncorroborated. The guard on the adjoining post did not hear him. The sister of deceased testified that accused first made indecent proposals to her and then to deceased. This was corroborated by the declaration of deceased made when she was on the operating table and acutely aware that death was imminent. The sister gave an eyewitness account of the shooting showing it to have been entirely unjustifiable and testified that afterward, when she went to the aid of her dying sister, accused pointed his rifle at her in a threatening manner and placed his forefinger to his lips indicating for her to keep quiet. Malice aforethought was inferable from the circumstances

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in evidence.

Accused's version of the homicide was uncorroborated and in its principal parts in direct conflict with the testimony of deceased's sister, the guard on the adjoining post, and a number of other witnesses. His testimony that he did not see any person other than deceased either before or after the shooting, that he did not know or pay any attention to how deceased was carried to her home, that he did not go to deceased after she was shot, and that he supposed she was screaming because she was "scared or something" does not comport with ordinary human conduct. His testimony was for evaluation by the court.

Accused's defense was founded upon the principle that a homicide done in the performance of a legal duty is justifiable (MCM, 1928, par. 148a). In rejecting this theory the court, acting within its prerogative, found the homicide was without legal justification. There is in the record substantial evidence to support this conclusion.

The dying declaration of deceased was admitted over the objection of defense counsel. This was not error. Before the admission of the declaration it was clearly established that deceased was in extremis at the time she made the utterance and clearly indicated by her statement "I am dying" that she was acutely aware death was imminent (MCM, 1928, par. 148a).

5. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge and confinement at hard labor for the term of the natural life of accused. The disapproval of that portion of the sentence adjudging forfeiture of all pay and allowances due or to become due was unnecessary. The inclusion in the sentence of total forfeiture was not legally improper (Bull. JAG, November 1943, sec. 450).

6. The charge sheet shows accused is 24 years old, was inducted into the Army of the United States 16 February 1942, and had no prior service.

7. The court was legally constituted. 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 and sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Thomas H. Holmgren, Judge Advocate.

Gordon Simpson, Judge Advocate.

Donald W. Mackay, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
30 June 1944.

Board of Review

NATO 2454

UNITED STATES v. Private First Class WILLIE J. PERKINS (34 180 627) and Private CHARLES M. DAVIS (33 192 143), both of 2036th Quartermaster Company, Truck, Aviation, on detached service with XII Air Force Training & Replacement Command.	XII AIR FORCE TRAINING & REPLACEMENT COMMAND Trial by G.C.M., convened at Constantine, Algeria, 1 June 1944. As to each: Dishonorable discharge and confinement for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Simpson, Mackay and Irion, 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 93d Article of War.

Specification 1: In that Pvt. Charles M. Davis and Pfc. Willie J. Perkins, each of 2036th QMC Company Trk. Aviation, acting jointly and in pursuance of a common intent, did on National Route #10 near Ain-Fakroun, Algeria, North Africa, on or about 27 November 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of SABBA Achour ben Mohamed a sack of flour valued at 250 francs and 10,400 francs, the property of SABBA Achour ben Mohamed, value of $285.00.

Specification 2: In that Pvt. Charles M. Davis and Pfc. Willie J.

Perkins, each of 2036th QMC Company Trk. Aviation, acting jointly and in pursuance of a common intent, did on National Route #10 near Canrobert, Algeria, North Africa, on or about 27 November 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Khelifi Said 1560 francs, the property of Khelifi Said, value of $31.20.

Specification 3: In that Pvt. Charles M. Davis and Pfc. Willie J. Perkins, each of 2036th QMC Company Trk. Aviation, acting jointly and in pursuance of a common intent, did on National Route #10 near Canrobert, Algeria, North Africa, on or about 27 November 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Harrat Djemoi 1600 francs, the property of Harrat Djemoi, value of $32.00.

Specification 4: In that Pvt. Charles M. Davis and Pfc. Willie J. Perkins, each of 2036th QMC Company Trk. Aviation, acting jointly and in pursuance of a common intent, did on National Route #10 near Canrobert, Algeria, North Africa, on or about 27 November 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Hadji Zaid 600 francs, the property of Hadji Zaid, value of $12.00.

Specification 5: In that Pvt. Charles M. Davis and Pfc. Willie J. Perkins, each of 2036th QMC Company Trk. Aviation, acting jointly and in pursuance of a common intent, did at Canrobert, Algeria, North Africa, on or about 27 November 1943, wrongfully and unlawfully commit an assault upon the person of Anziani Jacques (Assistant Administrator) with a deadly and dangerous weapon, to-wit a .45 calibre colt revolver, by then and there pointing the same at the said Anziani Jacques and threatening to shoot him.

Each accused pleaded not guilty to the Charge and Specifications. Each was found guilty of the Charge and Specifications 1, 2, 3 and 4 thereunder, and not guilty of Specification 5, "but guilty of a violation of the 96th AW". No evidence of previous convictions was introduced as to accused Davis. Evidence of one previous conviction by summary court-martial for breach of traffic regulations in violation of Article of War 96 was introduced as to accused Perkins. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 15 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that during the afternoon of 27 November 1943,

accused, who were stationed at Telergma Air Base, Telergma, Algeria, and were assigned as drivers of "GMC, 2-½ ton cargo trucks", encountered Sabba Achour ben Mohamed a short distance from Canrobert, Algeria, on National Route Number 10 (R. 6-9,11,13,17). This highway leads from Ain-Beida northward through Canrobert and Ain-Fakroun. Sabba Achour testified that

> "They stopped me and asked me if I wanted to buy anything. They had something for sale. I told them I had no money to buy anything. They hit me on the nose, leg, and back of my neck. After that they took my wallet away and took the road to Ain-Beida". (R. 7)

This witness also testified that accused attacked him twice and took 10,400 francs and "50 kilos of grain" from him (R. 8). (Specification 1)

Khelifi Said testified that he and Hadji Zaid were leaving Canrobert about "five months ago, or four months ago" when Khelifi was stopped by the two accused who pointed a pistol at him and took 1560 francs from him (R. 14, 15). Khelifi testified that after taking his money, accused Perkins twisted his arm and "I made an advance to get back my money. He hit me on the side of my cheek" (R. 14). He testified further that while accused were taking his money, his friend Hadji Zaid "was standing there with his mouth wide open. After they took my money they worked on my friend" (R. 15). (Specification 2)

Hadji Zaid testified that as he was walking from Canrobert, accused, who were coming from the direction of Ain-Beida, stopped him, pointed a pistol at him and took his "money away - 600 francs" (R. 9,10). He identified accused Davis as the one who pointed the weapon at him and testified that after taking the money, Davis "walked into a man's house by the name of Harrot Djemei" (R. 10). (Specification 4)

Harrot Djemei testified that during the afternoon of 27 or 28 November 1943, he was at his home near Canrobert when he saw two colored soldiers, one of whom he identified as accused Davis, get out of their truck and shake hands with two of his friends, Sabba Achour ben Mohamed and Hadji Zaid (R. 11,13). Harrot also testified that

> "My friends were talking with the two American soldiers when I walked up. As I approached I noticed that these two American soldiers were searching my friends' pockets so I took off and left the place with my brother. We started running down the road. The truck followed us and they hollered for us to stop. We continued running. Finally, they fired with their pistols so we were afraid and stopped. When I stopped they grabbed me, knocked me on the ground, and took 600 francs of my money" (R. 11,12).

Harrot testified further he was sure that accused Davis was one of the two

soldiers involved, that "I know it is that man. I can't forget him. He is the one that knocked me down and took my money away" (R. 13). Also, he testified that the soldier with Davis was not so tall, but "a little stocky" and that accused Perkins "is one like him" (R. 13). (Specification 3).

During the afternoon of 27 November 1943, Jacques Anziani, "Assistant Administrator", Canrobert, was directed "to go down to the village and see what was going on" (R. 17,18). Accompanied by two Canrobert police agents and an American soldier, Anziani proceeded to a point on the road to Ain-Beida about two kilometers out of Canrobert where he found a parked truck (R. 18,20,21). He testified that

> "When we drove up the occupants of the truck were off in the village about 100 meters away from the main road. They were firing revolver shots. One matter which I noticed was that only one man had two revolvers. As I approached them I cried out 'Police'. At this moment the two men went toward their own truck. The driver took his place while the large one (Davis) stood on the running board on the right-hand side, holding a revolver" (R. 18).

Accused Davis pointed his pistol at Anziani who was about three or four meters away (R. 10,12,14,19,22). The truck was then driven off (R. 10,12, 14). (Specification 5)

On 27 November 1943, about 1500 or 1515 hours, a gendarme on duty at Ain-Beida testified he received a report of a disturbance and upon investigating, learned at "the gate of the town" that a truck had just passed. He testified that "they went into a house of tolerance" and he "went over and noted the number of the truck" which was "GMC No. 12 (Star) 2036-0-TRK-33". He also testified that as the truck departed, he recognized its occupants as two colored men one of whom was accused Davis. (R. 23,24)

An officer of accused's organization testified that on 27 November 1943, a "GMC, 2-½ ton, cargo" truck with "12 (Star) 2036 TRK 33" stenciled on the bumper had been assigned to accused Davis and was dispatched about 0705 or 0710 hours that morning (R. 25).

Accused Perkins testified that about 1300 hours on 27 November 1943, "immediately after chow" (R. 26,27), he, accompanied by Private Elbert Fields, 2036th QMC Company, Truck (Aviation) (R. 30), left Telergma for a gravel pit at St. Donat where some Italian prisoners of war put a "good load" of gravel on his truck. He testified further that he was using his regularly assigned truck, number 43, on this detail and that he drove his loaded truck to the "gas dump" where he unloaded the gravel and then returned to his camp area about 1530 hours where he remained until about 1800 hours. (R. 27-29) He denied that Davis went with him on this trip (R. 29,30).

Fields testified for the defense that he remembered the day "a report

of investigation concerning some robberies" was made (R. 35), and that he

> "was with Pvt Perkins that day on the gravel haul. We went up to the other side of St. Donat after gravel. We didn't get any gravel because the prisoners were gone and we returned to Telergma and to camp" (R. 31).

He testified also that they left before noon and did not eat the noon meal (R. 32), that he and Perkins left Telergma about 1000 hours and returned about 1700 hours when an officer "questioned us about the robberies" (R. 31). Fields testified he was sure this questioning occurred the same day "there was supposed to have been a robbery" (R. 32).

In rebuttal, the company officer who had interrogated Fields and accused Perkins, testified that the questioning occurred 28 November 1943. This officer also testified that the truck assigned to Perkins was marked on the bumper "12 (Star) 2036 TRK 43" and bore "U.S.A. registration number" 4187315. (R. 34) He testified further that this particular truck was out of commission on 27 November (R. 36). An ordnance maintenance officer testified that the "record of all vehicles entered and worked on since June 2, 1943", which was kept under his control and supervision, showed that truck No. 4187315 from 2036th Quartermaster Truck Company came into his shop for repairs 26 November 1943 and left the shop 1 December 1943 (R. 36,37).

Accused Davis elected to remain silent (R. 34).

4. There is substantial evidence justifying the conclusion that at the places and times alleged in Specifications 1, 2, 3 and 4 of the Charge, the two accused, by force and violence and putting them in fear, feloniously took, stole and carried away from the four persons named in these Specifications the property and money as averred. It was shown that accused, each armed with a pistol, were comporting themselves in a violent and turbulent manner along the highway where they committed the robberies, discharging their weapons, beating and terrifying their victims. It appears that each of the Arabs robbed was forcibly obliged to part with the possession of his property, that three of these victims were subdued by blows and the fourth was robbed at the point of a pistol. The Arabs were warranted in making no other resistance than that shown by the evidence. It was satisfactorily demonstrated that each was assaulted and put in fear and that the fear was based upon a well-founded apprehension of present danger. The property stolen, as alleged in the several Specifications, was in each instance shown to have been taken from the person or in the presence of the victim. The court was warranted in finding accused guilty of the robberies as specified (MCM, 1928, pars. 149f,149g). The robberies were closely related in point of time, and those alleged in Specifications 2 and 4 arose from what amounted to a single transaction. There were, however, at least three distinct robberies each of which was punishable separately.

There is also uncontroverted evidence that at the place and time alleged in Specification 5 of the Charge, accused Davis committed an assault upon one Jacques Anziani by pointing a pistol at him. There is also substantial

evidence that accused Perkins was present at the time of this assault and that both accused, acting in concert, had just completed the robbery of four Arabs and had been engaged in indiscriminate firing in a native village. When Anziani, a member of the French police, undertook to investigate these disturbances, one of the accused held him at bay with a revolver and both drove away with the effects they had stolen. Accused were obviously acting together and in concert. Each was responsible for the acts of the other done in pursuance of the common design. The court was warranted in concluding accused were guilty of an assault with a dangerous weapon as here specified, in violation of Article of War 96.

Accused Perkins claimed an alibi. However, he was identified as one of the offenders by three of the four Arabs who were robbed. Moreover, Perkins' testimony supporting the claimed alibi was at such variance with that of the soldier he testified he was with at the material times that the court was warranted in refusing to give it credence. Further, the truck with which Perkins claimed he was hauling gravel when the offenses were committed was shown by competent proof to have been in a maintenance shop for repairs on the day of the assaults and robberies. The court was warranted in rejecting accused Perkins' alibi.

5. It was alleged in Specification 1 that, besides the money they took from their victim, accused also robbed him of a sack of flour. The evidence shows that the money was taken as averred but that "50 kilos of grain" were stolen rather than a sack of flour. This variance, which might under other conceivable circumstances become material, is of no controlling importance here where a robbery, substantially as alleged, was established by the evidence.

6. The court granted the prosecution's motion to amend Specification 1 by substituting the figure "250 francs" for the figures "350 francs" as alleged, and to change the allegation of the value of the property averred to have been stolen from "$285.00" to "$215.00". Defense counsel agreed to the changes proposed by the motion (R. 26). This procedure was proper.

7. In Specification 5, the name of the person assaulted was alleged to be Anziani Jacques (Assistant Administrator) while the proof showed his name to have been Jacques Anziani, and his occupation and address "Asst. Administrator, Civil Service, residence Canrobert". The assaulted person was thus sufficiently described in the Specification, both as to name and occupation, to enable accused to know the nature and details of the offense they were alleged to have committed. Under the circumstances, they could not have been misled or injured (NATO 2481, Conrad).

8. The Arab witnesses testified upon affirmation rather than under oath (R. 6,9,11,13). This procedure is permissible under the statute and was proper (AW 19).

9. The charge sheets show that accused Perkins is about 28 years old, was inducted into the Army 14 November 1941, with no prior service, and that accused Davis is about 29 years old, was inducted into the Army 14 July

1942, with no prior service.

10. The court was legally constituted. 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 and sentences.

Gordon Simpson, Judge Advocate.

Donald K. MacKay, Judge Advocate.

Wilmer R. Lewis, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
24 June 1944.

Board of Review

NATO 2481

UNITED STATES	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO #3, U. S. Army, 25 February 1944.
Privates TOM F. CONRAD (37 556 742) and JOSEPH CHEBRA (35 055 917), both of Company A, 30th Infantry.	)	As to each: Dishonorable discharge and confinement for 40 years. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, 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 several and joint Charges and Specifications:

CONRAD

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

Specification: In that Private Tom F. Conrad, Company "A", 30th Infantry, did, at Pietravairano, Italy, on or about 13 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 12 January 1944.

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

Specification: In that Private Tom F. Conrad, Company "A", 30th Infantry, and Private Joseph (NMI) Chebra, Company "A", 30th

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Infantry, acting jointly, and in pursuance of a common intent, did, at Naples, Italy, on or about 12 January 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of D'Atri Pasquali, 12 reams of mimeograph paper, 7 officers mess components, and 50 intrenching shovels, property of the United States, value in excess of $50.00.

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

Specification: In that Private Tom F. Conrad, Company "A", 30th Infantry, and Private Joseph (NMI) Chebra, Company "A", 30th Infantry, acting jointly, and in pursuance of a common intent, did, while engaged in the commission of a felony, viz, robbery against one D'Atri Pasquali, at Naples, Italy, on or about 12 January 1944, wrongfully, feloniously, and unlawfully force the said D'Atri Pasquali to accompany them from near the port of Naples, Italy, to near 66 Pasquali Scura, Naples, Italy, without the consent of the said D'Atri Pasquali.

CHEBRA

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

Specification: In that Private Joseph (NMI) Chebra, Company "A", 30th Infantry, then Private First Class, Company "A", 30th Infantry, did, at Pietravairano, Italy, on or about 13 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 12 January 1944.

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

Specification: In that Private Joseph (NMI) Chebra, Company "A", 30th Infantry, and Private Tom F. Conrad, Company "A", 30th Infantry, acting jointly, and in pursuance of a common intent, did, at Naples, Italy, on or about 12 January 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of D'Atri Pasquali, 12 reams of mimeograph paper, 7 officers mess components, and 50 intrenching shovels, property of the United States, value in excess of $50.00.

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

Specification: In that Private Joseph (NMI) Chebra, Company "A", 30th Infantry, and Private Tom F. Conrad, Company "A", 30th Infantry, acting jointly, and in pursuance of a common intent, did, while engaged in the commission of a felony, viz, robbery against one D'Atri Pasquali, at Naples, Italy, on or about 12 January 1944, wrongfully, feloniously, and unlawfully force

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NAVY DEPARTMENT

the said D'Atri Pasquali to accompany them from near the port of Naples, Italy, to near 66 Pasquali Scura, Naples, Italy, without the consent of the said D'Atri Pasquali.

Each accused pleaded guilty to the Specification of Charge I pertaining to him, except the words "desert" and "in desertion", substituting therefore respectively the words "absent himself without leave from" and "without leave", not guilty of the excepted words, guilty of the substituted words, and not guilty of the Charge but guilty of a violation of the 61st Article of War. Each accused pleaded guilty to Charge II pertaining to him and the Specification thereunder and not guilty to Charge III pertaining to him and the Specification thereunder. Each accused was found guilty of Charge I pertaining to him and the Specification thereunder, as pleaded, and guilty of Charges II and III pertaining to him and the Specifications thereunder. No evidence of previous convictions was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 50 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence as to each, but reduced the periods of confinement to 40 years, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that both accused absented themselves without leave from their organization, 13 December 1943 (Ex. A).

A Pasquali D'Atri testified that on the night of 11 January 1944 he was working for the American government as a truck driver. He was in the port of Naples driving an "American government" truck loaded "with cases" which he was taking to "the depot". Before he drove out of the gate at the port the two accused "opened the door and entered inside the truck". (R. 12,14, 17) The two accused sat on the seat with D'Atri and motioned him to keep silent, Chebra menacing D'Atri with a pistol, which the latter testified was "placed in my side to keep silent". This witness left the truck to get "the dispatch", returned and drove the truck away, leaving "Naples with the two in the truck". (R. 14,15) D'Atri was going to Cretchedona but the accused told him "to turn around," which he did (R. 15). Witness testified that when they arrived "one block before Pasquali Scura" Chebra got out of the truck but "on not finding the place, we all climbed back on the truck", and drove to San Giacomo. There Chebra again got out and again they "all climbed back in the truck and went back to the same place". D'Atri was driving the truck "all this time", although Chebra "had" driven the truck. (R. 15,16) They stopped the truck at the side of a building where there were some American soldiers and civilians. D'Atri entered the building followed by Chebra and "the soldiers and civilians unloaded the boxes off of the truck". D'Atri testified, "One remained guarding me while the others unloaded the truck" and "after they unloaded part of the truck, they told me to get on and not say a word to the police". D'Atri also testified he would not have gone with the accused if they had not had a pistol, and that he would not have permitted them to take the cases which belonged to the American government if they had not menaced him with the pistol. (R. 17)

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Second Lieutenant Robert Baird, 58th Military Police Company, testified that on the night of 11-12 January 1944 when he was duty officer in the "MP" headquarters, he received certain information from an Italian named D'Atri Pasquali and that as a consequence about 1:30 A.M. he entered "this apartment" with some companions and found accused with "government property" consisting of six or seven officers' mess components, a case of shovels and five or six cases of mimeograph paper. (R. 27,28) This witness testified Chebra was wearing "staff sergeant's stripes" and that after "due time and investigation" Conrad took witness and his companions "to his place that he called his room". Lieutenant Baird testified Conrad "said he and Chebra both lived there". (R. 29)

A "C.I.D." agent who accompanied Lieutenant Baird testified that they found accused "within an apartment, sitting on the cases which had been removed from the vehicle". He testified "The officer's mess components had been broken open within the room where Conrad and Chebra were apprehended". (R. 19) This agent testified Conrad took them "to the place where he had been living while he was AWOL", that it was a private room with a bed and wardrobe, in an "apartment where various Italians were also residing", and it had "the appearance of being occupied for quite some time". (R. 25)

This witness testified that he and his "partner" examined both accused and warned them of their rights under Article of War 24. He identified sworn statements which he testified accused signed and swore to after the warnings. The defense stated it had no objection and the statements were admitted in evidence. (R. 20,21; Exs. B.C)

In his statement Chebra said:

> "Conrad and me left our organization about a month ago. A few days later we met up with Edward Dushane and Pete. ***The night before we got the truck we were all in a tavern drinking and some kid came up to Dushane and told him he knew where he could get a gun so me and Dushane went up there. The Italian gave the gun to me and then Dushane and me parted. I didn't give any money for the gun, I didn't have a dime, to spend for a gun.***That night me and Conrad went down to the port and got on the truck. A civilian was driving it. I don't know how far we went or just how it was done but we made the civilian drive over to the place.*** we unloaded the truck. There was three or four Italians helping us, one of them was the guy that gave me the gun. I had never seen the others before. We took the stuff up to the apartment. I don't know where Dushane and Pete went to but they didn't stay around after this. I had been drinking pretty heavy that day. I made a pig of myself. After this I drank some more. When we were caught we were laying down sleeping" (R. 22).

In his statement Conrad said:

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"About a month ago I left my organization while it was down here for a rest period. Joe Chebra left with me.***most of the time I lived with Joe, near the place where we were caught.***The day before we pulled this 'raid' we were all in a tavern together and some Italian that spoke a little English came up to us and told us if we could get some American goods he'd buy it off of us. We were short of 'dough' so he took us around to place where we could deliver the stuff. That was the place where we were caught. That night Dushane and Pete got a gun off of the Italian and made arrangements for the following night. The next night Joe and I went out and got the truck while Dushane, Pete and the Italians waited at the place where the stuff was to be taken. Joe and I went down to the port, bum(m)ed a ride on the truck and when we got out a ways we told the driver to turn around and made him drive to the place. He knew we had a pistol so he didn't give us any trouble. When we got there, three Italians, including the one that spoke English, Dushane and Pete helped us take the stuff upstairs. We told the driver to get in his truck and beat it.***The English speaking Italian took a quick look at the stuff and said he'd be around at nine o'clock in the morning to buy it. Joe and I just sat there and pretty soon the MP's came up and we told them we were the guys they were looking for.

"The only reason we did this was to get some dough. If we hadn't been drunk we wouldn't have done it" (R. 23,24).

Accused made unsworn statements through counsel. Conrad said:

"One day about the middle of December, when our outfit was back for a rest, Chebra and I went to a town about a mile from where we were bivouacked and got drunk. After we got drunk we went to Naples. I had over $200, and was just going to have a good time for a while and when I ran out of money come back.

"I hung around Naples and did a lot of drinking.***I don't know whose idea it was to get hold of a truck. I guess it was because an Italian some one knew kept wanting to buy some stuff. Both the day before and the day of the robbery I was drinking a lot.

"I have admitted that I was along when the robbery happened and I haven't lied about it and won't lie about it. But I didn't desert and never had any intention of deserting. My outfit wasn't in combat, and I was just in Naples doing some drinking, and I still had some money. I knew that if I didn't go back I'd be picked up sooner or later, but I just kept putting off going back because I didn't want to face the music.

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My outfit wasn't in combat during any part of the time I was absent. I did intend to go back" (R. 30).

Chebra said:

"Conrad and I got drunk one day at a town near where our outfit was bivouacked. I had about $300 and suggested we go to Naples and celebrate, and we did. That's how all this trouble started.

"We did a lot of drinking in Naples. We were drunk almost all the time. We ran into a couple of fellows named Deschaine and Crescent. Crescent spoke some Italian, and that way we got mixed up with some Italians who wanted us to get hold of some stuff and they would buy it. Deschaine fixed it up to get a gun from some Italian.

"The charge about the robbery is right. I was drunk at the time, but as far as I know I did what I'm accused of doing about the robbery. But I didn't desert..I intended to rejoin my outfit but just kept putting it off.

"My outfit wasn't fighting while we were AWOL" (R. 31).

4. It thus appears from the evidence as well as accused's pleas of guilty that each accused at the place and time alleged in the Specification of Charge I pertaining to him absented himself without leave from the service of the United States and remained absent without leave until apprehended as alleged. Each was properly found guilty of a violation of Article of War 61.

Likewise it appears from the evidence as well as accused's pleas of guilty that each accused at the place and time alleged in the Specification of Charge II pertaining to him, acting jointly with the other in pursuance of a common design, by putting an Italian man, whose name was variously given as Pasquali D'Atri and D'Atri Pasquali, in fear, and without his consent, took from his presence articles substantially as alleged. That the articles were of the value alleged was properly inferable by the court. The confusion as to which of the Italian's names was his surname and which his given name is immaterial, and the accused were in no way misled or harmed thereby. The conviction of each accused of the Charge II as to him and the Specification thereunder was clearly warranted.

The evidence with respect to the facts alleged in the Specification under Charge III as to each accused is uncontradicted and ample. The language employed in the Specification suggests that it was intended to charge kidnapping and there is serious doubt as to whether that offense is here well pleaded or proven under either common law or federal statutes. At common law it was generally held that an essential element of the offense of kidnapping was the taking of the victim to another country (35 C.J. p. 903 et seq.). Section 408a, Title 18, United States Code, commonly known

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as the "Lindberg Act", denounces kidnapping but only when it involves interstate or foreign commerce and that element of the offense is not here present. Section 22-2101, Code of the District of Columbia likewise denounces kidnapping but contains as an essential element that the act must be "for ransom or reward" and it is questionable if the record contains evidence to prove the presence of that element. The offense described is, however, clearly a disorder to the prejudice of military discipline and conduct of a nature to bring discredit upon the military service, properly chargeable under Article of War 96. In any event, the sentence imposed is authorized for the offense of absence without leave and the adequacy of the pleading of the offense of kidnapping is immaterial.

5. The court received in evidence generally the pretrial statements of accused wherein each implicated the other, as well as testimony of similar oral admissions. The court failed to limit properly the applicability of this evidence. The court should have received the evidence as applicable only against the accused making the statement or admission as they were not made in the course of the joint venture but subsequent thereto. However, as all of the facts contained in the statements and admissions were proved by other competent evidence it cannot be said that the error injuriously affected the substantial rights of accused.

6. The charge sheets show that accused Conrad is 28 years of age, was inducted into the Army 25 March 1943 and had no prior service; that accused Chebra is 31 years of age, was inducted into the Army 24 March 1943 and had no prior service.

7. The court was legally constituted. 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 and sentence as to each accused. Penitentiary confinement is authorized for the offense of robbery here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 463, Title 18, United States Code.

(absent), Judge Advocate.

Joseph Simpson, Judge Advocate.

Donald K. MacKay, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 June 1944.

Board of Review

NATO 2490

UNITED STATES	)	FIFTEENTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at APO 520, U. S. Army, 7 May 1944.
Private CARLTON F. WADDELL (12 035 104), 49th Bombardment Squadron, 2d Bombardment Group (Heavy).	)	Dishonorable discharge and confinement for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

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

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

Specification: In that Private Carlton F. Waddell, 49th Bombardment Squadron, 2nd Bombardment Group (H), did, at Massicault, Tunisia, North Africa, on or about 1 December 1943, desert the service of the United States and did remain in desertion until he was apprehended at Sale, French Morocco, North Africa, on or about 10 December 1943.

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

Specification 1: In that Private Carlton F. Waddell, 49th Bombardment Squadron, 2nd Bombardment Group (H), did, in conjunction with Private Gordon T. Durst, 429th Bombardment Squadron, 2nd Bombardment Group (Heavy), at Massicault,

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Tunisia, North Africa, on or about 30 November 1943, feloniously take, steal, and drive away one (1) ¼ ton 4 x 4 truck (jeep), value about eight hundred dollars ($800.00), the property of the United States, furnished and intended for the military service thereof.

Specification 2: (Acquittal on motion.)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification and of Charge II and Specification 1 thereunder. On motion he was found not guilty of Specification 2, Charge II. Evidence of previous convictions was introduced, one by summary court-martial for being drunk and disorderly in quarters in violation of Article of War 96, and three by special courts-martial for being drunk and disorderly in quarters and for willfully destroying property leased by the government in violation of Articles of War 96 and 89, for absence without leave and breach of restriction in violation of Articles of War 61 and 96, and for being drunk and disorderly in uniform in a public place in violation of Article of War 96, respectively. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor 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 forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 1 December 1943, accused absented himself without leave from his organization at Massicault, Tunisia. At this time aircraft of the organization were engaged in combat. (R. 5-8; Ex. 1) Approximately 15 days previously accused had been removed from flying status and designated "a detail man" (R. 6). His extra equipment and clothing, which were kept in a "little wall tent" behind his "regular" tent, were missing when accused's absence was noted. The equipment had been packed the previous day and the clothing was in the tent the night before accused left. (R. 7)

An officer of accused's bombardment group testified that on 1 December 1943 a "jeep" with serial number 20305352, valued at $961.00, which had been assigned to the group, was missing. Accused was not the driver. (R. 8)

On 9 or 10 December 1943, two military policemen on motorcycle patrol in Sale, French Morocco, saw an unoccupied "jeep" parked near a "beer joint". As they went to investigate, accused came out wearing "a green cap and a rain coat". Asked if he were an officer accused answered in the affirmative. (R. 9,10) One of the military policemen testified:

"I asked him about orders or his AGO Card and he said it was in the hotel where they were staying. When we went in, he went upstairs and came back with a leather flying suit, sheep lined. I told him they issue those to all combat men, so that doesn't show that he is an

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officer. We went back and he was looking through his bags to find orders. When he first pulled out a cap he said it was an officer's cap. It was a tan cap with braid on it. He went into the other room where he said his driver was staying. I said, 'Let me see your dog tags'. As he pushed open a jacket, I saw a 45 in the shoulder holster. I pulled my 45 out, put a shell in the chamber and told him to give me the 45, and that we would have to take him to the police station because he didn't have enough identification to let him go." (R. 9)

Witness disarmed accused and took him to the provost marshal at Rabat (R. 9, 10). This witness also testified he heard accused making a statement in the "MP" station in "Casa" to an officer, who asked accused

"if the .45 was his and first Waddell said, 'Yes'. He told him, well, they don't issue pistols to a private very often, and he said the sooner they got it straight, his trial would be that much faster, and he wouldn't have so much bad time against him." (R. 10)

The officer told accused he did not have to tell him anything, "He told him that any statement he made will be used against him, that is he didn't have to say anything if he didn't want to" (R. 10).

Captain Oakland D. Ramsey, Provost Marshal at Rabat, testified accused stated at the police station that he was an officer and "didn't have to answer any questions". He stated he did not have an "AGO Card" and that his travel orders were "being flown down to Marrakech". That officer saw accused's identification "tabs" and testified "to the best of my memory it was for Privates". Accused would not give any more information about himself and was locked up. The following morning the provost marshal "had him out to camp for breakfast and he told the same story that Durst did". Durst was a companion of accused. (R. 11) This witness testified accused

"admitted he was a deserter, as best as I can remember from the Fifteenth Air Force at Tunis, where they were stationed and they had, him and his partner, Durst, swiped a jeep and also he had a pistol that he had, the best I can remember, he swiped it from a Staff Sergeant who was with him in the Air Force and that he posed as an officer so that he could get gasoline" (R. 11).

Accused also stated to this witness that he and Durst, who acted as chauffeur, had driven "to Oran and had repairs some place and went down to Rabat and Casablanca and back to Rabat" and that "they were going to Marrakech to fly to the States" (R. 11). When asked what words accused used "on desertion", witness testified:

"Well, he didn't say desertion, he said that he was absent from the outfit from the 1st of December. That took place

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on the 10th. He said he was absent from his outfit, he said he left his outfit, which means a deserter." (R. 13)

Witness testified he did not tell accused he did not have to answer any questions and did not mention whether the answers would or would not be used against him (R. 12,13). Accused and his companion had flight clothes and their bags with them (R. 13). Witness did not recall the number of the "jeep" but identified a certified copy of a receipt he received for the "jeep" when it was turned in at the "Ordnance Dump" at Casablanca. That document was received in evidence, defense stating it had "no objection". It showed that the number of the vehicle was #20305325. A final paragraph of the exhibit, which referred to the vehicle as "stolen", was excluded by the law member. (R. 11,12; Ex. 3)

First Lieutenant James T. Turner, Port Provost Marshal at Casablanca, testified that on 12 December 1943, in his presence, at the military police headquarters, accused signed and swore to a statement which was introduced in evidence (R. 14-16,21; Ex. 4). This witness testified that accused had talked with a "CID" agent in an adjoining office before the statement was signed, and that he "could hear them talking in there" but that he could not recall what was said. When the statement was presented to this witness for execution he explained accused's rights to him. The witness testified he was busy at the time but did not try to finish with accused "as quick as possible". (R. 14,15) He testified further:

> "I told him that he didn't have to make a statement. That it could be used for him or against him. That what he said here could be used in court-martials against him, and that if he should be willing, that it was the whole truth and nothing but the truth." (R. 15)

The provost marshal also testified he read the statement to accused before the latter signed it, that no coercion, threats or promises were employed and that there was no conversation other than the explanation of accused's rights (R. 14,17).

Before the statement was received in evidence accused testified "on the sole question as to whether or not the confession was voluntary". He testified he had never seen the port provost marshal of Casablanca and that that officer was not present when he signed the statement. He also testified:

> "We were called in by the CID approximately three times and told that if we made a statement it would save them the trouble. If we did, it would go much easier on us, that we would have the trial at Casablanca." (R. 18)

and that the "CID" told them "desertion and AWOL were considered the same so long as you were in uniform". (R. 18) The "CID" did not explain his rights to accused or tell him that the punishment "for AWOL was the same as desertion" (R. 19). The "CID" did not make any threats and the only promise that they made was for "a faster trial". A lieutenant in charge of

"the MP outfit" at Casablanca told accused he did not have to make a statement, but nobody read or talked to accused about the 24th Article of War. He testified he was familiar with the contents of "that document" before he signed it. (R. 20)

The statement of accused was as follows:

> "Having been warned of my rights under the 24th Article of War, I freely choose to make the following statement:
>
> "I left Tunis on 30 November 1943 with Durst; we left in a jeep that we had stolen. I stole a pistol in a tent of the 429th Bomb Sqn the night we left. We rode to Rabat in 8 days, getting gasoline at various American gas dumps by showing trip tickets that we made out ourselves. We picked up an Arab boy at Mescara on our way. We spent the nights in hotels; we also spent one night at a railroad station and another night in an English officers' bivouack area. We had intended to go to South Africa when we first started out; however when we got here, we decided to go to the States if we could. On 10 December 1943 I parked my jeep in front of a cafe and went in to get a couple of drinks. This was in Sale. Two motorcycle M.P.'s rode up; one of the motorcycle M.P.'s started to salute me and I saluted him back; I was wearing an officer's overseas cap that had no braid and no officer's rank insignia. I started talking with the M.P.'s and one of them asked me for my A.G.O. card; I told him I did not have it on me and told him I would go down to the Hotel room and see if I had it in the bag; after we got down there, he put us under arrest.
>
> "The reason why I intended to desert from the U.S. Army is that I was court martialed and fined 4 times since I have been in Africa where I came to on November 10th, 1942. I got so thoroughly disgusted of losing so much pay and always being chased around by a guard that I made my mind up to get away from it all." (Ex. 4).

The court granted a motion to strike "so much of the exhibit as pertains to the theft of this pistol" (R. 21).

Accused elected to remain silent (R. 22).

4. It thus appears from uncontroverted evidence that at the place and time alleged in Charge I and its Specification, accused absented himself without leave from his organization and was apprehended eight or nine days later at Sale, French Morocco, approximately 1,000 miles from his station. After accused had been fully apprised of his rights, he signed a confession, shown to have been voluntary, and made other statements to the effect that

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he deserted because he was "thoroughly disgusted" with the Army and had concluded "to get away from it all", and at one time intended to go to South Africa or to the United States. Aliunde the confession the evidence of accused's intent not to return to his place of service is ample. Though the absence was not prolonged, accused was apprehended a great distance from his station. While absent he was in the neighborhood of numerous military installations, but did not surrender to military authorities. When apprehended accused falsely represented himself to be an officer, admitted he was trying to get to the "States", and was in possession of a government vehicle which he and his companion had wrongfully taken when the absence began. From these facts and the other circumstances of the case, the court was justified in finding accused guilty of desertion (MCM, 1928, par. 130a).

With respect to Specification 1 of Charge II the evidence shows that when apprehended about 1000 miles from his proper station, accused was in possession of a "jeep" and that immediately after he had absented himself from his organization such a vehicle was missing. The testimony was to the effect that the serial number of the missing vehicle corresponded with that shown on the receipt given for the vehicle which accused had when apprehended except that the last two digits were reversed. Accused admitted to the provost marshal at Rabat that he and Durst "swiped a jeep" and in his written confession he stated "we left in a jeep we had stolen". That the vehicle was property of the United States and was furnished and intended for the military service was shown by the testimony that it had been assigned to the bombardment group of which accused was a member. There was testimony that the value of the vehicle was in excess of the value alleged. All elements of the offense alleged in Specification 1 of Charge II were established (MCM, 1928, par. 150i).

5. Captain Ramsey testified that prior to accused's oral statement to him witness did not warn accused of his right to remain silent and that what he said might be used against him. The statement, as presented in this witness' testimony, amounted to an admission of being absent without leave and a confession of the larceny alleged in Specification 1 of Charge II. While that part of the statement which consisted of the admission was properly in evidence without a showing accused had been warned of his rights, that portion which was a confession would ordinarily require further inquiry into the surrounding circumstances before its admission, in view of the fact that accused was confessing to a military superior (MCM, 1928, par. 114a). However accused, after he had been told he did not have to make a statement, according to his oral testimony, signed and swore to a subsequent written confession before Lieutenant Turner which contained a statement that he had been warned of his rights under Article of War 24. In that confession accused stated "we left in a jeep that we had stolen". It would thus appear that though the admission of a portion of the oral statement made to Captain Ramsey was objectionable, the written confession which was clearly admissible embodied the same facts. Too, it is undisputed that when apprehended accused and his companion had in their possession a recently stolen "jeep". From that possession, under the circumstances here present, the court would have been fully warranted in finding accused guilty of Specification 1 of Charge II.

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It cannot be said accused's substantial rights were injuriously affected by the receipt in evidence of the oral confession (AW 37).

6. The charge sheet shows that accused is 22 years old. He was inducted into the Army of the United States 15 December 1941 and had no prior service.

7. The court was legally constituted. 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 and sentence.

Kenneth P. Billingsley, Judge Advocate.

Gordon Simpson, Judge Advocate.

Donald K. MacKay, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
21 July 1944.

Board of Review

NATO 2531

UNITED STATES v. Privates NATHANIEL J. SCOTT (37 061 831) and GEORGE M. MC GHEE (32 076 904) and Private First Class VIRGIL DAVIS (37 371 363), all of Detachment Company B, 743d Military Police Battalion (Aviation), and Technician Fifth Grade WILLIAM D. COHEN (32 452 735), Headquarters Detachment, 743d Military Police Battalion (Aviation).	ARMY AIR FORCE SERVICE COMMAND MEDITERRANEAN THEATER OF OPERATIONS Trial by G.C.M., convened at Naples, Italy, 19 May 1944. Davis: Acquitted. Cohen: Finding of guilty disapproved. Scott and McGhee: Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Nathaniel J. Scott, Detachment Company B, 743rd. Military Police Battalian (Avn), and Technician fifth grade William D. Cohen, Headquarters detachment, 743rd. Military Police Battalian (Avn) and Private first class Virgil (NMI) Davis, Detachment Company B 743rd. Military Police Battalian (Avn), and Private George M. McGhee Detachment Company B, 743rd. Military

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Police Battalion (Avn), acting jointly and in pursuance of a common intent, did, at Acerra, Italy, on or about 2030 hours, 9 April, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Eugene C. Evans, a human being by shooting him with a Thompson sub-machine gun caliber 45.

Each accused pleaded not guilty to and accused Scott, McGhee and Cohen were found guilty of the Charge and Specification. Davis was found not guilty. No evidence of previous convictions as to accused McGhee or Cohen was introduced. As to accused Scott, evidence of one previous conviction by summary court-martial for discharging a submachine gun in his squad room through carelessness in violation of Article of War 96 was introduced. Scott, McGhee and Cohen were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor "for life", three-fourths of the members of the court present concurring. The reviewing authority disapproved the findings and sentence as to accused Cohen, approved the sentences as to accused Scott and McGhee, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 9 April 1944 Detachment Company B, 743d Military Police Battalion, of which accused were members, was bivouacked about two miles from Acerra, Italy (R. 5,6,59,62,118,119). About 1800 hours on the date alleged, Private Eugene C. Evans, Private Leonard E. Taylor, and Private Milford L. Taylor, all members of the 65th Ordnance Ammunition Company (Aviation), were in a room on the second floor of a house of prostitution at 63 Via Calzolaio in Acerra with two Italian girls when four other colored American soldiers entered and "asked about women" (R. 7,15-18,21-23, 28-30,34,35,59,60,63; Ex. 2). Milford L. Taylor testified the "ladies told us to tell the boys that they wasn't having any intercourse with them because it was Easter". Leonard Taylor testified that at the request of one of the girls he told the visitors "the girls had gone to Naples" whereupon a soldier, whom Taylor identified as accused McGhee, asked Taylor "What you going to do?", to which Taylor replied "Nothing". After some words the two engaged in an altercation during which McGhee struck Taylor in the face causing his mouth to bleed. There was evidence that during the altercation between McGhee and Taylor, Evans produced and loaded a .45 caliber automatic pistol. (R. 17-19,22-25,30,31,33,35,37,42,56) The visitors withdrew and Evans, with the pistol in his hand, followed them down the stairs and fired as they drove away in a weapons carrier (R. 17,18,31; Exs. 4,7).

Evans rejoined Leonard Taylor in the room with the two girls and Milford Taylor departed (R. 33,39). The four were in the room when about three hours later a commotion was heard outside. Evans was loading his pistol and went toward the door with the weapon in his hand. (R. 39,43) One of the girls was about to unlock the door when suddenly it was broken open and three or four colored soldiers "come in shooting" (R. 18,19,27,35,36,38,39,42,43). Five or six shots were fired in rapid succession. Taylor and one of the girls ran out the door, the other girl dived under a bed and Evans fell to

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the floor with two bullets in his left shoulder, one in his head and a fourth in his right shoulder. (R. 7-11,19,20,28,36,38,39,42; Ex. 1) It was dark and none of the occupants of the room were able to identify any of the intruders (R. 19,26,31,36,39,43). The commander of the local carabinieri arrived shortly after the shooting and found Evans' body on the floor in a pool of blood, on the floor near it his pistol, and just inside and to the right of the door six empty .45 caliber cartridge cases (R. 52-55,58). An American lieutenant who arrived a few minutes later examined Evans' pistol and found it had been fired recently but had seven rounds of live ammunition in the magazine and none in the chamber (R. 64,65,88,89). This witness testified that the magazine of this type pistol holds seven cartridges and an additional one could be inserted in the chamber and that when it is fired a live cartridge is automatically pushed from the magazine into the chamber (R. 90,91). Three days after the homicide the investigating officer recovered two copper-jacketed .45 caliber bullets from the soft plaster wall opposite the door. They entered the wall about three or four feet apart and about four feet from the floor. The six empty cartridge cases found in the room, the two bullets retrieved from the wall and three other copper-jacketed .45 caliber bullets removed from Evans' body were turned over to a ballistics expert for identification. (R. 10-14,54,61,64-66,87,99-101)

A medical officer testified that four bullets entered Evans' body from the front and that his death resulted from the shock caused by the wounds (R. 10-12).

About 0200 hours on the morning following the shooting, accused's company commander examined a .45 caliber Thompson submachine gun issued to accused Scott and found it had been fired recently. The gun had a fresh odor of burnt powder and particles of burnt bits in the barrel. It was turned over to a ballistics expert for identification. (R. 5,92-94,98) The weapons were kept in a rack, were always available and there was no way of knowing when they were removed (R. 94).

A ballistics expert who examined the cartridge cases, bullets and machine gun testified that the five bullets and six cartridge cases were fired from Scott's Thompson submachine gun. He based his conclusion on 36 points of similarity he observed through a comparison microscope between the pattern of markings on the cartridge cases and bullets turned over to him for identification and those on four cartridge cases and bullets fired by him from Scott's gun. Two microscopic photographs showing some of these similarities were introduced in evidence. (R. 95-108,112,114; Exs. 14,15) Scott's submachine gun, the six evidence cartridge cases and five bullets and the four test cartridge cases and bullets were also introduced in evidence (R. 98-102; Exs. 8-13).

Private Emanuel Bethea, a member of accused's company, testified that on the night of the homicide, pursuant to an agreement with accused Scott, he was walking Scott's post with Scott's submachine gun when about 2030 hours Scott arrived at the post in a weapons carrier driven by accused Davis. The weapons carrier stopped about ten feet from witness and Scott approached him saying he would take over the post whereupon witness returned Scott's sub-

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machine gun to him. Scott then disappeared with the gun in the direction of the weapons carrier. However, it was dark, and Bethea could not see whether Scott left in it. Bethea called the corporal of the guard, remained on the post without a weapon until 0015 hours but did not see Scott again that night. (R. 44-50)

The investigating officer was also line-of-duty investigating officer for his organization. He testified that on 15 April 1944, acting in the latter capacity, he took statements from each of the accused concerning the facts surrounding Evans' death without first informing them of their rights under Article of War 24. Subsequently, on 28 April 1944, in his capacity as investigating officer in the instant case, he read the charges to each accused individually, advised each as to the signer thereof and informed each as to his rights under Article of War 24. After having been so advised each accused stated he had previously related all he knew about the matter and requested that his previous statement be used. The officer then copied the previous statement of each accused and each signed and swore to his statement before the officer. (R. 66-76, 78,79,81-83) The statements were offered in evidence with the specific qualification that each was tendered as evidence solely against the accused who made it. Over the objection of defense the statements were admitted in evidence "as admissions against interest" and the law member admonished the members of the court to "consider each statement as against the maker only and not as evidence against the other accused". (R. 76,81-83,85,86) An objection by defense to the reading of "any hearsay declaration contained in the statement" of Scott was likewise overruled (R. 84,85). The statements by Scott and McGhee contained recitals to the effect that they had been warned that they might remain silent and that whatever they said could be used against them.

Scott, in his statement, said, among other things:

> "About 2000 hours, 9 April 1944, McGhee, Cohen and I met Davis driving the weapons carrier toward Acerra. He stopped and asked us if we wanted to ride with him. We asked him where he was going, and he said, 'to take some laundry down'. We all got into the truck. I rode in the front seat, Cohen and McGhee in the rear of the truck. We went to Acerra and stopped at a whore house. Davis, Cohen, and McGhee got out and went upstairs. I stood in the street door-way for a little while. Then I started up the steps and some civilians came down past me. I continued on up to the porch where I met Davis, McGhee and Cohen coming out. We went down the stairs with me walking in front. We all got in the truck and started away. Then I heard two shots. I don't know who fired them. Davis, McGhee and Cohen said, 'we are going back dwon there.' I said, 'I am with the bunch'. We went back to our camp and parked the truck at the corner of the barracks. Davis stayed outside. McGhee, Cohen and myself went inside the barracks. I went into the Day room. In a little while McGhee came into the dayroom and said,'Come on, we are ready to go'. I came on outside with McGhee and when we were in the yard I saw that Cohen had

an M1 Ca..30 rifle, McGhee had a Thompson sub-machine gun. Davis had no weapon as far as I know. As we went into the yard Davis said to me, 'Where are some of the corporals or sergeants, so I can borrow a pistol. I don't want to go down there without a weapon'. Davis, Cohen, McGhee and I then started out for Acerra in the weapons carrier. While we were moving along in the truck they said, 'Scott where is your weapon?' I told them that the sentry, Pvt. Bethea on post #2 had it. Pvt. Bethea had my Thompson machine gun on post when I visited him at post #2, April 9, 1944 about 2130 or 2200 hours. We drove up to the Post #2 in a weapon(s) carrier. Davis was driving. I asked the sentry, 'let me have the gun a few minutes, I will bring it back right away'. The sentry did not say anything but handed me the gun.

"The reason we went after my gun was because at camp, McGhee had a Thompson submachine gun in his hand, standing out in the yard near our barracks, Cohen had an M1 Cal..30 rifle in his hand at the same time. Davis was standing there also. Davis had no weapon as far as I know. I think it was then about 2130 hours. Davis McGhee, Cohen and I then went back to the house that we had been to previously. Davis wanted to drive the truck into the wide doorway into the court yard, but McGhee said, 'no, park it on the street. The truck was left on the street. McGhee got out first, Cohen second, I was behind Cohen, and Davis was behind me. We went upstairs to the room. The door was open when we reached it. I heard lots of shots being fired. The room had a dim light in it. I saw McGhee and Cohen go through the door with their weapons at about port arms. Davis was behind me. I don't know whether Davis had any weapon with him at that time or not. I don't know whether Cohen and McGhee fired their weapons or not. I did hear shooting, more than one shot. I was standing in the door-way and I fired one shot with my machine-gun into the room. I do not know whether I hit any-one or not. I did not see anyone fall as if hit. I did not hear anyone yell out as if they had been shot. Lots of people ran down the stairs. I ran down also. I still carried my gun. I ran down the street toward my camp. ****

"Before the party broke up I went to bed. After I was asleep for awhile Cpl Raab woke me up and said Bethea had called up for my gun. I said there is nothing I can do about it. Later on in the night I was awakened and placed under arrest." (Ex. 4)

McGhee's statement included the following:

"I was coming back to camp from a walk and I met a weapons carrier with Davis driving and Scott on the front seat and Cohen in the back. So they insisted I go with them. I got in with them and we went to Acerra. We go to this house. When we get in there

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(120)

were three other colored soldiers in the place and some girls. When we got in one of the soldiers said, 'this place is finished get out', the soldier who said this was lying on a small bed, and so Scott went over to the bed and had some words with him. A soldier pulled a pistol and put a bullet in the chamber. This soldier was standing in the corner, so I told him it was no use in doing that, cause maybe the fellow was drinking and did not know what he was doing. He insisted we get out in a hurry. Two went out right away, and then Scott, and he then pushed Cohen out, and he came out behind us calling one of his soldier friends. So when we got in the weapons carrier he fired at us, one shot. We then came to camp and Scott insisted we go back. Scott got a submachine gun and gave it to me. He went upstairs in our quarters and got it when we were back at the camp. Scott insisted on going to Post #2 to get another sub-Thompson gun, saying that this one was his. We went to Post #2 and he got the weapon from the sentry and we go back to the house and when Scott got in he opened fire. All the people in the room ran out. When we got out on the ground he insisted that I drive the vehicle back to camp because we could not find Davis. I would not do this because I didn't have a key and I didn't take the vehicle down with me. So I walked back to camp. The four of us went down to this place twice. I carried a gun, Scott carried a gun, Cohen had a rifle, Davis did not have a weapon. Scott was the only one of our group in the house the second time.

"When we went to Post #2 Davis stopped the truck in alongside sentry. Scott called the sentry by name, from the truck, and said, 'give me my gun'. My view of the sentry was obstructed by the canvas top on the truck, and I was talking to Cohen, so I didn't see the sentry give the gun to Scott. The sentry said something in reply to Scotts' demand for the gun, but I did not understand the words. When we got back to the house the second time I saw Davis get out of the truck. I do not know where he went to. I saw Scott fire his gun. He did not put it to his shoulder, but fired it by holding it in both hands above the hip. I was beside the doorway right behind Scott, who was inside the doorway in the room. I saw the flashes of the shots. I did not count the number of shots fired, but there were more than one. I did not see anyone get hit nor hear anyone scream or make a noise as if hit by a bullet. The people in the room all ran and were making a lot of noise by yelling. I followed the other soldiers and women down the stairs to the turn in the steps, where Cohen was standing. Cohen and I ran on down to the truck in the street. Scott then walked up to the truck where Cohen and I were standing, Scott said, 'Get in the truck and drive it away from here'. Scott had a machine gun in his hand at the time. I would not drive the truck, and walked down the street toward my camp by myself. I do not know where Scott and Cohen went from there. I next saw Cohen in our barracks. I never saw Scott anymore that night.

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"When we were at the house the first time, and after we were told to get out by the soldiers, and we all started away, one of the soldiers, who had an Army Cal..45, followed us down to the ground and fired the pistol as we got into the truck. I did not see him fire the pistol, but while he was following us down stairs I saw the pistol in his hand. All this occur(r)ed on 9 April 1944" (Ex. 7).

Accused's former and present company commanders and a lieutenant from accused's company testified for the defense that McGhee, Cohen and Davis had performed their duties in a satisfactory manner, had not been in trouble and had good military records (R. 115-120).

The accused elected to remain silent (R. 121).

4. It thus appears from the evidence that at the time and place alleged Eugene C. Evans, the person named in the Specification, was killed as the result of being struck by four bullets fired from a .45 caliber Thompson submachine gun issued to accused Scott. The homicide occurred in a room on the second floor of a house of prostitution. Scott admitted he was standing in the door of the room occupied by Evans and "fired one shot with my machine-gun into the room". Accused McGhee admitted he was "beside the doorway right behind Scott, who was inside the doorway in the room when Scott fired" and was himself armed with a submachine gun. Both these accused admitted further that a few hours before the homicide they visited the room where the homicide occurred where McGhee had an altercation with a companion of Evans, and Evans, with a pistol in his hand, forced them to leave, followed them to their truck and discharged his weapon as they drove away. Scott stated that, as they drove away, his companions said "we are going back dwon there", to which he replied "I am with the bunch". Both Scott and McGhee admitted going some two miles to their camp, arming themselves with submachine guns and returning to the room occupied by Evans where the evidence shows they broke open the door and "come in shooting". The attack was so sudden that although Evans had an automatic pistol in his hand he did not, apparently, fire it.

There is evidence that the return to the scene was motivated by a common unlawful purpose, that is, that, resentful of the indignities imposed upon them by Evans, accused Scott and McGhee, armed with deadly weapons, returned to even the score. Evans was armed but accused were plainly the aggressors. No excuse or justification for the homicide is suggested by the evidence. By joining in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involved the contingency of taking human life, Scott and McGhee each became responsible for the homicide committed by Scott acting in furtherance of such common design. The shooting was deliberate and wanton and without legal excuse or justification. Malice is inferable from the possession and use of deadly weapons and other circumstances in evidence. Scott and McGhee were properly found guilty as charged (NATO 1470, Hall et al; NATO 2221, Harris et al; 18 U.S.C.A. 550; 26 Am. Jur., Homicide, secs. 58,60,64,66; 29 CJ p. 1073 et seq.).

5. The statements of accused Scott and McGhee were admitted in evidence over objection. The objection was based, in substance, upon the fact that some two weeks before the statements were secured accused, without being advised of their rights under Article of War 24, had given similar statements in the course of an investigation into the line-of-duty status of Evans at the time of his death, and also on the additional ground that the statement of each accused was competent only as against the maker. The record is clear that before the statements introduced in evidence were made each accused was fully informed of his right to remain silent and after being so informed requested that his previous statement be used as the basis for the statement he desired to make. In compliance with such request the previous statement of each accused was copied and each accused signed and swore thereto. The statements were tendered in evidence with the specific qualification that they were offered only against the maker in each case. In addition the law member specifically advised the court that each statement was to be considered only as evidence against the maker thereof. This procedure was proper. The fact that a confession or admission of one cooffender is inadmissible against the others does not prevent the use at a joint trial of such confession or admission against the one who made it (MCM, 1928, par. 114c). The voluntary nature of the statements was clearly shown by the evidence.

6. There was no error in the action of the court in overruling the objection by defense to the reading of "any hearsay declaration" contained in the statement of accused Scott. Consideration of the statement was specifically limited to the author thereof. Moreover, there was ample and convincing competent evidence aliunde Scott's statement to sustain the conviction of McGhee. It is not reasonable under the circumstances to suppose that the hearsay declarations contained in Scott's statement, even if inadmissible, had any influence on the finding of the court as to the accused McGhee or that their admission under the circumstances in any way prejudiced any substantial rights of the accused McGhee.

7. The charge sheet shows that accused Scott is 26 years old. He was inducted into the Army 6 March 1941, and had no prior service. Accused McGhee is 28 years old. He was inducted into the Army 23 July 1942, and had no prior service.

8. The court was legally constituted. 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 as to accused Scott and McGhee and the sentences as to these accused. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Ralph W. MacRae, Judge Advocate.

Werner Rohm, Judge Advocate.

Harry C. Herrick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
28 June 1944.

Board of Review

NATO 2539

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 9 May 1944.
Privates BERNARD O'DONNELL (33 016 153) and STEVE KORINCHOK (33 015 912), both of Company C, 51st Medical Battalion, and Private CECIL E. GUNTER (34 760 942), attached to Headquarters Detachment, 29th Replacement Battalion.	)	As to O'Donnell and Korinchok: Dishonorable discharge and confinement for 10 years. As to Gunter: Dishonorable discharge and confinement for 15 years. O'Donnell and Korinchok: Federal Reformatory, Chillicothe, Ohio. Gunter: U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

2. Accused were jointly tried upon the following several and joint Charges and Specifications:

O'DONNELL AND KORINCHOK

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Bernard (NMI) O'Donnell, Co. "C", 51st Medical Battalion and Private Steve (NMI) Korinchok, Co. "C", 51st Medical Battalion acting jointly, and in pursuant of a common intent with Private Cecil E. Gunter, did, at Naples, Italy, on or about 2200 hours, 14 March 1944, feloniously take,

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steal, and carry away thirty-two (32) U. S. Army blankets of the value of about $247.68, property, of the United States furnished and intended for military service thereof.

Specification 2: In that Private Bernard (NMI) O'Donnell, Co. "C" 51st Medical Battalion, and Private Steve (NMI) Korinchok, Co. "C", 51st Medical Battalion acting jointly and in pursuant of a common intent with Private Cecil E. Gunter, did, at Naples, Italy, on or about 2200 hours, 14 March 1944, wrongfully and knowingly sell twenty-six (26) U. S. Army blankets of the value of $201.24, property of the United States furnished and intended for military service thereof.

GUNTER

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

Specification: In that Private Cecil E. Gunter, casually atchd headquarters Detachment, 29th Replacement Battalion, did, without proper leave, absent himself from his command at Agnano, Naples, Italy, from about 10 March 1944 to about 16 March 1944

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

Specification 1: In that Pvt Cecil E. Gunter, casually atchd Hq Det, 29th Repl Bn, did, in conjunction with Pvt Bernard O'Donnell and Pvt Steve Korinchok, both of Company "C", 51st Medical Battalion, at Bagnoli, Italy, on or about 14 March 1944, feloniously take, steal, and carry away thirty-two (32) blankets of the value of about $247.68, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Pvt Cecil E. Gunter, casually atchd Hq Det, 29th Repl Bn, did, at Bagnoli, Italy, on or about 16 March 1944, feloniously take, steal and carry away eighteen (18) blankets of the value of about $139.32, property of the United States furnished and intended for the military service thereof.

Specification 3: In that Pvt Cecil E. Gunter, casually atchd Hq Det, 29th Repl Bn, did, in conjunction with Pvt Bernard O'Donnell and Pvt Steve Korinchok, both of Company "C", 51st Medical Battalion, at Bagnoli, Italy, on or about 14 March 1944, wrongfully and knowingly sell to Izzo Alberino twenty-six (26) blankets of the value of about $201.24, property of the United States furnished and intended for the military service thereof.

Each accused consented to a common trial. Each pleaded not guilty to and was found guilty of the Charges and Specifications pertaining to him. No evidence of previous convictions as to accused Gunter and O'Donnell was introduced. Evidence of two previous convictions by summary court-martial

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as to accused Korinchok, one for entering an off-limits area and being disorderly in a public place in violation of Article of War 96, and one for absence without leave in violation of Article of War 61, was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, O'Donnell and Korinchok for ten years and Gunter for 15 years, three-fourths of the members of the court present concurring in the sentence as to Gunter. The reviewing authority approved each sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement for O'Donnell and Korinchok and the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for Gunter, and forwarded the record of trial for action under Article of War 50½.

3. As to the Specifications of the Charge respecting O'Donnell and Korinchok and Specifications 1 and 3, Charge II, respecting Gunter, the evidence shows that during the evening of 14 March 1944, at Fuorigrotta, Italy (in the vicinity of Bagnoli and Naples), the three accused and an Italian woman named Lisi Umilia, went to the house of one Izzo Alberino.. This Italian testified that the accused had 32 blankets with them and that the woman consulted him about their quality and, according to witness, obtained a loan from him to enable her to purchase the blankets from the soldiers. (R. 10-12,14) Of the blankets, 26 "were bought and six (6) were refused". The price agreed upon was $130.00, of which accused Korinchok was then paid $43.00. Each of the other accused was to get $43.50 on the following day. With the exception of two or three "which were a little different" and were possibly English, the 32 blankets were "regular U.S. Army blankets". (R. 11-14)

Accused Gunter made a written statement on 19 March 1944, after he was

> "quoted the 24th Article of War and warned of his rights as a soldier and was told that he did not have to make a statement if he did not want to, and he was also told that if he did make a statement that it could be used against him if the case ever came to trial" (R. 20).

The statement was admitted in evidence only "against the one who signed it" (R. 20,21; Ex. 2). Gunter stated therein that while absent without leave he got acquainted with accused O'Donnell and together they often visited the family of "Izzo Al Bartino". On 14 March 1944, he and O'Donnell left

> "Izzo's house at about 1930 hours, for O'Donnels camp. On the way he told me that he had made a deal to sell some Army blankets for $5.00 each. O'Donnel told me that he was on guard near a tent where there were some blankets and if I would help him take the blankets to Izzo's house we would split the money. I agreed. O'Donnel showed me the tent where the blankets were, telling me that he would watch for other guards and let me know when to take the blankets from the tent. I went

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into the tent and sat down on some blankets. A few minutes later O'Donnel and another guard Pvt. Korinchok, came into the tent. O'Donnel told me that Korinchok was in on the deal and that the money would be split three ways. I agreed to this. The three of us agreed that I would take the blankets from the tent and carry them about 100 yards away and leave them there until O'Donnel and Korinchok were relieved at 2200 hours. Then they were to come and help me carry the blankets to Izzo's home. O'Donnel and Korinchok then left the tent to take up their posts, so they could warn me if anyone came around. I made two trips carrying the blankets about 100 yards away from the bn. area, and put them on the ground in a near by field. I then went to Izzo's house and I stayed there until about 2130 hours then I went back to where O'Donnel and Korinchok were walking guard. O'Donnel told me I shouldn't be hanging around that someone might see me. So I then went to where the blankets were in the field and waited there until O'Donnel and Korinchok came, it was about 2215 when they arrived."

Gunter stated further that,

"The three of us then carried the blankets to Izzo's house. Izzo agreed to buy the blankets for $5.00 each. Izzo said that he had only 5,000 lire with him, saying that he would pay the balance tomorrow. He gave Korinchok $43.00, and told O'Donnel and I that he would pay us the next day. On the following day at about 1300 hours O'Donnel and I went to Izzo's house and he gave us each $43.50." (R. 21; Ex. 2)

After being warned in substantially the same language as in the case of Gunter, accused O'Donnell made a written statement on 18 March 1944, which was admitted in evidence "as it pertains to the accused that signed it" (R. 20,22,23; Ex. 3). O'Donnell stated therein that on the night of 15 March 1944 he met accused Gunter at the home of "Izzo Alberino" where they were drinking with "some of the girls", including Lisi Umilia, and that he, O'Donnell, proposed to sell her some blankets at a price of five dollars each. He stated further that

"Gunter and I had a few more drinks with the girls and left about 1930 as I had to go on guard at 2000 hrs. On the way back to my camp we agreed that we would get some blankets from my camp and bring them to Izzo Alberino's house to sell for five ($5.00) dollars each. We knew that my post was near the tent where the blankets were stored. I was to watch out for the other guards and Gunter was to go into the tent and take the blankets out and throw them in a field until I got off guard which was 2200 hrs. We would then take the blankets to Izzo

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Alberino's house. Gunter went into the tent where the blankets were and I took up my post, which was #4. Post #3 connected with mine and the guard on there was Pvt. Korinchok. Pvt. Korinchok was standing around the tent and I asked him if he cared to take a walk or would he stick around and make some easy money. He said he would stay around. I called Gunter out of the tent and we told him that we would watch out for the other guard while he took the blankets out of the tent. Gunter made two trips taking 32 blankets. Later Korinchok and myself met Gunter when we got off guard. We went over to the field where Gunter had the blankets and took them down to Izzo Alberino's house. Six of these blankets had holes in them and we were unable to sell them. We sold the remaining 26 for one hundred and thirty ($130.00) dollars. Izzo Alberto, not having enough money to pay the full amount, give Pvt. Korinchok forty-three ($43.00) dollars and informed Pvt. Gunter and myself to come back to next day and he would pay the balance. The following day Gunter and myself returned to Alberto's house and received from him forty-three ($43.00) dollars each. Later that night I took the six blankets that we were unable to sell back to my organization." (R. 22,23; Ex. 3)

Accused Korinchok made a written statement on 19 March 1944 after having been warned in substantially the same language as were the other two accused (R. 20,22,23; Ex. 4). The statement was admitted but with the understanding that it would "not be used in evidence except for the person whose signature appears thereon" (R. 24). In it, Korinchok stated that,

"On the night of March 14 at 2000 hours I went on guard at Post #3 at the 51st Medical Bn., Co. C, APO 782. The Post next to me was post #4 and the sentry walking that post was Pvt. Bernard O'Donnell. I was walking my Post and heard a noise in the motor pool supply tent where U. S. Army blankets are stored. I went and investigated and found a soldier in the tent laying on some blankets. I asked him what he was doing and he answered that he was a friend of Private O'Donnell and was just waiting for him to get off duty. At about 2215 Pvt O'Donnell and myself met Pvt. Gunter out in the field where he had 32 blankets. I was appointed the guard while Pvt. O'Donnell and Gunter take the 32 blankets to the home of Izza Alberino. At about 2230 Gunter came back and informed me that the 32 blankets were down at the house. I then went down to the house and Pvt. O'Donnell and Gunter and myself had a few drinks. Izza Alberino refused to buy six (6) of the thirty-two (32) blankets as they had holes in them. The remaining twenty-six (26) were purchased by Izza Alberino at five ($5.00) dollars. Alberino was unable to pay the full amount so he paid me forty-three ($43.00) dollars that night and told O'Donnell and Gunter to return the next day for their share" (R. 24; Ex. 4).

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The court, at the prosecution's request, took judicial notice of "AR 30-3000, 31 August 1943, wherein U. S. Army blankets are listed" at $7.74 each (R. 25).

As to the Specification of Charge I, pertaining to accused Gunter, an extract copy of the morning report of Headquarters Detachment, 29th Replacement Battalion, introduced in evidence (Ex. 1; R. 9), shows the following entries:

> "11 Mar 44
> 34760942 Gunter rtns & qtrs Pvt
> Duty to AWOL as of 10 Mar 44 0645"

In his statement dated 19 March 1944, Gunter stated:

> "On the 9th day of March I left the 29th Repl. Bn. on pass. My pass was up at 2030 hours, but I did not return to my camp***For the past seven days, I have been staying at the 45th Hosp. and the 51st Med. Bn" (R. 21; Ex. 2).

As to Specification 2 of Charge II, relating to Gunter, the evidence shows that about 20 minutes past midnight of 16-17 March 1944, a sentinel of Company D, 51st Medical Battalion, stationed at Bagnoli, Italy, halted Gunter when the latter "with 18 blankets on his shoulder" crossed the sentinel's post and was undertaking to climb over a near-by wire fence (R. 16,17). Gunter "laid the blankets down and walked up" to the sentinel (R. 17). The latter testified he knew there were 18 blankets because they were counted in his presence (R. 16,17). The sergeant of the guard, who arrived at the scene, testified that accused Gunter had in his possession 18 blankets which had been taken from a tent where they were stored and which were the property of the United States (R. 18,19). The witness testified further that he

> "asked him who he was and he told me. I asked him what he was doing with the blankets and he said he just wanted them. And I said, 'do you know what you get for stealing blankets', and he didn't answer. Then he told me to be a good guy and to leave him off. I told him that I'm not that kind of a soldier, to do these things" (R. 18).

In his statement dated 19 March 1944, accused Gunter stated:

> "On 16 March 1944 at about 2000 hours, I met O'Donnel at Izzo's house, and we stayed there drinking wine until about 2300 hours. We left together and walked back to his camp. After arriving in his camp we went to the tent where we had previously taken the blankets from. There were no guards around, so O'Donnel suggested that we take some more blankets to Izzo. We each took a bundle of blankets. O'Donnel left first, he was several yards ahead of me, when a guard flashed his light on me and called halt. I stopped, dropped the

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blankets and went back to the guard. The Cpl. and the Sgt. of the guard came over and took me to the guardhouse, also the 18 blankets which I had taken from the tent" (R. 21; Ex. 2).

The three accused elected to remain silent (R. 25,26).

4. The uncontradicted evidence shows that at the places and times alleged in the Specifications of the Charge respecting O'Donnell and Korinchok and Specifications 1 and 3, Charge II, respecting Gunter, the three accused, acting jointly and in pursuance of a common intent, took, stole and carried away 32 United States Army blankets of the value as alleged, furnished and intended for the military service, and thereupon wrongfully sold 26 of these blankets, inferentially, to Izzo Alberino. The completion of the asportation and the sale were established by the testimony of an Italian who was shown to have been involved in the wrongful sale and a preceding larcenous taking is clearly inferable from all the circumstances disclosed. The pretrial statements of the three accused contained admissions amounting to confessions of guilt of both offenses and were sufficiently corroborated by the testimony of the Italian accomplice. Accused were properly found guilty as here charged (MCM, 1928, par. 150i).

The uncontradicted evidence also shows that at the place and time alleged in the Specification, Charge I, relating to him, Gunter absented himself without leave from his command and remained absent for a period of six days. The morning report as well as the admissions in accused's pretrial statement establish his guilt as here alleged (MCM, 1928, par. 132).

The evidence also shows that at the place and time alleged in Specification 2, Charge II, relating to him, Gunter took, stole and carried away 18 blankets, of the value averred, property of the United States furnished and intended for the military service thereof. This accused was apprehended in the act of carrying away the stolen blankets. Admissions of guilt were implicit in his conversation with the noncommissioned officer who talked to him immediately after his apprehension. These together with his written pretrial statement clearly demonstrate his guilt (MCM, 1928, par. 150i).

5. Defense counsel objected to the introduction of the written pretrial statements of accused on the ground that there was "no evidence relating to conspiracy" (R. 20,22,24). The statements were plainly admissible against the individuals making them. Moreover, concert of action between the three accused as to the offenses alleged in the Specifications of the Charge as to O'Donnell and Korinchok and Specifications 1 and 3, Charge II, as to Gunter was independently established by the testimony of their Italian accomplice. The objection went to the weight and not the admissibility of the evidence and was properly overruled in each instance.

6. Accused were charged with both the larceny and wrongful sale of property of the United States, furnished and intended for its military service. The two offenses thus averred constitute distinct violations of

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Article of War 94 and were properly charged in separate specifications. Accused were punishable for both offenses (MCM, 1928, par. 150i; Bull. JAG, January 1944, sec. 452 (8); NATO 1135, Morning).

7. The charge sheets show that accused O'Donnell is 23 years old (he announced in court he was 24) and was inducted into the Army 20 March 1941, with no prior service; that accused Korinchok is 22 years old and was inducted into the Army 15 March 1941, with no prior service; and that accused Gunter is 21 years old and was inducted into the Army 18 February 1943, with no prior service.

8. The court was legally constituted. 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 and sentences. Penitentiary confinement is authorized for the offenses of larceny and sale of property furnished or to be used for the military service, of value in excess of $50.00, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 87, Title 18, United States Code.

Samuel L. Hughes, Judge Advocate.

Gordon Simpson, Judge Advocate.

Ronald K. MacKay, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
24 June 1944.

Board of Review

NATO 2542

UNITED STATES	)	FIRST ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 251, U. S. Army, 8 May
Private First Class ROBERT W.	)	1944.
REHM (35 341 595), Company I,	)	Dishonorable discharge and
6th Armored Infantry Regiment.	)	confinement for 30 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Holmgren, Simpson and Mackay, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private First Class Robert W. Rehm, Company "I", Sixth Armored Infantry Regiment, did, near Qualiano, Italy on or about 21 January, 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: Transportation to staging area at Naples, Italy for embarkation on ships enroute to new combat area, and service thereat; and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 23 January, 1944.

Specification 2: In that Private First Class Robert W. Rehm, Company "I", Sixth Armored Infantry Regiment, did, at staging area at Naples, Italy, on or about 24 January, 1944 desert the service

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of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Transportation by water to the beachhead at Anzio, Italy, and service thereat; and did remain absent in desertion until he was apprehended at Naples, Italy on or about March 7, 1944.

Specification 3: In that Private First Class Robert W. Rehm, Company "I", Sixth Armored Infantry Regiment, did, at bivouac near Camigliano, Italy, on or about 8 March, 1944 desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: Transportation by water to the beachhead at Anzio, Italy, and service thereat; and did remain absent in desertion until he was apprehended at Naples, Italy on or about 14 March, 1944.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated "United States Disciplinary Barracks, Greenhaven, New York", as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 21 January 1944, Company I, 6th Armored Infantry, of which accused was a member, was in a staging area near Qualiano, Italy. The company was finishing the water-proofing of its vehicles "for some kind of a move". They did not know where they were going but they knew they "were going by water" and "were getting ready for a movement by water". (R. 5,7,10) The men knew they "would be making a trip by water and going into a new combat zone", making an amphibious landing (R. 8). No passes were issued for that day and all members of the organization were restricted to the company area (R. 7,10). On that date accused was missing and though a search was made for him, he could not be found. He did not have permission to be absent. (R. 6,8,10; Ex. B) The company moved to "the palace grounds" in Naples "a day or two later" (R. 5), and accused "was brought back" to his company on 23 January 1944 (R. 6,8,10). It was stipulated that accused had been apprehended "at Naples" (R. 11). It was common knowledge that a landing had been made on the Anzio beachhead and "it was common knowledge that in all probability" that was where the company was going.

When the organization arrived at the palace grounds it was "constantly on an alert", no passes were issued, and the troops were told "no one was to leave the palace grounds without permission from higher authority". While at the palace grounds each man was informed the number of the boat he was going on. (R. 9) On the morning of 24 January 1944 accused was missing at reveille and was not with the company again until March. He did not have permission to be absent. The company left "the palace ground" on 27 January

1944 and embarked, sailing for Anzio the next day. (R. 6,8,10,11; Ex. B) It was stipulated that accused was apprehended in Naples on 7 March 1944 (R. 11), that

> "On or about 7 March, 1944 at about 0930 hours a group of casuals were brought to Service Company, 1st Armored Division for temporary attachment, until transportation could be arranged for them to return to their organizations. Pfc Robert W. Rehm, Company "I", Sixth Armored Infantry Regt. was among these casuals.
>
> "On or about 8 March, 1944 at about 0730 hours a check of all the casuals was made and the roll was called. Pfc Rehm was not present. A search was made of the surrounding area, but he could not be found. When the trucks left for the boat at about 1000 hours he was still absent", (Ex. A)

and that accused was again apprehended at Naples, Italy about 14 March 1944 (R. 11). He was returned to his company on the beachhead on 14 March 1944 (R. 11; Ex. B).

Accused elected to remain silent.

4. It thus appears from undisputed evidence that at the places and times alleged in the Specifications accused absented himself without leave from his organization or place of duty as averred and remained absent until apprehended as alleged. There was evidence that at the times alleged in Specifications 1 and 2 accused's company was in a staging area on a status of alert, where its vehicles were being waterproofed and preparations were under way for trans-shipment by water to a new combat zone, the Anzio Beachhead. It was commonly known among the men that amphibious landings had been made by American troops at near-by Anzio and that engagements with the enemy were in progress there. It was shown that accused did not voluntarily return to his command after his first absence but was apprehended and returned to his unit where he again absented himself without leave before the organization sailed. From these and the other circumstances in evidence, the court was warranted in ascribing accused's conduct to a desire and intent to avoid the hazardous duty of combat in the area to which the company was moving.

The evidence shows further that the company sailed for the Anzio Beachhead on 28 January 1944. Accused was apprehended in Naples on 7 March where he was being held until transportation could be arranged to take him to his unit. Pending these arrangements, accused again absented himself without leave and was again apprehended in Naples the following week. It was reasonable to infer that the same motive which actuated accused to absent himself on the first two occasions, that is, the intent to avoid the hazardous duty of combat with the enemy, again was the motivating force when he sought to avoid being transferred to his company at the time and

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under the circumstances alleged in Specification 3. Accused was properly found guilty as charged (AW 28; MCM, 1928, par. 130a).

5. The charge sheet shows accused is 24 years of age, that he was inducted into the Army 24 September 1942 and had prior service from 1 August 1938 to 31 July 1941, with the 152d Infantry.

6. The court was legally constituted. 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 and sentence.

(absent), Judge Advocate.

Joseph Simpson, Judge Advocate.

Ronald W. MacKay, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
24 July 1944.

Board of Review

NATO 2572

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 6 May 1944.
Private PERCY E. MAYES	)	Dishonorable discharge, sus-
(39 614 981), 25th Chemical	)	pended, and confinement for
Decontamination Company.	)	15 years.
	)	NATOUSA Disciplinary Training
	)	Center, Oran, Algeria.

OPINION by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Percy E. Mayes, 25th Chemical Decontamination Company, did at Fornaka, Algeria, on or about 23 August 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: participate in the invasion of Italy.

He pleaded not guilty and was found guilty of the Specification "except the words, 'with intent to avoid hazardous duty, to wit: participate in the

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invasion of Italy', substituting therefor, 'and did remain absent in desertion until he was apprehended at Oran, Algeria, on or about 11 February 1944'. Of the excepted words, Not Guilty; of the substituted words, Guilty", and guilty of the Charge. Evidence of one previous conviction by summary court-martial for violation of Article of War 96 was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 15 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, ordered it executed but suspended execution of the dishonorable discharge until the soldier's release from confinement, and designated the NATOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 208, Headquarters Peninsular Base Section, 26 May 1944.

3. The evidence shows that accused was a member of the 25th Chemical Decontamination Company which, on 23 August 1943, was located at Fornaka, Algeria, about three miles from Port Aux Poole (R. 6,10). Prior to that date the organization had been "running smoke lanes" in Oran (R. 7), "laying out smoke lanes on the ground to simulate the beachhead, making trial runs, testing the time needed to land the boat, and the methods of communication", and had engaged in hiking, physical training, exercises and some close order drill (R. 9). On 8 August 1943 the organization had been attached to the 5th Army Training Center for training, and smoke screen training was practiced which most of the men and officers believed was "connected with the coming invasion" of Italy (R. 7). On 23 August 1943 accused absented himself without leave from his organization (R. 7; Ex. 1). His commanding officer testified that after accused's absence had been reported to him by the first sergeant,

> "I tried to locate him, and I heard by rumor that he was in Oran. One N.C.O. said that he had tried to get him to return to the organization, but I was unable to locate him then or for several weeks after that. I notified the military police that he was absent without leave, and after that I had my mail orderly make inquiries with the military police in Oran to see whether or not he had been apprehended" (R. 7).

Witness testified that the organization embarked at Mers-el-Kebir Harbor, 3 October 1943, while accused was "still on an AWOL status" (R. 7), and landed at Naples 14 October 1943. The first time accused was seen by his commanding officer after 23 August 1943 was on 29 March 1944, when accused was returned from a replacement center and was in confinement. He also testified that a letter was received to the effect that accused had been apprehended by the military authorities on 15 February 1944 and "confined at the M.P. Disciplinary Center and returned back to Oran". Witness testified that accused was dropped as a deserter on 23 September 1943 by the authority of "the NATOUSA Circular" (R. 8) and that at that time, even though the invasion had been made on 9 September, witness did not know the company was going to land in Naples and it was his "impression" from his orders that the organization was "going to

lay smoke screens on the beach". The only information the company had as to what was going to take place was the training program instituted by "Colonel Parker". (R. 9)

Accused testified that the training his organization was engaged in about 23 August 1943 consisted of "close order drill, hikes and digging slit trenches, and we laid a smoke screen on the highway", which he considered to be "just training that we were taking only a little bit more of it". He did not know where the Invasion Training Center was, nor what the letters "I.T.C." stood for. He testified he did not know at that time of any invasion that was to be made, nor was he "alerted for movement" and further there was no "rumor going around" that they "might be going somewhere", except one rumor that "we were going back to the States". (R. 10) He testified further that when he left his company on 23 August 1944 he did not leave with the intention of avoiding hazardous duty, and that he left his company because

> "I did not like my commanding officer. He didn't like the Negro(e)s, and I was told at one time the only way I could get a transfer was to mess up with an officer, that is if I wanted a transfer."

He had not heard by rumor or otherwise that his organization was going overseas, and did not know they would leave. He testified that he did not return shortly to his organization "Because I was intending to get myself transferred if I could" and that "I had gone out there one time around, after about ten days. I don't remember the exact number of days. Anyhow, they weren't there, and I didn't know what to do". He testified that he was apprehended by the military police in Oran "about the 11th of February" 1944. (R. 11)

4. It thus appears from uncontradicted evidence and from accused's testimony that on 23 August 1943, at the place alleged in the Specification, accused absented himself from his organization without proper leave. He remained absent without authority until he was apprehended at Oran, Algeria, about 11 February 1944.

5. There remains for consideration the question as to whether the findings of desertion generally in lieu of desertion with intent to avoid hazardous duty, involved in the exception by the court, was legally justified.

The Specification alleged that accused deserted by absenting himself without proper leave with intent to avoid hazardous duty, participation in the invasion of Italy. In legal effect the court found accused not guilty of the alleged specific intent to avoid hazardous duty but found that he did "desert". In view of the finding of not guilty of the specific intent to avoid hazardous duty the only tenable conclusion is that the court intended to find accused guilty of that form of desertion denounced by Article of War 58 and defined by paragraph 130a of the Manual for Courts-Martial, 1928, as absence without leave accompanied by the intention not to return. Is the offense thus found a lesser included offense within that charged? If not, the findings involve a fatal variance in so far as they concern the findings of guilty of desertion, for it is well established that an accused cannot

legally be convicted of an offense or of any element of an offense not charged or included in the offense alleged.

In charging the accused with having deserted the service by absenting himself without proper leave with intent to avoid hazardous duty only the narrowly limited form of desertion recognized by Article of War 28 was alleged, and the averment that he did "desert" must be so construed. This narrow form of desertion is complete when a soldier absents himself without leave with the specific intention of avoiding hazardous duty. A general intention not to return to the service of the United States is not an element of the offense (AW 28). Proof of the offense as herein charged would have been complete upon the introduction of evidence of absence without leave coupled with the intention of avoiding the hazardous duty described. Accused was not put on notice by the Specification that he was charged with or that he must defend himself against any other element of wrongdoing. The offense of desertion as found was not included in that charged.

That a fatal variance results in such cases has been authoritatively determined by the Office of The Judge Advocate General. In a case in which the allegations were equivalent to those here charged but in which the proof was inadequate to support a finding of the specific intent to avoid hazardous duty though sufficient to show the broad intent not to return to the military service, it was held, in the language of the Board of Review, as follows:

> "The offense of desertion is defined as '***absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service' (M.C.M., 1928, par. 130). Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '***in order to avoid hazardous duty***', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved. CM 224765 (1942)." (Bull. JAG, November 1942, sec. 385).

The record is legally sufficient to support only so much of the findings of guilty as finds that accused did at the time and place alleged in the Specification, absent himself without proper leave from his organization, in violation of Article of War 61. The duration of the absence was not alleged and the court was therefore without authority to find in this respect, as it did. The duration of the absence is not, however, material in so far as

punishment is concerned. The record of trial is legally sufficient to support the sentence.

5. The charge sheet states that accused is 35 years of age, was inducted into the Army of the United States 15 December 1942, and had no prior service.

6. The court was legally constituted. Other than 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 involves findings that at the place and time alleged accused absented himself without proper leave from his organization, in violation of Article of War 61, and legally sufficient to support the sentence.

Daniel W. MacKay, Judge Advocate.
Wetmore Boyd Inman, Judge Advocate.
Henry C. Berwick, Judge Advocate.

NATO 2572 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 24 July 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50½, the record of trial by general court-martial in the case of Private Percy E. Hayes (39 614 981), 25th Chemical Decontamination Company, together with the opinion of the Board of Review in this Branch Office that the record of trial is legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave in violation of Article of War 61, and legally sufficient to support the sentence. I concur in the opinion of the Board of Review and recommend that so much of the findings of guilty of the Charge and its Specification as finds accused guilty of an offense other than absence without proper leave from his organization, at the place and on the date alleged, in violation of Article of War 61, be vacated and that all rights, privileges, and property of which accused has been deprived by virtue of the findings so vacated be restored.

2. This is a case in which accused was tried for desertion by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: participation in the invasion of Italy, the special offense of desertion recognized by Article of War 28. By an exception accused was found not guilty of desertion with intent to avoid hazardous

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NATO 2572, 1st Ind.
24 July 1944 (Continued).

duty but guilty of that type of desertion denounced generally by Article of War 58, and involving an intention not to return to the military service. Under established precedents these findings involved a fatal variance with respect to desertion. Although the sentence is not affected, the findings of guilty of the Charge and Specification involve an illegal conviction of desertion with its attendant legal disabilities, which disabilities should be removed. The action herein recommended is designed to vacate the conviction of desertion and to confirm so much of the findings under the Charge and Specification as involves conviction of the lesser included offense of absence without leave in violation of Article of War 61, and to confirm the sentence.

3. There is transmitted herewith a form of action designed to carry the foregoing recommendation into effect should it meet with your approval.

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

2 Incls:
Incl. 1 - Record of trial, NATO 2572
Incl. 2 - Draft of action

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 59, NATO, 28 Aug 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
2 August 1944.

Board of Review

NATO 2621

UNITED STATES v. Private JOHN H. JORDON (34 277 761), 3491st Quartermaster Truck Company.	NORTHERN BASE SECTION Trial by G.C.M., convened at APO 386, U. S. Army, 28 April 1944. Dishonorable discharge and confinement for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 93d Article of War.

Specification: In that Private John H. Jordon, 3491st Quartermaster Truck Company, did, at Carcopino, Corsica, on or about 1700 hours, 29 February 1944, with intent to commit a felony, viz, rape, commit an assault upon Catherine Sanzonetti, Carcopino, Corsica, by willfully and feloniously knocking her to the ground, placing his knees on her chest, and strangling her with his hands.

He pleaded "guilty to the specification of the charge except the words 'with the intent to commit a felony, viz rape'. To the excepted words not guilty. To the charge without the excepted words *** guilty. Guilty to the specification as modified", and was found guilty of the Charge and Specification.

Evidence of one previous conviction by summary court-martial for being off-limits in violation of Article of War 96 was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor 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 forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 29 February 1944, accused, a member of the 3491st Quartermaster Truck Company (R. 6,7,63), together with some other soldiers of his organization, secured permission to leave camp and arrived about 1200 hours at Carcopino, a small village in Corsica (R. 7,26). Private Clyde Ford, a member of the group, testified that the soldiers went to several bars and had some drinks, and then walked through the village stopping occasionally to visit with French inhabitants. Witness testified that some time after 1430 hours, as he was walking down the road which connects Carcopino with another village,

> "there was a French lady walking down in front, so I passed her and went right on around another curve, so I met two Corsican girls and they were walking up and down the road, so I went around the curve and I met Johnnie and these other two girls and Johnnie is walking about three paces behind these girls. I hesitated and asked him where he was going and he said he was going up the hill. He said he was going up there for a piece of ass. Well I told him if them women didn't want him, to go with me to the camp. Then I walked about thirty paces and I happened to look back. Jordan was walking in between these two girls, and then I looked back again and saw one girl on the left hand side of the road and one on the right. Then I looked back again and as I was looking around Johnnie was on the left hand side of the road and Johnnie shev'd her down. Then he got astraddle of the girl, so I got out of sight then. I walked on down the road a little bit further and met a Frenchman walking up the road. One of the girls had yelled before I met this Frenchman. I kept on walking and meets an old French lady. She said 'American beaucoup zig zag crazy', so I walked on down to the cafe and started talking to a Frenchman". (R. 7-9)

witness testified that he asked accused "where he was going and he said he was going for a piece of tail" (R. 24), and "He told me he was going to try and get a piece of ass from these women, that's all" (R. 10). To witness, it "looked like" accused said to the girls as he approached them, "zig zag, chewing gum, bon bon" (R. 9). Witness first heard "the scream" when accused "shoved her on the ground" (R. 21) and saw accused shove her. Accused's knee could have been on her chest and "it could have been that he was not astraddle but had one knee on her arm" (R. 22). Witness testified that after hearing the scream he did not go back and investigate because "I didn't want to have anything to do with it because I knew what the consequences would be" (R. 24).

Three photographs of the scene of the alleged incident were introduced in evidence without objection (R. 14). Ford identified Exhibit A as a "picture taken as you look up the hill towards the village" (R. 13), representing "the road between two villages" (R. 11). Witness marked the photograph to indicate the spot where the incident occurred and testified that it was "on the lower side of the road" that "she was laid down" (R. 13). He identified Exhibit B as a photograph "of the same road" "looking down the hill" and "in the general location" of the scene of the incident (R. 13,14). Exhibit C appeared to witness "like on the right hand side of the road going down the hill in front of the house" (R. 14). He described the scene as follows:

> "Sir, it is going up the hill and the road has a lot of curves. Where this place are it is the curve right on the end of a straight line, I reckon, about 350 feet, probably a little bit further. Anyway, there's a wall on the right hand side and a tall bank on the left hand side" (R. 15).

The bank was about eight feet high and there was one house about 350 yards away (R. 15). The wall on the right side of the road was about four feet high, and the road was about 15 feet wide (R. 20). First Lieutenant Richard D. Weist, 976th Signal Service Company, identified Exhibits A, B and C as photographs he had taken the day before the trial and testified that they were a "fair representation of the road that was photographed" (R. 44,45).

Catherine Sanzonetti, 16 years of age and a resident of Carcopino,(Corsica) testified that on 29 February 1944 she "was climbing up the hill to fetch some water and saw the two American soldiers stop and say to me 'chewing gum'" (R. 25-27). She replied "We do not want any chewing gum. Go ahead. Go your way", and continued to walk. Then, witness testified,

> "the American (identified by witness as accused) followed me. He struck me and shoved me down and put one of his hands to my throat and one of his knees on my stomach". (R. 26)

She continued,

> "He crossed my hand and turned my head with one of his hands and continued to speak to me. My friend cried 'police, police', and the American left me. Two Frenchmen came on the spot and they took me down to my house" (R. 26,27).

Witness later changed her clothing and went to bed (R. 29). Witness testified that accused "took my back by my clothing with one hand on the front and one on the back" and that she was thrown down "on the back". He "crossed" her hand and put one of his hands "to my throat and he was speaking" (R. 33). She testified that accused held her by the throat about three or four minutes and until she lost consciousness (R. 28). Her throat was blackened (R. 29) and later her "eyes were bloody" (R. 30). Her clothing "was absolutely wet" (R. 33) and was torn in one place "between buttons". On her "head was a little hit caused by a stone" (R. 34). She testified that accused with one hand "was trying to get to my private parts" and "was trying to get at my underdress" and "I think he wanted to make love with me" (R. 34,35). Witness did not think accused was drunk (R. 31).

Felice Leca, a resident of Carcopino (Corsica), and a friend of Catherine Sanzonetti, testified that on 29 February 1944 she was walking with Miss Sanzonetti "to get some water" when accused "put his hands on her shoulder" and "offered us chewing gum" (R. 36,37). Witness replied "Sors d'ici, va t'en" and Miss Sanzonetti said "go away" and "What are you talking?" (R. 39). Then, she testified, accused "threw her (Miss Sanzonetti) down on the ditch on her back", whereupon he "used both of his hands on her throat". When witness "noticed that he wanted to strangle her", witness cried for help and the police. Accused then left. (R. 37,42) Witness testified: "I just noticed he was using his hands on the throat of the girl. I have not seen his hands do anything else" (R. 42) and that "When I screamed he got up" (R. 40). Miss Sanzonetti "was crying and she had some marks on her neck. Some white marks. She was crying 'mama, mama'" and "her eyes were red". (R. 38) There "was swelling" on her throat and she was badly hurt (R. 40). She reached her home after the accident "hanging on the arms of two other ladies" (R. 38). Shortly after witness screamed two Corsicans arrived on the scene but witness did not know if accused fought them (R. 38). When the two Corsicans reached a point about four or five meters from him accused got up (R. 40). Witness did not know if accused was drunk; "When I cried 'police' he went away right away, so I don't think he was drunk" (R. 40,41).

The "two Corsicans" were Charlos Ciccarelli and Georgio Tuninetti, both residents of "Savrola-Carcopino" (R. 49,51). Tuninetti testified that he was standing in the door of his house when Miss Sanzonetti passed, then he saw accused "walking quickly in the same direction as the girl", and then, about three minutes later, when "the American negro was about fifteen metres" from his house, witness "heard 'au secours, au secours'". Thereupon witness "just went on the spot", found Miss Sanzonetti lying on her back on the ground, fought accused and knocked him down, and told accused to go away. In witness's opinion accused "was drunk. He was smelling of eau de vie". (R. 51-54)

Captain Joseph J. DiSalvo, Medical Corps, made a physical examination of Catherine Sanzonetti at her home in Carcopino "about 48 hours after the incident took place". Captain DiSalvo testified:

> "I made a cursory examination and on the examination of her head found a swelling of the left parietal bone about the size of a peanut. Examination of the eyes revealed a severe sub-conjunctival bleeding of the right eye. I also found a slight tenderness of the hyoid bone, which is sometimes called Adams Apple".

In witness's opinion the condition of her eyes, which were bloodshot, "would indicate that a great deal of pressure had been applied to her hyoid bone upon her neck", but there were no marks on her neck. (R. 54-57)

First Lieutenant Alfred W. Tauschel, 3491st Quartermaster Trucking Company, testified for the defense that the day before the trial he had accompanied defense counsel to the town of Carcopino and that Exhibit B looked "very much like part of the terrain I observed". On Exhibit A witness "distinctly" remembered "observing the wall" on the right hand side of the road, about 30 to 36 inches in height. The "lower end of town" was on the right, and "facing up" on the left were the buildings of a town. (R. 58-62).

Accused testified that between 1000 and 1200 hours on 29 February 1944 he walked with other soldiers of his organization "up to a little village", where the group "stayed around a little while and then started to drink", visiting three or four bars and having "vino" and "eau de vie" at each bar (R. 63, 64,66,67). Accused left the group, walked "quite a distance" before he met anyone, and then met Boyd (R. 64).

"Boyd asked me where I was going. I am not sure but I think that is what he asked, but I told him I was going to the camp. I never turned around, so he went on and I went on. Then I met the two ladies".

Accused talked with them and asked them if they would go with him.

"I don't know what she said. I spoke the words you hear. I asked her 'jig jig' or something. Right then she spoke me 'zebe'. I said 'zebe' no good. When she says the word again, so I struck her",

and knocked her down. (R. 65). Accused testified that he did not at any time "touch this girl under her dress" nor unbutton his trousers (R. 66). He "didn't do anything but hit her". When he hit her the girl screamed. Two men came up behind the girl and accused "got to fighting then". (R. 66). Accused further testified that when he went "up there" he did not know what his purpose was. "We were just after what we could find". (R. 67)

In the course of the direct examination of accused the defense introduced in evidence a sworn statement made by accused on 4 March 1944 before an agent of the Criminal Investigation Division (R. 68), which reads as follows:

"On or about 29 Feb 1944, a little after 1200 hours, Eddie GRAHAM, CLYDE FORD, HOUSTON SHARP, and myself, left camp to walk around. While walking around, we came to a little village, located in the mountains. We stayed in the village for quite a while and drank quite a bit of wine. At about four or five o'clock, a truck from our organization came up. Cpl. VILROY JONES was driving. In the truck was BENNIE COLEY, OLIE HOWARD & FRANK REED. They came in the cafe where we were and some of them started drinking with us. Clyde Ford went out saying that he was going to see if he could find a piece of ass, or something like that. A little later Eddie Graham and I left. We were going to see if we could find some 'trim'. We came to another little joint, stopped there and got some more to drink. I was about drunk and I left Eddie Graham in the joint. I started down the road and I met Clyde Ford. Behind

him there were two women (French). Clyde told me that he had done got some 'trim'. Seeing these two French women, I decided to proposition them. I spoke to them. One walked off and the other stopped. I started speaking to her and gave her some candy. She said something like 'Zebe', the way they (the French) say it, means 'kiss my ass'. I told her she wasn't no good. She said something, I do not remember what, but I slapped her, she fell down & I had hold of one of her arms. She was speaking real fast and if I put my knee across her chest, holding her arms and if I choked her I do not remember because I was drinking and about drunk. It could have happened but due to my drunken condition I do not remember. While I was holding her two civilians came up. They began talking real fast and I let go of the girl. I tried to explain to them why I hit the girl. They did not seem to understand and one of them went to hit me. I hit him and sort of stunned him. The other one jumped in during the struggle with these two men, my helmet fell off. I hit the second one and got away from them. I then walked back to Camp.

"While I was struggling with the woman Clyde Ford was with the other one. I do not know what he was doing.

"Before I gave her the candy I told her 'Jig-jig' or something like that, I do not remember the exact words but it was in reference to getting some 'trim'. The helmet was shown to me by the C.I.D. Agents is mine & the one I lost up on the mountain, during the fight with the Frenchmen.

"When we all went up to this village, we were going up there to see if we could find one of the houses where you can get some 'Trim'.

"This is about all I remember concerning this affair" (Ex. D).

Accused testified that when he approached the girl and said "jig jig" he was trying to "get it from" her. Then, when she said "'Zebe' or something like that", which he had been told

in Africa meant "kiss my ass", he "just told her 'you are no good'". She repeated the remark and he hit the girl a slap "on the side of the ear". He also testified that he did not know how he slapped her, for he was drunk. (R. 68,69,72) He did not remember having his hands on her throat. He "just had her by one hand" and with the other hand "I was doing nothing. I might have had her head over my hand and then these two ladies and the two Frenchmen came behind them. I didn't have time to place my hands on her throat". Accused testified further: "I was drinking" and "There is a lot of it I don't remember". (R. 70) Accused did not know nor speak any French, but spoke English. He did not offer cigarettes or anything to drink. The girls asked him for "'bon bon' or something". (R. 71,72) He did not know the women before. He testified: "Clyde met the women and they were going the same direction. I met Clyde first and then the women". (R. 73)

4. It thus appears from the evidence, including accused's testimony, that at the place and time alleged accused assaulted Catherine Sanzonetti, the person named in the Specification, striking her and knocking her to the ground. Accused had, by his own admission, approached and "propositioned" his victim, using the words "jig jig". Accused testified that his victim had replied in a foreign tongue, saying "kiss my ass". No other provocation, justification or excuse is suggested by the record and manifestly the alleged reply was no warrant for the brutal and cowardly battery accused inflicted. Having sought sexual intercourse with Catherine, who was 16 years old, and having been refused, accused not only struck the girl but knocked her to the ground. An American soldier, a companion of accused, testified accused shoved her down and "got astraddle of the girl" or placed his knee on her chest or arm. The victim testified that accused choked her, tore her clothing and tried to "get at" her underclothing and private parts. While the victim's companion did not see accused use his hands except upon the girl's throat, several witnesses saw accused on the ground with Catherine. Accused, in his pretrial statement, did not deny he got on the ground and put his knee on the girl's chest, held her arms and choked her, and stated that if he did those things he did not remember them because of his drunken condition. By his plea he admitted he had knocked her to the ground, placed his knees on her chest and strangled her with his hands. Accused continued his assault until the arrival of two natives, with whom he exchanged blows before leaving. The events surrounding the assault permit the conclusion that accused at the time of the assault had the intent to have carnal knowledge of the girl by force and without her consent. Accused's actions after he was refused intercourse indicate he intended to overcome any resistance by force and penetrate the girl's person. Once the assault with intent to commit rape was made it was no defense that accused desisted. The evidence as to accused's drunkenness was conflicting and, in so far as it bore

on the question of accused's capacity to entertain the specific intent alleged, was for the court's determination. The record supports the findings.

5. The record shows that a Monsieur Charlos Ciccarelli "testified" but fails affirmatively to show that he was sworn before his testimony was received by the court. He was an eye-witness to the events following the assault, and his testimony did not differ materially from that of the witness Tuninetti. (R. 49-51) As the record states that Ciccarelli "testified" the conclusion may be drawn that the witness was in fact regularly sworn. In any event, this witness's testimony was but cumulative and corroborative of other competent and undisputed testimony and was in no way essential to support the conviction. Too, as accused admitted in his statement (Ex. D) all the material facts to which witness testified, the substantial rights of accused could not have been injuriously affected by any omission in the premises (Dig. Op. JAG, 1912-40, sec. 376 (3)).

6. The charge sheet shows that accused is 25 years of age and was inducted into the Army 26 May 1942. No prior service is shown.

7. The court was legally constituted. 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 and the sentence.

Donald W. MacKay, Judge Advocate.
Mylmer R. Jones, Judge Advocate.
Henry C. Renick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
25 July 1944.

Board of Review

NATO 2642

U N I T E D S T A T E S	)	ARMY AIR FORCE SERVICE COMMAND MEDITERRANEAN THEATER OF OPERATIONS
v.	)	
Corporal EARNEST JERNIGAN, SR. (38 234 430), 1948th Quartermaster Company (Truck) (Aviation), 34th Service Group.	)	Trial by G.C.M., convened at Bari, Italy, 29 May 1944. Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 92d Article of War.

Specification: In that Corporal EARNEST (NMI) JERNIGAN SR. did, at San Severo, Italy, on or about 20 March, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, THELMAN C. H. (IO) LIMUEL, a human being by shooting him with a pistol (to wit: A German P-38, Luger Type Pistol).

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for "the term of your natural life", three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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3. The evidence shows that in March 1944 the 1948th Quartermaster Company (Truck) (Aviation) was stationed at San Severo, Italy. The motor pool of the organization was located two miles from the company area in a building approximately 110 feet long and 35 feet wide, in one corner of which was a room about 24 feet by 15 feet which was used as sleeping quarters by seven members of the company who worked in the pool, including accused and the deceased, Corporal Thelman C. H. Limuel (R. 5-7; Ex. B). The room was dark, the only window having been closed by masonry (R. 48).

One of the occupents of the room, a witness for the defense, testified that on the evening of 19 March when accused and Limuel were in the room with him, Limuel "picked up a five gallon can and poured it in the stove. The stove exploded" and the flames "jumped all over". Accused was lying on a bed with his head toward the stove and was burned "pretty bad". His head was not covered by a blanket and the flames "must have hit his face because he went to the dispensary right away", on his own initiative. (R. 62,63) Witness also testified he did not hear accused make any statements before the "fire" and that when accused returned from the dispensary Limuel told accused "he didn't know he got burned that bad. Jernigan said 'Well, I did'". Witness further testified accused "didn't say that the fire had been an accident". (R. 64) A medical officer testified accused received second degree burns (R. 65).

The following afternoon between 1600 and 1700 hours, accused, Limuel and a number of other soldiers were in the motor pool building gathered around a fire, repairing a speedometer (R. 18,28). Limuel had put a pan of water on the fire, preparatory to washing his face (R. 28,43). One witness testified that the group was "standing around" the fire "laughing and talking" and that there was not any argument (R. 28). Witness also testified Limuel said to accused "I am sorry that you think that I burned you intentionally" and later "You are a two-faced kind of a guy". Accused asked "I'm two-faced, eh" and Limuel replied "Yes". Accused said "Thank you" and Limuel answered "You're welcome". This witness further testified that during this conversation Limuel and accused "didn't talk like they were arguing. They were laughing and talking". (R. 32,33) Another witness testified that there was no argument between accused and himself and that "they just had a casual conversation" about accused being burned (R. 25). A third witness testified:

> "Jernigan had been to the dispensary and he had come back. Limuel asked Jernigan how many times did he have to go to the dispensary. Limuel didn't think he had been burned that much. Limuel told Jernigan that he had heard that Jernigan said that he had tried to burn him up, and he called him a two-faced guy" (R. 37).

A fourth witness testified:

> "I heard Limuel tell Jernigan that he had heard that, 'you said I burned you on purpose, then you would kill me.' Limuel also said, 'You're kind of funny anyway, you say one thing here and then go some where else and say another.' We all laughed" (R. 43).

Then this witness heard accused say to Limuel "I heard you say that if you knowed I said that, I would kill you?" (R. 46). Witness also testified:

> "Well all I heard Limuel say was that, 'I heard you said that I burnt you on purpose.' 'Yes,' Jernigan said, and then, 'I heard that you said that, you would kill me too'" (R. 48).

Shortly after the conversation Limuel turned and went to the room in which they slept to get a towel (R. 28,43). One witness testified "we thought he would come back to wash his face" (R. 35). In two or three minutes (R. 34), when Limuel entered the bedroom (R. 43), accused followed him (R. 34, 43), armed with a pistol which he carried in his right hand and "behind him". Accused, tiptoeing slowly in a crouched position, reached the bedroom and entered. (R. 18,30 34,37,39,44) Shortly six or seven shots were fired in rapid succession, all, according to witnesses, sounding alike (R. 18,19,24,29, 37,44). Accused then came out of the bedroom with the pistol in his hand. He walked out of the motor pool, put another clip into the pistol and said to a witness who was by the door "Have you got anything to say about it". This witness testified accused "looked at me and glared his eyes, like he was asking a question". (R. 29) This witness also testified accused called him by name and intended to say something else, "but he was frightened". Witness thought accused was going to shoot him. (R. 34) Another witness testified that accused asked him the same question and this witness replied in the negative (R. 44). A third witness heard accused ask "some guys" "if anyone else had anything to say about it". In four or five minutes witness was approached by accused who asked to be taken to "Lieutenant Woodard". (R. 50, 51)

Accused got in a vehicle, placed a pistol in the glove compartment and was driven by witness to the company area. On the way accused said, "These guys think they are running over someone. I bet I didn't miss him once". On arrival at the area accused "got out. He walked around the truck and then came back and got the pistol in the locker and then he walked towards the Lieutenant". (R. 51) First Lieutenant Edward R. Woodard, accused's company commander, testified that after the shooting accused came to the company area in a truck and gave witness a pistol. Witness further testified accused stated "I have to shoot Limuel before he shoots me", and surrendered himself, asking to be taken to the military police. Witness also testified he turned over to a Captain Thomas D. Powell the pistol received from accused. The pistol was introduced in evidence. (R. 7,69; Ex. B)

Soldiers who entered the "quarters room" found Limuel lying on the floor with a cake of soap and a towel beside him (R. 37,38,45). He was groaning but did not say anything (R. 41,42). One witness testified that "you couldn't see him so well when he was on the floor. There was just a little light***" and that they "tried to hook up a light". (R. 20,21) When they started to carry Limuel out of the room they felt something in a pocket of his fatigue jacket. They unbuttoned the pocket and "way down inside" they found a Beretta pistol. (R. 24,38,46) Deceased was wearing "coveralls" over his fatigue jacket, all the buttons of which were fastened except that at the collar (R. 21,38,45). Three witnesses testified they did not know that Limuel had a pistol and they had never seen him with one (R. 26,40,46).

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One witness testified he knew that accused and Limuel were the only two who went into the room before the shooting, that he "was by there all the time, and *** would have seen anyone go in there" (R. 49).

Captain George H. Lord, Medical Corps, testified that he examined a "boy", who was shown to have been Limuel, at about 1630 hours 20 March 1944 and found

> "He was suffering from multiple wounds of the chest, abdomen, legs, and one in the arm, and there was evidence of acute, profound, internal hemorrhage" (R. 59)

and that Limuel died about 15 or 20 minutes after his admission to the hospital. An autopsy showed

> "the course of the fatal missile where it entered the left of the seventh rib on the right side. It passed downward shattering the lower border of the right lung, penetrated through his diaphragm to a large gap holding his liver and lodged itself in the pelvic bone" (R. 59).

This officer identified the "missile that caused the death" and testified he turned it over to a "Mr. Loveday", together with "another missile" (R. 59,60).

Mr. Thomas T. Loveday, of the Criminal Investigation Division, identified a pistol as one he received from Captain Powell, and three "P-38 bullets", two of which he testified he had received from Captain Lord, the third being "the bullet used by Lieutenant Bird in identifying and testing the bullets" (R. 54,55). It was stipulated that if "Lieutenant Bird" were present he would testify as set forth in a ballistics report which was received in evidence (R. 55,56; Ex I). That report, signed by First Lieutenant George R. Bird of the "6709 C.I.D. Platoon", was entitled "Ballistics Test: Murder, San Severo, March 21, 1944". Therein Lieutenant Bird stated:

> "1. Received following items from Investigator Harry Fisher, March 23, 1944:
>
> a. One 'P38' Automatic Pistol, Caliber 9 mm, # 5681-k.
> b. Envelope marked 'A' containing bullet recovered from body of deceased, marked 'TL' on base.
> c. Envelope 'B' containing bullet recovered from body of deceased, base of bullet deformed.
> d. Envelope 'C' containing bullet found at scene of crime.
>
> "2. Test shot was fired from above pistol and compared under the Comparison Microscope with bullets from envelopes A, B, and C and it was determined that the above pistol had fired all three bullets." (Ex. I)

Loveday also testified that after he had warned accused "that he did not have to make any statement, and that after he did make a statement it could be

used for or against him in court", accused made a written statement to a "Mr. Fisher" and himself. After the defense counsel stated "I would like to have it read before the court", the statement was received in evidence. (R. 57; Ex. J) It read as follows:

"I, Earnest (NMI) Jernigan, Sr, ASN 38,234,430, Rank: Cpl., Organization 1948th Q.M. Trucking Co. having been warned of my rights under the 24th Article of War, by Harry Fisher, C.I.D. and without threats or promises, duress or coercion, and knowing that anything that I say may be used against me, do hereby make the following statement:

"I have known Cpl. Thelman C.H. Limuel since September 1942. We were both members of the 1948 Trucking Co. Up until 19 March 1944, Limuel and I were always on friendly terms. We worked together and got along well together.

"On Sunday, 19 March 1944, at about 2200 hours I was asleep on my cot in our quarters at the Motor Pool. Suddenly I was awakened when I felt a burning sensation on my face. I had a blanket over my head. I stood up and smothered the face with the blanket. With reference to the stove my head was on the end of the cot nearest the stove. I then put on my clothing and sat on the side of my cot. At the time this happened the only ones in the room were myself, Limuel and Brown. I sat there for about one half hour when Donnell and Pratt came into the room. I asked Donnell to take me to the dispensary to have my face treated and we both went out together. Shortly after I was burned on the face and neck Limuel told me that the stove had exploded.

"On 20 March 1944, I, Limuel, Grace, Pratt, Simmons were standing around the fire at the Motor Pool. Limuel said to me 'You told Pratt that I tried to burn you up.' I said, 'Did Pratt tell you that.' He did not answer. I said 'Just like you say that I told Pratt that you tried to burn me up, I heard that you said that you would kill me if I said anything else about it. That I didn't know who I was fooling with.' He cursed and said 'That's all right. You just wait until I come back.' I already had my back turned to him when that conversation ended. He walked off but I did not know where he went. About two or three minutes later I walked to the back room to get a drink of water. Just as I entered the door there were two shots fired at me. I backed away, pulled out a P-38 Automatic Pistol I carried in my bosom and fired in the direction the bullets came from. I saw the flashes made by the two shots and I fired several shots in that direction. I ran out to the Motor Pool where Dalrymple was greasing a truck and told him to drive me to the Company area. He drove me to the company area and I turned the gun I had used over to Lt. Woodard. I then went to the Town Major (American) at San Severo and gave myself up" (Ex. J).

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Captain Thomas D. Powell, 34th Service Group, testified that as an investigating officer he read and explained Article of War 24 to accused and that accused made a statement, which witness identified. The statement, which was received in evidence (R. 11; Ex. D), was substantially identical with the statement quoted above except in the first paragraph it recited accused had been warned of his rights by Captain Powell and the final paragraph contained the following additional matter:

> "Limuel did not fire at me with his baretta. He used his .30 cal. Government rifle. The shots that were fired at me did not sound like those from a pistol. After I fired, I saw that Limuel's scabbard was empty, and that his riffle was laying on the floor about two feet from him. I put it back in the scabbard *** The Town Major told me I had better not talk to anyone. When the C.I.D. man came to see me, I did not know for sure who he was, and felt that I couldn't trust a stranger too far, in talking to anyone. Especially after what the Town Major, Col. Davis had told me. The bullets that Limuel fired, or the marks from them, should be on the wall of the Motor-pool" (Ex. D).

The defense introduced by stipulation a report of a neuropsychiatric examination of accused by Major John P. Spiegal, Medical Corps, Neuropsychiatrist, "in order to show that due to certain emotional impulses of the accused, his actions were not of murder but of manslaughter only" (R. 67,68;Def. Ex. 2). In that report Major Spiegal stated:

> "His judgement concerning right and wrong is good at the present time. He has no hallucinations though he states that he frequently hears his mother's voice warning him to 'stay out of trouble'. It is not considered that this is an actual auditory hallucination, but rather a vivid memory impression of his mother's often repeated warnings."

and that

> "On the night of the murder, he became convinced that this man was going to get a gun to kill him. He became greatly alarmed, excited, and determined to kill him first, which he accordingly did.
>
> "There is no evidence that in the performance of this act he was not able to distinguish right from wrong, or that he was not mentally responsible. He cannot be said to have been insane at the time of the commission of the act. It can be said, however, that as a result of his emotional instability and Schizoid Character, he was so disturbed by Lemmuel's actions, that his judgement was seriously impaired, and that his power to react in a reasonable and moral manner was seriously weakened" (Def. Ex. 2).

Lieutenant Woodard, who had been accused's company commander for 20 months, testified that accused gambled sometimes and had some arguments in that connection but had not caused any trouble and had not been brought before witness for disciplinary action. Witness also testified that he had not observed anything peculiar in accused's behavior and that accused was a man witness liked to have in the organization. (R. 69,70)

The motor sergeant of the company testified that accused was the best worker in the motor pool, that his character was excellent, and that disciplinary action had not been necessary (R. 71).

Accused elected to remain silent.

4. It thus appears from the evidence, including accused's statements, that at the place and time alleged accused shot Thelman C. H. Limuel, the person named in the Specification, with a pistol, death resulting shortly. Accused had followed his victim on tiptoe in a crouched position, armed with a drawn pistol held behind him. After fatally wounding Limuel accused inserted a fresh clip in his pistol and asked two witnesses "Have you got anything to say about it". There also is evidence that within a few minutes of the shooting accused stated to another soldier "I bet I didn't miss him once". Accused reported the shooting to a company officer and asked to be taken to the military police. At the time of the shooting the victim had a pistol in a pocket of his clothing, but there is no evidence that he attempted to use it against accused. Aside from the pretrial statements by accused there is no suggestion in the record of trial of legal excuse or legal provocation.

The defense contended that the killing was done in self-defense after Limuel had shot at accused with a service rifle. Accused's statements in this respect are unsupported by the evidence and the court was clearly warranted in concluding otherwise. The defense further contended that accused killed Limuel while alarmed, excited and fearful for his own life and that the killing was but manslaughter. However, the court was justified, upon the evidence, in rejecting this theory and in concluding that the homicide was the result of cold and calculated premeditation. The report of the neuropsychiatric examination stated that accused was able to distinguish between right and wrong and though it also stated accused's judgment was seriously impaired and his power to react in a reasonable and moral manner was seriously weakened there was no evidence that he could not adhere to the right. Malice was inferable from the use of the pistol and other attendant facts and circumstances. The court was warranted in finding accused guilty of murder in violation of Article of War 92 (MCM, 1928, par. 148a).

5. The defense, in an attempt "to determine the character of deceased", asked a witness "Did you know whether Limuel got in any fights in town". The president of the court objected to the question and the law member sustained the objection. (R. 64) The ruling was correct. The character of deceased was not in issue and any attempt by either the prosecution or the defense to adduce testimony thereof would be clearly objectionable. Similarly an inquiry as to whether Limuel had been engaged in certain specified fights would be entirely irrelevant and equally objectionable. The only inquiry along these lines that

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might be permitted when relevant is concerning an individual's general reputation in the community as a peaceful and law abiding citizen. But while inquiry into Limuel's general reputation in his organization as a peaceful and law abiding individual might have been of probative value and admissible if a proper foundation had been laid, an inquiry into specific unlawful acts or incidents of violence as was here attempted was improper.

6. The charge sheet shows that accused is 31 years of age, was inducted into the Army 24 August 1942 and had no prior service.

7. The court was legally constituted. 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 and sentence. A sentence of death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Donald D. MacBay, Judge Advocate.

Wilfred R. Gunn, Judge Advocate.

Henry C. Kunik, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
18 September 1944.

Board of Review

NATO 2649

UNITED STATES	)	EASTERN BASE SECTION
v.	)	Trial by G.C.M., convened at Bizerte, Tunisia, 19 April 1944.
Private DALE S. LIPPS (35 214 998), Company C, 389th Port Battalion.	)	Dishonorable discharge and confinement for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 81st Article of War.

Specification: In that Dale S. Lipps, Private, Company "C" 389th. Port Battalion, did, near Bizerte, Tunisia, on or about the 4th day of April 1944, attempt to relieve the enemy with supplies designed to aid certain German Prisioners of War to escape, to wit: by giving Karl Heinz Steder, a German prisioner of War, a compass, of a value of about $1.00.

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

Specification: In that Dale S. Lipps, Private, Company "C" 389th Port Battalion, did, near Bizerte, Tunisia, between 15 March 1944 and the 4th of April 1944 fraternize with

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> German prisioners of war by giving to the said Prisioners of war food, news bulletins, newspapers, money and drugs and by consorting with and counseling the said prisioners of war.

Accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification, except the words "consorting with" and "counseling the". He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 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 under Article of War 50½.

3. The evidence shows that during February 1944, a companionship developed between accused and Private Charles W. Prichard, Company G, 504th Parachute Infantry, who at the time were patients in a hospital in Naples, Italy, and who subsequently were transferred to the 33d General Hospital near Bizerte, Tunisia (R. 7,12). Prichard testified that during the course of that association, accused had said that

> "he was fighting on the wrong side of the war; if he ever got close enough to the front, he was going over to fight with the Germans" (R. 7);

that the witness' suspicions became aroused because of this assertion and he told accused that he, too,

> "liked the German people and thought a lot of them but it wasn't safe just to talk around anybody. I told him this in order to find out what I could about him. Then he seemed to have a lot of trust in me. He told me to go over and visit his German friends and we went over there taking some food *** that night" (R. 8,13).

The Germans, of whom there were nine, were "on a farm attached to this hospital area". One of their number, Karl Heinz Steder, spoke English. (R. 8)

Prichard testified that on the first visit to the Germans, he and accused went after nightfall to the house where the prisoners were staying and stopped at a gate which was fastened. There accused whistled and "one of the fellows" came out and let them in. Prichard was introduced "to the boys" and accused "gave them their stuff and got a bottle of cognac". (R. 8) During the visit, the witness played "several games of checkers". He testified he heard Steder tell accused

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"the Germans didn't want to conquer the world; they only wanted to unite the European nations to protect themselves from the Oriental race" (R. 8).

Accused also gave the Germans "Stars and Stripes and a daily news bulletin at this time" (R. 8). Prichard testified further that he saw accused every day after the first visit and the latter would tell him of having been over to visit the Germans and would bring back cognac and offer the witness a drink; that after about four or five days, he and accused went back to see the Germans and

"Lipps asked Steder if there was anything he could get them to help them in any way. Steder says, 'yes, you get us a compass to escape; we need a compass to escape; we have no ways of finding direction', and Lipps said that he would get a compass if he possibly could. Then Steder said, 'if you can't get a compass, we can use a watch as a compass and will you get us a watch' and he promised he would get a watch if he couldn't get a compass" (R. 9);

and further that accused

"told me to check with the boys coming in the ward coming back from the front with their equipment and see if I could get a compass. 'In the meantime, they only need a luminous dial watch which you have', he said, 'You are a good friend of the Germans', he said, 'you only paid thirty-dollars for the watch; will you give that to the German boys and I will give you fifteen-dollars, that we will donate the watch together'. I told him that I didn't want to part with my watch and he made a statement that I was a hell of a friend; I was for the German boys but I didn't want to cooperate with them, and he got quite angry and we parted that night" (R. 9).

The witness testified he was "quite positive" he heard the word "escape" used (R. 15).

Prichard testified further that accused said he had brought Steder to listen to a news broadcast at the hospital, had brought the Germans "over to see the movies" and that these prisoners were "dressed in fatigue clothes of some sort" which accused told the witness he had taken to them (R. 10,11). Also, this witness had seen accused give the Germans a bottle of atebrine tablets, some lice powder, playing cards, magazines, one large can of black pepper and one dollar apiece in American currency, eight of which were "gold seal money" and one, which he gave Steder, "blue seal" (R. 11,12,16).

Prichard testified also that on one occasion "We went there in the daytime and the Germans wouldn't let us in; they said we weren't allowed in there", so accused "told them we would be back during the night about eight o'clock" (R. 14).

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Prichard subsequently reported the activities of accused to First Lieutenant Ernest L. Krieger, Medical Administrative Corps, who was the officer in command of the Detachment of Patients, 33d General Hospital (R. 10,21). When asked by defense counsel why he did not make the report immediately, Prichard testified that

> "I didn't think I had sufficient evidence on this man to turn him in and when I knew it in my own mind that this man was a traitor to our country, then I turned him in". (R. 14)

Lieutenant Krieger ordered Prichard to "carry on" as he had been doing and to gain all the information he could about accused (R. 10).

On 29 March 1944, Lieutenant Krieger assigned Technician Fifth Grade Louis Maslofsky, attached to 33d General Hospital, as a "special agent" for the purpose of "checking up" on the patients and on the same day, in the course of that investigation accused, who had heard Maslofsky speak a few words of Hollandese or German, asked the latter how he liked the Germans and told Maslofsky that "he thought the Germans were pretty good *** and he visited a place where they have nine German Prisoners" (R. 23). At Maslofsky's suggestion, he and accused visited the Germans and Maslofsky, at accused's request, procured a bottle of atebrine tablets for the prisoners (R. 24). Maslofsky was "only supposed" to get accused what the latter requested and "not to give him any thing unless he asked for it" (R. 30). When first assigned to the investigation, Maslofsky was not told specifically about accused but was told to observe all the patients in the ward (R. 23,29). After telling Maslofsky how he liked the Germans, accused began deriding the French and Italians and praising the Germans (R. 24). Maslofsky testified that accused

> "ran down the American Army once when he told me that he was sick and disgusted the way he was being treated here and if he ever got close enough to the German lines he was going to get on the other side". (R. 30)

Maslofsky testified further that accused said these German prisoners "weren't fed any too good and they were being treated terrible". On the occasion of their first visit, when Maslofsky and accused reached the house where the Germans stayed, accused whistled and in about 15 minutes one of the prisoners came out and unfastened the door. Maslofsky testified that during the visit,

> "Lipps had asked them if they needed anything and the German said, 'well, I don't know yet' and Lipps told him that the hospital was ready to move out and if they needed anything, they would have to get it now, there wouldn't be nobody to bring it to you". (R. 24)

This visit was made on a Friday (R. 24). On the following Tuesday, 4 April, accused told Maslofsky he was going to visit the Germans that night and asked for some aspirin for the prisoners (R. 25). Maslofsky testified that he

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reported the prospective visit to Lieutenant Krieger who gave him a compass with instructions that if accused should ask for such an instrument, "not to give it to him but to sell it to him" (R. 26). Maslofsky testified that he mentioned the compass to accused during a checker game on 4 April 1944 and the latter

> "was enthused about it. He said, 'you have a compass?' I said, 'sure'. He said, 'those fellows need a compass'. I said, 'What the hell the need a compass for?' He said, 'They aren't going to be over here all the time; a few of them are figuring on going away; they have work to do'" (R. 27).

And further, that

> "he told me that those fellows needed the compass. He said a few of them was going to make an escape; they needed the compass to get back to Germany again" (R. 63).

Maslofsky testified that he did not get any money for the compass because accused said he did not have "any change" (R. 27).

Accused, Prichard and Maslofsky set out for the house where the Germans were quartered on the night of 4 April (R. 26,27) and on the way, Maslofsky handed accused the compass and a box of aspirin (R. 27,61). Maslofsky testified that upon arriving at the house, Steder poured drinks and

> "Lipps took the compass out of his pocket and made a move to give it to Steder and Prichard happened to turn his head a little bit and when Lipps saw Prichard turn his head, he pulled the compass back. When Prichard turned around again, Lipps handed the compass to Steder and Steder immediately put it in his pocket" (R. 28).

About 2130 hours Maslofsky said he had some work to do and left (R. 28). At about 2215 hours, while Prichard, accused and the prisoners "were all sitting there", Captain Ralph W. Powers, Counter Intelligence Corps, Headquarters, Eastern Base Section, accompanied by another American officer, an agent of the Criminal Investigations Division, a captain of the French Army and "the owner of the place" went into the room where the Germans were quartered and Captain Powers asked if "anybody in the house" spoke English. Steder replied he did and Captain Powers asked

> "'Have you got a compass in this room?' and the German said, 'Yes, sir, I have'. The Captain asked for the compass and the German walked over to a bed and got the compass from under the bed". (R. 10,18)

This compass which had been marked with a "small 'x' mark" was identified as the same one Maslofsky had gotten from Lieutenant Krieger (R. 17,21; Ex. 1)

and had later given to accused who in turn had delivered the instrument to Steder on the night of 4 April (R. 17,18). Captain Powers testified that in accused's presence he asked Steder where the latter got the compass and Steder replied he got it from an American soldier whose name he did not remember; and further, that Steder explained he got the compass in order to compare it with the kind they had in the German Army (R. 18). Captain Powers testified further that he asked accused if he had seen the compass before and the latter replied "he had never seen it before in his life" (R. 59) and knew nothing "about getting a compass to Steder" (R. 60).

Steder testified for the prosecution upon his affirmation to tell the truth (R. 34). He testified that he asked accused for a watch or compass (he explained it was possible for him "to get the time even with a compass") because the French farmer for whom the prisoners worked wanted them to labor more than ten hours a day in violation of the "conference of Geneva" (R. 35,37). He also testified that he had made a statement to the effect that he had told accused he wanted the watch or compass in order to escape "but it wasn't true"; that "in the moment one of our enemy soldier is accused to do something against his government, it is better for Germany" (R. 36). Steder explained further in his testimony that he thought by making a statement to accused that he wanted to escape, accused "might be caught and punished as an American soldier if they found out about it" (R. 36).

Accused testified that he had seen German prisoners working in the fields and on one occasion when he was returning from the airport, "this German prisoner" asked him for a cigarette and started

> "discussing that they were French prisoners and the food was very poor and they had no clothing and that they were working long hours ***" (R. 45),

and further that

> "while going after wine I came in contact with this soldier again and he was discussing about the food troubles *** and he asked me if I might get them some bread and I told him I would see if I could ***" (R. 45).

Accused took them butter and bread and on one occasion meat (R. 46). He testified further that he had met Prichard in a hospital in Italy and both were evacuated to the 33d General Hospital in Africa where Prichard was in a tent adjoining accused (R. 43,44). Accused denied that he and Prichard became very good friends (R. 44). He testified that "Prichard seemed to be quite a drinker" and went with accused over to the house where the German prisoners stayed to get some wine but there "was a lady there and she ran us out" but accused returned that evening and got some wine and cognac (R. 46). Accused denied his having expressed sympathy for the Germans either in or out of Prichard's presence and also denied he had ever said if he got near enough to the Germans' lines, he would go over to their side. He

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testified the German prisoners, "this one that talked English", complained about working more than was allowable under the "Geneva Convention" and wanted a watch to check on the time they worked. (R. 47) Accused told this prisoner watches were hard to get and the German said

> "he could determine the time by the compass and he asked me if I would get him a compass" (R. 48).

Accused testified he promised to try to get one but that the German never mentioned he wanted the compass to aid him in an escape nor did accused think that was the case (R. 48). He did ask Prichard if he wanted to sell his watch but the latter said "no" (R. 48). Respecting the compass, accused testified a week or longer had elapsed after the German had asked about the compass and he had "forgotten completely" about it (R. 48) when Maslofsky, during a game of checkers, "mentioned about a compass" and accused asked if he wanted to sell it. Maslofsky replied he did not (R. 49). Accused testified further that "a few days passed by and he came around again *** and he said he had the compass" (R. 49); that he told Maslofsky about the German prisoners and Maslofsky said he would like to go over to where the prisoners were to get some souvenirs. During that day accused and Prichard went to Ferryville. They passed by where the Germans worked and accused gave the English-speaking prisoner some soap. (R. 50) Upon returning from Ferryville, where "Prichard drank very heavy", accused "ran into this Corporal Maslofsky" who said "I found the compass *** I think I am going over this evening; come back after while and we will go over" (R. 51). Accused testified that he had asked Maslofsky to get some atebrine to take to the Germans; that accused, Prichard, who "was pretty well drunk", and Maslofsky "started over there and on the way over Maslofsky gave" accused the compass (R. 51,52). Upon arriving at the house, Steder showed accused "an article about something", Prichard and the "other fellows" played checkers, "and we proceeded to talk and in that length of time I gave him the compass" (R. 53). Accused also testified that when he handed Steder the compass, he told the German to thank Maslofsky for it as the latter "was the one that gave them the compass" and that "Steder showed him out" and thanked him for the instrument (R. 53). Prichard and accused stayed a while longer, drinking wine, and as they were about to go, "two American officers and a French captain, civilian, and the French in the house come in" and "this American officer said 'we want that compass'". Steder got the compass out of a box and handed it to the officer. (R. 54)

Accused also testified he had given the Germans underwear and "a pair of work overalls", atebrine and aspirin tablets, a small bottle of iodine and occasionally news bulletins and issues of the Stars and Stripes (R. 56). He testified further that the night the Germans' quarters "were raided" he was asked by the officers about the compass and "I admitted knowledge of the compass; I knew the compass was there" (R. 57). Accused testified he gave the prisoners clothes for cognac and also gave them cigarettes and some money for some of the wine (R. 58); also that he exchanged souvenirs with the Germans and gave them "a dollar bill apiece" (R. 59).

4. There is evidence that prior to the date of the act set forth in the

Specification of Charge I, accused had become acquainted with a group of German prisoners living on a French-owned farm where they were employed near accused's organization. It is shown by the evidence that accused maintained friendly relations with these Germans and clandestinely fraternized with them. Upon frequent visits at the farm, he gave the Germans food, playing cards, magazines, newspapers and other articles. On one occasion he gave each a dollar bill in American currency. He expressed himself in favor of the German cause and was heard to say that he would join the German forces if he ever got close enough to their lines. The evidence shows that while in company with another soldier, to whom he confided his leanings and activities, accused asked one of the Germans, Karl Heinz Steder, who could speak English, if there was anything he could do to help them. Steder replied, "yes, you get us a compass to escape; we need a compass to escape; we have no ways of finding direction". Thereafter, on the date alleged, accused surreptitiously gave Steder a compass. There is thus substantial evidence to sustain the court's findings of guilty under the Charges and Specifications.

It is however pertinent, regarding the alleged offense under Article of War 81, to advert to the following language by Colonel Winthrop:

> "It need hardly be remarked that the term 'the enemy,' or 'an enemy,' does not include enemies regularly held as <u>prisoners of war</u>; such, while so held, being entitled, by the usages of civilized warfare, to be furnished with subsistence, quarters, &c. It would include, however, a prisoner of war who has escaped and while he is at large, as also one who, having been made prisoner of war, has been paroled, and is at large upon his parole" (Winthrop's, reprint, p. 631).

Manifestly, official acts in furnishing subsistence and other needs to regularly held prisoners of war are not within the purview of Article of War 81. But this view is without application to the facts and circumstances as disclosed in the instant case. Here the acts of accused were designedly nefarious in nature, going beyond what might be deemed authorized and legitimate in connection with persons in the status of prisoners of war. There is evidentiary support for the theory that accused gave the compass to Steder for the sole and deliberate purpose of enabling the Germans to effect their escape to their own forces and thereupon further the cause of the enemy. In this respect, regardless of the precise status of these Germans, as prisoners, or of the jurisdiction under which they were held, accused's acts are susceptible to no other interpretation than that he attempted to relieve and render aid to the enemy within the condemnation of Article of War 81, as alleged.

5. The defense asserted that the actions of Lieutenant Krieger and Maslofsky were such as to constitute a defense of entrapment, but this contention was not sound. Accused intended to obtain a compass and other articles for the prisoners and this intent was his own. Once the intent to

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so supply the prisoners existed any person could properly furnish opportunity or even lend assistance to the accused for the purpose of detection and punishment. Accused voluntarily bought the compass from Maslofsky and requested the latter to provide the aspirin. An accused who formulates a plan and diligently seeks its consummation cannot complain entrapment where others of whom he asks assistance accede to his request. The case presents the situation where acts were done assisting accused to commit an offense which he himself conceived rather than the situation where an innocent person was induced to commit the offense charged (Bull. JAG, December 1942 and February 1944, sec. 395 (35)).

6. The charge sheet shows that accused is 29 years of age. He was inducted into the Army 17 November 1941, with no prior service.

7. The court was legally constituted. 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 and the sentence.

Donald K. MacKay, Judge Advocate.
William R. Simon, Judge Advocate.
Henry C. Renick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
21 July 1944.

Board of Review

NATO 2649

UNITED STATES	)	EASTERN BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Bizerte, Tunisia, 19 April
Private DALE S. LIPPS	)	1944.
(35 214 998), Company C,	)	Dishonorable discharge and
389th Port Battalion.	)	confinement for ten years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Donald W. MacKay, Judge Advocate.
Mortimer R. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

NATO 2649 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 21 July 1944.

TO: Commanding General, NATOUSA, APO 534. U. S. Army.

1. In the case of Private Dale S. Lipps (35 214 998), Company C, 389th 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 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. After publication of the general court-martial order in the case nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2649).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 47, NATO, 21 Jul 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
1 August 1944.

Board of Review

NATO 2650

UNITED STATES	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Pozzuoli, Italy, 4 February 1944.
Second Lieutenant PRESTON W. KEMMERER (01 319 115), Company G, 15th Infantry.	)	Dismissal and confinement for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that 2nd Lieut. PRESTON W. KEMMERER, Company G, 15th Infantry, did, at Naples, Italy, on or about 20 January 1944, desert the service of the United States, by quitting his organization, with intent to avoid hazardous duty, to wit: an amphibious operation, and did remain absent in desertion until he surrendered himself at Naples, Italy, at about 1800 20 January 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and confinement at hard labor for 20 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, reduced the period of confinement to 15 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of

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confinement and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 20 January 1944 accused's organization was in the process of "loading aboard ships for an amphibious operation" against the German Army. Accused's company left its area around 1000 hours to load aboard an "LCI" at Pozzuoli, Italy. By 1430 hours the loading was complete and by 1500 hours the ship had left port. Captain Eugene A. Salet, of accused's regiment, who was in command of the "follow-up" group of the regiment, testified that accused's battalion had as its mission upon arrival at its destination to follow the assault battalion of the regiment, move inland about four miles and establish itself at a predesignated spot. (R. 14,15) This witness also testified that accused was not authorized to remain in Naples (R. 17).

Captain Salet further testified that in his capacity as investigating officer he had warned accused of his rights and had told him that anything he said "orally or otherwise could be used against him". This witness testified that accused thereupon stated he had been told by oral order from his company commander that he was to leave on 20 January. (R. 14,16) Witness also testified,

> "I further asked as to what preparations the battalion had been making the previous day, on the 19th. He said they loaded the bags and most of the officer's bags. They were generally getting ready to leave the next day. To continue, he said the battalion commander had told them they were leaving; that they had had a sand table, to know where the beach was; that they were shown the approximate terrain they were to occupy, and, in general, important factors of their mission. I asked him as to what time he left his organization. He said on the morning of the 20th. I asked him where had he gone, and he said he had walked into Naples alone. On arriving in Naples, he hung around the docks and had gone into a church and prayed. I asked him his purpose in leaving his organization, and he said he was attempting to straighten himself out. I asked in what way and he said that he couldn't get himself into the proper mental frame of mind to go with his organization on the operation. I asked him, also, if he realized the consequences of his acts. He said he did. I believe he told me that he just didn't have the stuff" (R. 16).

Witness also stated it would be "better" to say accused stated he realized the "seriousness" rather than "consequences" of his acts (R. 16).

Captain Curtis F. Yarbrough, Peninsular Base Section, testified that about 1800 hours 20 January 1944 when he was "night duty officer at the Questora Building in Naples" accused came to the desk of witness and stated, "I am AWOL from my outfit and didn't get on the boat" and stated he wanted

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to "turn in". Witness warned him to be careful what he said, that the matter was serious and that anything he said could be used against him. Accused told witness "he missed the boat because he wanted to; he didn't want to catch the boat and now he wanted to turn himself in". When talking to witness or to a "Major Mikulak", who entered the room about that time, accused stated "he had left his organization that morning and had gone to Naples to hide". (R. 9-11) Witness further testified accused stated in effect "he couldn't take the consequences of an operation" (R. 11). Witness did not observe any abnormalities about accused except "just that little nervousness" (R. 65).

Major Michael N. Mikulak, Deputy Provost Marshal, Peninsular Base Section, testified he was present when accused talked with Captain Yarbrough and that accused also talked with witness, stating he was "AWOL", that he believed his organization had sailed and that "he just couldn't take it any more" (R. 12,13). Witness further testified that accused talked to "General Immell" in his presence. In connection with that conversation witness testified:

> "General Immell told him that he was letting his men down, and the lieutenant answered and said, 'I do know that.' General Immell then asked him ... then told him that 'you know, lieutenant, you can't ever face those men again.' He answered it didn't make any difference if he failed the men; that the men in his organization didn't have any confidence in him anyway; that they would probably do better without him." (R. 13,14)

Witness testified he did not observe any abnormalities in accused's condition and that accused's actions did not lead him to suspect accused was abnormal (R. 66).

Second Lieutenant Louis Levine, 58th Military Police Company, testified that he was duty officer at the Central Police Station, District Number One, Naples, on 20 January 1944 and that accused was placed in his custody that evening and remained in the office all night. Witness testified that while in arrest accused stated to him that he "just didn't have the guts" "to go" and that "he thought he could go, but he couldn't lead someone else". About 2200 hours accused went "to sleep on the floor with a blanket," but was awakened by the commotion that followed the shooting of an "MP" in front of the building approximately 20 yards away. Witness testified that accused was apprised of the killing and accused "said that he hoped that they would catch the man who shot the corporal" but did not vomit, appear nervous, show any excitability or indicate any abnormality. (R. 67-69) Witness believed accused slept later that night (R. 70).

Captain Isadore Kaplan, Medical Corps, 70th Station Hospital, testified he was in charge of the officers' ward at the hospital and that accused was a patient of his from 24 December 1943 to 10 January 1944 during which period accused was examined for gastro-intestinal symptoms. Accused was not suffering from diarrhea at the time of his first examination although he did develop that condition about five days later. (R. 70,71) Witness also

testified he had occasion to observe accused with psychoneurosis in mind but that accused did not exhibit any symptoms of that condition (R. 72-74). In witness' opinion accused knew the difference between right and wrong and was not suffering from any maladjustment or disability which would keep him from adhering to the right (R. 73). Witness also testified that in his opinion a person suffering from "anxiety state mild" can adhere to the right (R. 75).

Accused made an unsworn statement which was read to the court. The statement was as follows:

> "I was assigned to G Company, 15th Infantry, on 17 December 1943, after spending three and one-half months as a casual in various replacement depots. The following night the regiment moved to the front, and as I had not been assigned to a platoon my time was spent at the company C.P. There was some artillery fire, not close, and I got somewhat excited. On the night of 20 December I accompanied Lt. Thomas, one of the Company officers, and six men on a patrol mission. My position was at the tail of the column. We ran into machine gun, pistol, mortar and artillery fire. I followed after the patrol, as best I can remember, panicky and unable to think clearly. I just felt tense and nauseated. My thoughts would not function. On the way back I fell on the bank of a stream and lost my glasses. After that I followed the patrol but had a hard time doing it. After returning to our area I could not sleep. I tried to eat but vomited my food. The following day when I explained I had lost my glasses I was sent to the 8th Evacuation Hospital to obtain new ones. When I entered the hospital I was given sedatives. I don't remember much. I was beginning to have attacks of diarrhea and I also had a mild case of trench feet. After two nights at this hospital I was sent to the 70th Station Hospital. There I received glasses and after I had complained about the nausea, cramps and diarrhea I was having, an Xray of my stomach was made. Once when I complained of my stomach, paragoric was prescribed. I was finally told that the Xrays were negative and that my trouble was caused by tension. I was discharged from the hospital on 10 January and spent the next nine days in training operations. I continued to have diarrhea, nausea, no appetite and was unable to sleep. In one training problem my mission was to install a road block. I was not able to concentrate and placed the road block at the wrong road junction, bringing down heavy criticism on G Company by the Battalion Commander. In another problem I took my platoon the wrong place and the Executive Officer seemed to blame me for it. When we were on an LCI, on another exercise, the Company Commander told me to keep the men from gambling and I gave the order and then he chewed me out when he found a game going on on deck. I guess I failed every time I tried to lead men. During all this period I felt depressed and worried over having no confidence

in myself. I did not feel that the men had any confidence in me and the way I was feeling I didn't see why they should. They didn't seem to want me around. I did not feel capable of leading a platoon and I worried about it all the time. The men followed the Sergeant but didn't pay any attention to me. I couldn't help feeling that the platoon would be better off without me. I couldn't seem to be able to get to know anyone that I could talk to or tell how I felt. I was just all tied up inside. The other officers seemed calm and confident and I was too ashamed, I guess, to tell them or anybody that I wasn't good enough to do what they could do. I just felt inferior to everybody. On 19 January we were told about the coming operation and that we would load on the ships the next day. On the morning of the twentieth I left the Company and walked into Naples. I did not feel capable of leading my men in combat and could not bring myself to continue my assigned duty. I found a church and spent part of the morning praying. I went to the Red Cross and wandered around the streets of Naples. I could not force myself to go back. I knew I would fail. I realized from the last time that I couldn't take it and wouldn't be able to lead the men in battle. I felt that it wouldn't be fair to the men for me to try to take them in combat. At 1800 I turned myself in to the Provost Marshal's office at Naples. I don't know when my organization departed. I enlisted in the Army in March, 1941, because I was told by my Draft Board I would soon be drafted anyway. I was in CA at first, and then was transferred to FA, and became a T/5 radio operator. In the summer of 1942 my Battery Commander said he wanted all non-coms to put in for OCS, and talked me into putting in. I was sent to Fort Benning Infantry OCS, I got through but don't know how, as I hadn't had any Infantry training. I was surprised that I got through. I know now that that was a mistake. Before I went to OCS our unit went overseas. I got a hernia and had to have an operation. I went to OCS when I got over the operation. I was born in 1917 in Brooklyn, N.Y. I went to school until the middle of the eleventh grade. I quit and worked as a clerk and messenger and went to art school at nights for a few months, but quit both. I later got a job with the same place, and quit to take a trip. Later I worked a short time as a clerk. I made from $15.00 to $25.00 a week at such jobs. I never had any responsibility over other people or any executive position. I wasn't getting any place, only making $18.00 a week, so went in the Army as I was going to be drafted anyway. I had pneumonia when I was four and other childhood diseases. I had two injuries when I was little. Once I was struck by a golf club and once I was hurt in an automobile accident and was unconscious for a number of hours. I had what doctors call enuresis until I was six years old or so. I have the bad habit of biting my nails and the ends of my fingers. I haven't been able to stand seeing anybody injured since I saw an accident when I was about fourteen or fifteen. I was told to go phone for an ambulance but I got paralyzed in position and

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couldn't move and someone else had to go. Then I got sick and vomited. Since childhood, in fact all my life, I have gotten sick at my stomach when under any stress. When I used to participate in athletics a little I would get so tense with excitement that I couldn't go on. Other things, like planning to go on a trip, and once, when I had come back from a trip, upset me at the stomach and made me tense and caused me to have diarrhea. I like to be with people I know but have a hard time making friends. Ever since I was assigned to the 15th Infantry I have felt very lonely. I haven't gotten any mail from my family since early November, and what I received then was dated in September. I have a sister twenty-eight years old who has been an invalid with arthritis since she was about six years old. I have been told that this is not a sworn statement in a legal sense, but I want to state that I consider myself bound to tell the truth, and have told the truth in this statement just as much as if I had been sworn" (R. 18-21).

Major Andrew D. Hart, Jr., Medical Corps, Chief of the Neuropsychiatric Section of the 45th General Hospital, called by the defense, testified that accused was given physical, neurological and psychiatric examinations, the results of the first two being negative (R. 21,22,27). The report of the psychiatric examination was received in evidence (R. 28; Def. Ex. A). Witness read from the report with respect to accused's mental status the following:

"While under observation in this Hospital, the patient has appeared somewhat diffident and moderately depressed. His affect has not been inappropriate. He has appeared tense, but not outwardly apprehensive; his attitude and behavior have remained quiet and cooperative. Examinations have shown no abnormality of thought content or orientation, no retardation of memory, no impairment of insight or judgment. There has been no attempt to rationalize present difficulties. The patient states simply that he was afraid for himself and for his men to put himself in a position where he would, as in the last instance, be irresponsible and unable to act. This Officer's intelligence rating is obviously average or above average" (R. 29).

Witness testified his conclusions were,

"This officer suffered an acute anxiety reaction during recent brief exposure to enemy shell fire, 20 December 1943. Following this experience, he remained nervous and suffered a loss of confidence in his ability to stand combat duty or to lead his men. In addition he developed certain gastro-intestinal symptoms which have persisted and which are commonly related to anxiety" (R. 30),

and made the following diagnosis:

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"Psychoneurosis, Anxiety State, Mild, manifested chiefly by gastro-intestinal symptoms, and related to brief combat duty in Italy, 1943" (R. 30).

Major Hart testified that in his opinion accused could distinguish right from wrong but witness could not tell whether accused could adhere to the right if he wanted to (R. 47). Witness also testified he could not explain the difference between "what the accused has" and cowardice and testified,

"I would say that cowardice is a term which has been used in the past to denote fear and refusal to act according to our cultural ethical standards during a time of stress. I think in the present such is indistinguishable from thousands of battle reactions among men who have been exposed to combat" (R. 46).

This witness also testified,

"it is one of the most difficult problems in medicine for a psychiatrist to always tell with certainty the difference between a psychoneurotic and a malingerer. If I may amplify that: it seems largely a matter of personal opinion as to the genuineness of a patient's complaints ... the seriousness with which they have affected his attitude. In such a decision a physician may be fooled fairly easily by a patient who has knowledge of symptoms and the disease, and who is a good enough actor to play the part well. The diagnosis between malingering and psychoneurosis is very seldom made, because it is very difficult to diagnose malingering" (R. 43).

Witness further stated the question as to whether accused could adhere to the right cannot be answered as that question is not practical and is a "philosophical conundrum" (R. 40).

Lieutenant Colonel John Powell William, Medical Corps, Chief of Medical Service, 45th General Hospital, testified that he was "in agreement with the general conclusion" of the report of Major Hart (R. 50). He testified regarding accused,

"I think his behavior that morning when he walked in from camp and walked around Naples shows a man who was having a terrible time making up his mind to do something that he knew was wrong. We have every reason to believe that, because he says he knew it was wrong. He knew he was absent from his duties to avoid hazardous duty and told me so in those words. I think he was making a real effort to make himself do what he should do. As to whether you can say that he was able or unable, I don't think that's possible",

and, asked if he thought accused was capable of "doing what was right",

"That's something I can't answer. I wish I could, but I don't

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> know the answer to that. That is what I was trying to explain that the various reactions are so unpredictable that it doesn't follow rules or logic. The thing I'm asked was is he malingering or so sick he couldn't do his duty. I don't believe that can be answered ... I mean, I don't believe I can answer it" (R. 53).

This witness testified "a coward is a psychoneurotic ... acute anxiety state, that's what a coward is" (R. 56) and that "There is not one single bit of evidence of insanity". Witness also testified:

> "The one thing he could not force himself to follow, the only thing that we have evidence on was that he was not able to follow good judgment and force himself back to combat" (R. 60).

4. It thus appears that at the time and near the place alleged in the Specification accused quit his organization which was then embarking for an amphibious operation against the enemy (the Anzio beachhead). The evidence is undisputed that he "missed the boat" deliberately and with the express intent of avoiding what he believed to be, and in fact was, hazardous duty. It likewise appears the absence was terminated as set forth in the Specification. The evidence clearly establishes the offense alleged (MCM, 1928, par. 130a; AW 28).

5. The defense introduced the testimony of two psychiatrists, both of whom expressed the opinion that accused knew the difference between right and wrong and both testified they could not say whether or not accused could adhere to the right. One of these witnesses testified he could not explain the difference between "what the accused has" and cowardice, and the other testified "There is not one single bit of evidence of insanity" and that he could not tell whether or not accused was malingering. On the other hand the medical officer who was in charge of the ward accused occupied in the 70th Station Hospital for 17 days shortly prior to the date of the offense charged testified unequivocally that he thought accused knew the difference between right and wrong and was not suffering from any maladjustment or disability which would keep him from adhering to the right. Upon all the evidence and in the light of its own knowledge of human motives and behavior the court was justified in concluding accused was legally and mentally responsible for his acts within the meaning of the fifth subparagraph of paragraph 78a of the Manual for Courts-Martial.

6. After arraignment the defense moved for a continuance stating there was reason to believe that "serious questions" would arise during the trial concerning "the actions, mental state, behavior and demeanor of accused" and that as the organization was then engaged in combat "it has been, is, and will continue to be impossible to get any evidence from any person of that organization other than the accused". The charges had been served on accused on the date of trial, but defense counsel had received a copy of the charges two days prior thereto (R. 61). The defense assigned as a reason for the granting of the motion "it has been impossible to make an investigation". The defense did not specify the names of witnesses desired or the substance of their expected testimony. The trial judge advocate, in opposing the motion, stated that he had

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"constantly, since this case was referred for trial, offered his services to defense counsel in furthering the case for him. Until this minute, he has not requested the trial judge advocate to cause to appear in court witnesses to which he now refers. It definitely would have been possible to bring back witnesses from the beachhead, had that been requested. I would like the record to show that constantly officer couriers are going back and forth to the beachhead, and no one has been requested to appear here as a witness" (R. 6).

The motion was denied and was not renewed prior to the conclusion of the trial. An examination of the record as a whole does not indicate that the denial of the motion was error (MCM, 1928, par. 52). Defense did not, insofar as appears, desire any particular witness not called and did not know what evidence might be found. The only ground given for the continuance was that it had been impossible to make an investigation. Extensive inquiry into accused's mental condition had, however, been made. There was no dispute as to the physical actions of accused and three medical witnesses testified in detail as to his mental state. There is no showing that further investigation would have brought forth evidence that would have been other than cumulative. In any event, the defense rested (R. 63,75) without renewing the motion. It must be concluded the reasons that prompted the motion originally no longer existed or had lost force and that defense was content with the evidence presented to the court.

7. In the course of the trial the defense made what was in effect a plea to the jurisdiction of the court on the ground that the charges were referred to the trial judge advocate for trial without prior personal consideration by the appointing authority of the advice of his staff judge advocate thereon. In support of the plea it was stated that the charges were referred for trial, by command of the appointing authority, on 2 February 1944 and that the written advice of the staff judge advocate bore the same date but that, because of the absence of the appointing authority from the locality where the reference was made, it was physically impossible for him to have considered the written advice (R. 60,61). Whether advice by the staff judge advocate in other form was considered by the appointing authority in person does not appear. The plea was denied (R. 63).

Article of War 70 provides that before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice. Paragraph 35b of the Manual for Courts-Martial restates this requirement and provides that the reference to and advice by the staff judge advocate shall be in manner and form directed by the appointing authority but that it shall include a written and signed recommendation of the action to be taken.

Whether or not the matter stated by the defense counsel presented an issue as to compliance with Article of War 70 and paragraph 35b of the Manual for Courts-Martial, it is to be noted that the Board of Review, discussing the subject in a recent case, said:

"The requirements for reference of charges and records of trial

to staff judge advocates have heretofore been held to be directory only and to have no effect upon the legality of the proceedings (CM 215720, Pool; CM 215721, Klobucher; CM 224823, Grenzeback)" (CM 229477, Floyd).

It thus appears the plea was properly denied.

8. The charge sheet shows that accused is 26 years of age. He enlisted in the Army 3 March 1941 and was commissioned 29 April 1943. No prior service is shown.

9. The court was legally constituted. 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 and the sentence.

Daniel W. MacKay, Judge Advocate.
Mortimer R. Brown, Judge Advocate.
Henry C. Renick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
31 July 1944.

Board of Review

NATO 2650

UNITED STATES	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Pozzuoli, Italy, 4 February
Second Lieutenant PRESTON W.	)	1944.
KEMMERER (01 319 115), Company	)	Dismissal and confinement for
G, 15th Infantry.	)	15 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Donald R. MacKay, Judge Advocate.
Malmer P. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

NATO 2650 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 31 July 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Second Lieutenant Preston W. Kemmerer (01 319 115), Company G, 15th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions

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CONFIDENTIAL

Reels 3656

NATO 2650, 1st Ind.
31 July 1944 (Continued).

of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2650).

Hubert D. Hoover

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 53, NATO, 31 Jul 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
2 July 1944.

Board of Review

NATO 2668

UNITED STATES	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Pozzuoli, Italy, 18 April 1944. Dishonorable discharge and confinement for 30 years. U. S. Penitentiary, Lewisburg, Pennsylvania.
Private MANUEL R. SILVA, JR. (31 309 562), Company K, 30th Infantry.	)	

REVIEW by the BOARD OF REVIEW

Simpson, Mackay, and Irion, 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 Manuel R. Silva, Jr., Company "K", 30th Infantry, did, without proper leave, absent himself from the 225th Station Hospital in the vicinity of Naples, Italy, from about 1400, 8 December 1943, to about 1430, 21 December 1943.

Specification 2: In that Private Manuel R. Silva, Jr., Company "K", 30th Infantry, did, without proper leave, absent himself from his organization at Qualiano, Italy, from about 0720, 9 January 1944, to about 2030, 25 January 1944.

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

Specification: In that Private Manuel R. Silva, Jr., Company "K",

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30th Infantry, did, in the vicinity of N. Astura, Italy, on or about 1530, 4 February 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he surrendered himself at Naples, Italy, on or about 1745, 24 March 1944.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 40 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to 30 years, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. As to Specification 1, Charge I, an extract copy of the morning report of Detachment of Patients, 225th Station Hospital, admitted in evidence without objection, showed the following entries:

"9 December 1943: '31309562 Silver, Manuel R. Inf Pvt fr atchd fr Co, 30th Inf to AWOL at 1400 8 Dec 43'" (R. 7; Ex.I).

Accused voluntarily surrendered himself to military authorities in Naples, Italy, 21 December 1943 (R. 7,8).

As to Specification 2, Charge I, the first sergeant of Company K, 30th Infantry Regiment, testified by deposition that accused, who had been assigned to that organization on 8 January 1944, absented himself without leave on the day following his assignment to that command (R. 8-11; Ex. II). On 25 January 1944, accused was apprehended in Naples by a military policeman who testified accused, when arrested, was in possession of an "illegal pass" and was "loaded down with cigarettes" (R. 11,12).

As to the Specification of Charge II, an extract copy of the morning report of Company K, 30th Infantry Regiment, admitted in evidence without objection, showed the following entries:

"5 Feb. 1944 (2) Miles N. Astura, Italy.
31309562 Silva, Manuel R. Pvt. fr duty to A.W.O.L. 1530, 4th" (R. 13; Ex. III).

Another extract copy of the morning report of accused's company, dated 4 February 1944, also admitted in evidence without objection, showed the following:

"Location: (1½) Miles N.E. Conca, Italy Org. W/(6) Off.

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& (133) E.M. Remained in defense area (1½) miles N.E. of Conca, Italy thru-out the day & night. Pvt Beard, Samuel I, Fr Dy to Missing 2000-1-29-44. No casualties, Morale Excellent" (Ex. IV; R. 15).

At the request of the prosecution, the court took judicial notice that

"the locality known as Conca, Italy is a settlement which is on the Anzio-Nettuno beachhead. The entire Anzio-Nettuno beachhead on or about 4 February 1944 was an area of combat" (R. 15,16).

On 24 March 1944, accused went to a military police station in Naples and said "he wanted to turn himself in as he was AWOL" (R. 13,14).

For the defense, it was stipulated that the Chief of the Neuropsychiatric Section, 262d Station Hospital, if present, would testify in substance as follows:

"'Neurological examination was negative except for tremors of extended fingers. Psychiatric examination showed patient to be resentful towards society, particularly towards the Army and doctors. His insight and judgment are poor. He is antagonistic, sullen, petulant and impudent. Diagnosis: Constitutional psychopathic state, emotional instability.'

"At the present time, is this soldier able to understand the nature of court-martial proceedings and to assist his defense counsel in the preparation and trial of his case?

"'Yes.'

"At the time of the alleged offense, was this soldier suffering from a mental defect, disease or derangement?

"'Constitutional psychopathic state, emotional instability.'

"Did such mental defect, disease or derangement prevent him from distinguishing right from wrong, concerning the particular acts charged?

"'No.'

"If he could distinguish right from wrong concerning the particular acts charged, did such mental defect, disease or derangement prevent him from adhering to the right?

"'Yes, partially, in that it was more difficult for him to adhere to the right due to his emotional instability than

in the case of a normal individual. Due to his emotional instability, he is unable to be guided by judgment as is the normal individual, and instead is guided by his emotions'" (R. 16,17; Def. Ex. I).

Accused elected to make an unsworn statement through his counsel in which he stated that he was born, of Portuguese parentage, 13 December 1920 in Gloucester, Massachusetts, where he completed nine years of school; he was a fish cleaner in civilian life and was only seasonally employed (R. 18). He stated further that

"Prior to entering the army I had been twice admitted to the Danvers State Hospital in Massachusetts for mental examination. They told me that I was sick but my condition was not severe enough to warrant hospitalization in the crowded mental institutions of the State of Massachusetts" (R. 18).

He also stated he was inducted into the Army 8 April 1943, took basic training with an infantry division and was sent overseas as a replacement in October 1943 (R. 18).

4. The uncontradicted evidence shows that at the place and time alleged in Specification 1, Charge I, accused absented himself without proper leave from his organization and remained absent until he surrendered in Naples, Italy, about 12 days later. He was properly found guilty as here specified (MCM, 1928, par. 132).

Also, it appears from uncontradicted evidence that at the time alleged in Specification 2, Charge I, accused again absented himself without proper leave from his command and remained absent until he was apprehended in Naples some 17 days later. The place where accused absented himself without authority, alleged in this Specification to have been Qualiano, Italy, was not shown. This omission was not material (Dig. Op, JAG, 1912-40, sec. 416 (10)). Accused was properly found guilty of absence without leave as here alleged (MCM, 1928, par. 132).

It also appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge II, accused again absented himself without leave from his organization and remained so absent until he surrendered himself to military authorities about 49 days later. When he absented himself, his company was stationed in a combat area. Accused reported to his company one day and on the next, absented himself without proper leave. The court was warranted in concluding that accused was actuated by an intent to avoid the hazardous duty of combat with the enemy when he quit his organization under these circumstances. Findings of guilty of desertion as here alleged were proper (AW 28; MCM, 1928, par. 130a).

5. Evidence was introduced by the defense counsel showing a diagnosis by a medical officer in the case of accused of constitutional psychopathic state, emotional instability at the time of the "alleged offense". The

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psychiatrist who examined him was of the opinion that accused was able, concerning the particular acts charged, to distinguish between right and wrong, but was partially prevented by his mental state from adhering to the right "in that it was more difficult for him to adhere to the right due to his emotional instability than in the case of a normal individual". This officer was also of the opinion that accused, because of his instability, was "unable to be guided by judgment as is the normal individual, and instead is guided by his emotions". It was for the court to determine, from all the evidence and from its knowledge of human behavior, whether accused was so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right. The evidence upon which accused based this defense, viewed most favorably to him, only purported to show a partial mental defect. It was not suggested that he had been prevented by that defect from adhering to the right but only that such adherence was rendered more difficult than in the case of a normal individual. The court was warranted in concluding that accused was responsible in law and in fact for the consequences of his conduct. While no special finding of mental responsibility was made by the court, it was included in the general findings of guilty (MCM, 1928, par. 78; Bull. JAG, December 1943, sec. 395 (44a)).

6. The following is contained in the review by the staff judge advocate of the record of trial:

> "Accused was assigned to the Division and to 30th Infantry on 6 November 1943; on 8 November he was missing - the nature of the absence is unknown as his unit was then in combat; he returned to duty on 15 November and went AWOL the same day and sometime thereafter apparently turned in to the hospital from which he went AWOL on 9 December; he surrendered on 21 December and went AWOL on 9 January; after apprehension, accused was returned to his unit on 2 February and, while his company was in combat, went AWOL on 4 February. During five months service in the States, accused had one 7-day furlough and a two-day AWOL. The psychiatrist reports that accused has a long history of criminal activity in civil life, and describes accused as antagonistic, sullen, petulant and impudent; that accused states he was paroled from a one-year prison sentence on condition that he go into the Army."

7. The charge sheet shows that accused is 23 years old, was inducted into the Army 8 April 1943, and had no prior service.

8. The court was legally constituted. 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 and sentence. Penitentiary confinement is authorized by Article of War 42 for the offense of desertion in time of war.

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Irvin Simpson, Judge Advocate.

Donald K. Blackburn, Judge Advocate.

William R. Lane, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
2 July 1944.

Board of Review

NATO 2669

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 306, U. S. Army, 5 June
Private EDWARD L. BLISS	)	1944.
(12 056 638), Company D,	)	Dishonorable discharge and
52d Quartermaster Truck	)	confinement for 20 years.
Battalion (DUKWS).	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Simpson, Mackay and Irion, 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 Edward L. Bliss, Company "D", Fifty-Second Quartermaster Truck Battalion (Dukws), did, at CARDITO, ITALY on or about 29 November 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at CASTELLAMMARE, ITALY on or about 18 March 1944.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and guilty of the Specification except the words "was apprehended", substituting therefor the words "surrendered himself to military authorities", of the excepted words not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was

sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that accused, a member of the 52d Quartermaster Truck Battalion (DUKWS), absented himself therefrom without leave on 29 November 1943 and remained so absent until about 18 March 1944, when, it was stipulated, he surrendered himself to military authorities at a United States Hospital at or near Castellammare, Italy (R. 6-8; Ex. 1). Accused's company commander testified the absence commenced at Castellammare (R. 6). A noncommissioned officer of the same organization testified the absence commenced in Naples (R. 8).

Accused elected to remain silent.

4. It thus appears from the uncontradicted evidence that at the time alleged accused absented himself without proper leave from his organization and remained unauthorizedly absent until about 18 March 1944 when he surrendered at an Army hospital. He left his organization in an active theater of operations and remained absent for 110 days. When, as here, the absence is much prolonged and there is no satisfactory explanation of it, the court is justified in inferring from that alone an intent to remain permanently absent (MCM, 1928, par. 130a).

5. The Specification alleges that the absence commenced at Cardito, Italy, while there is testimony that it commenced elsewhere in Italy. The variance is immaterial as the place of the offense is not of the essence (NATO 440, Gilbert; NATO 1279, Alex; NATO 1715, Kinlow).

6. The charge sheet shows accused is 26 years of age, enlisted in the Army 16 February 1942 and had no prior service.

7. The court was legally constituted. 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 and sentence.

Gordon Simpson, Judge Advocate.

Donald W. McBay, Judge Advocate.

Milton R. Frei, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
2 August 1944.

Board of Review

NATO 2694

UNITED STATES	)	MEDITERRANEAN BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Algiers, Algeria, 5 June 1944.
Private HOMER J. CARLTON	)	Dishonorable discharge and
(37 387 299), Detachment	)	confinement for ten years.
Medical Department, 79th	)	Federal Reformatory, El Reno,
Station Hospital.	)	Oklahoma.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 92d Article of War.

Specification: In that Private Homer J. Carlton, Detachment Medical Department, 79th Station Hospital, did, at Cap Matifou, Algeria, on or about 21 April 1944, with Malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Marvin E. Pietz, Detachment Medical Department, 79th Station Hospital, a human being, by hitting him in the face with his fist and by kicking him on and about the head and neck with his foot.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the words "with malice aforethought" and the words "and with premeditation", substituting the word "and" between the words "feloniously, unlawfully", of the excepted words not guilty, of the substituted words guilty and not guilty of the Charge but guilty of a violation of Article of War 93. No evidence of previous convictions was introduced. He

was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. There is evidence that at about 1330 hours on 21 April 1944 accused went with Corporal Guy G. Pitts, both then of the 79th Station Hospital Medical Detachment, to a cafe or bar at Cap Matifou, which was near Algiers, Algeria (R. 5,10,22). They remained in the bar until about 1800 hours that evening and during that period accused drank about half a quart of brandy (R. 22,23). At about 1430 or 1500 hours Private Marvin E. Pietz, the deceased, together with Private First Class Byron J. Swanson and another soldier, all then of the 79th Station Hospital Medical Detachment, came to the same bar and had about three drinks. Then they left, went to another bar where they had one or two drinks, and returned to the bar where accused was. (R. 23,26) At about 1800 hours (R. 5,10), an argument developed between accused and Swanson, who had come to the bar with Pietz (R. 26,27,30). During the course of this quarrel accused said "I am a tough guy, and you too are a tough guy" and he said to Pietz "You are after my style" (R. 14). Thereupon, accused, Pietz and Swanson walked out of the bar, followed by Pitts and several other soldiers (R. 6,11,13-15,20,21,23,27-29,31). Swanson gave Pietz his camera to hold (R. 27) and Pietz stood "in the main road side", with his hands in his pockets, holding the camera, smoking a cigarette and not "engaged in any fight" (R. 11, 14,16,29,30).

Suddenly accused "took a swing" at Swanson and missed him, then came upon Pietz from the side and struck Pietz with his fist on the jaw, knocking him to the ground (R. 6,7,11,12,16,18,27). Accused, according to the testimony of a British soldier, who was near by, then ran away for a distance of about ten or fifteen yards (R. 6-8). Witness testified he went up to Pietz and picked him up from the pavement where he lay, and that while he was still holding Pietz in his arms, accused returned, again struck Pietz on the body causing witness to lose his balance so that Pietz "slipped out of" his arms and fell to the pavement for the second time (R. 7). While Pietz lay on the pavement, accused, who was wearing brown boots, kicked Pietz on the right side of the head a little above the ear (R. 7,11,12,16,18-20). Accused then ran away and Swanson "tried to capture him" and "chased down the road after him" about 100 feet, where he again had another altercation with accused (R. 10,12,24,25,27,31). The two had their fists clenched but "they never struck a blow" (R. 32). Pietz did not at any time strike or attempt to strike accused nor make any threatening gestures toward him (R. 14,16,18), and none of the other soldiers struck accused (R. 6,9).

The British soldier who had gone to Pietz's aid took Pietz, with the assistance of some British and American soldiers, "to the cafe to save him from further punishment" (R. 7,12,24). Private First Class Carl W. Paul, then of the 79th Station Hospital Medical Detachment, testified that after he had "separated" Swanson and accused, both of whom "had their hands drawn up and ready to fight", he immediately ran to the bar and

> "When I arrived there I saw Pietz laying on the ground and there was a French lady there with a pail of water pouring some water on him to bring him to."

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Pietz's lips and mouth were blue and he was unconscious. Witness testified that he put some water on Pietz's face, and after

> "I saw that I got no response I turned Pietz over and proceeded to give him artificial respiration. I ordered someone to go and try to stop a vehicle and that person halted a Weapons carrier and we then put Pietz on the Weapons carrier to take him to the hospital."

Witness also testified,

> "I held Pietz in my arms and he was still unconscious. Half way between he died in my arms."

Witness knew Pietz was dead because "On the way to the hospital I watched his pulse" and "his pulse quit beating half way to the hospital". (R. 30-33)

Accused meanwhile had returned to the scene (R. 16,27,31) and as Pietz was being placed in the weapons carrier by Paul and the other soldiers, Paul said to accused "Do you realize what you have done, well, you have killed a man practically". Accused "looked very scared." (R. 32) Pitts, the soldier with whom accused had started out that afternoon (R. 22), met accused and the two walked back to camp together. On the way back accused said "I hope the boy gets better". Pitts testified that accused "talked allright" to him, and that although they were walking fast, accused was keeping up with him and walking "steadily". Pitts did not believe that accused was drunk. (R. 24,25) Swanson testified that accused "could outrun" him and that accused, whose speech was clear, "looked alright" to him. He did not believe accused was drunk. (R. 28) Three British soldiers who observed accused all testified that he was steady on his feet (R. 9,12,17). One observed accused's physical appearance and testified that "his clothes were allright"(R. 8); another observed accused's manner of speech and testified that it was "slightly thick" (R. 12); the third, who had observed accused's locomotion "from the way he stood and the way he had been walking about", testified that in his opinion accused was drunk (R. 17).

At about 0930 hours on 22 April 1944 an autopsy was performed on the body of Pietz at the morgue of the 79th Station Hospital, to which he had been taken (R. 32,34). The medical officer who performed the autopsy testified:

> "The autopsy indicated a presence of blood in the inter-cranial cavity covering the entire brain. The middle meningeal arteries on both sides were torn. There was a small fracture across the petrous portion of the temporal bone and there was some blood in the middle ear and in the inner ear and in the mastoid cells on the left."

In his opinion the "cause of death was due to Inner-cranial Hemorrhages" as a result of a heavy force applied to the left side of the skull and the consequent "tearing of the blood cells". The "fall alone would not have been sufficient to have caused the death", although it might have contributed to it. (R. 33,34)

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(194)
Accused made an unsworn statement as follows:

"Well, sir, I went to Camp Matifou on a pass the 21st of April. I went into a cafe there and was just trying to pass the time away when two guys came in the bar at around two or two-thirty. Their names were Swanson and Pietz. While I was in there in the afternoon just passing the time away I was talking to the bar tender there and I stepped up to the bar and I was looking at the bottle and a French girl had just been looking at it. These two fellows came and went out after several drinks, say three or four apiece and the little French girl went out too. And they were cutting up and when she came in they went to the end of the bar and I was next to the bar; talking to her. That is after they came back in; after they was cutting up with the girl. They had ordered a drink or two again while I was talking to the girl. Swanson and Pietz were just standing at the end of the bar drinking with another fellow I can't recall who it was. They saw me standing alone and Swanson he hollers down the bar and says; 'Carlton quit talking to the girl; she is mine.' I didn't think anything and I just moved down. Pietz said, 'Come on, let's go get him, we can whip him.' I didn't know what to do; I was scared. I kept talking to her anyway. And so he says, 'Shut your damn mouth Carlton or we'll come on down after you.' So I just looked down the bar and I said, 'Take it easy fellows,' and he then comes on down and Pietz eggs him on and Swanson was already with his sleeves being rolled up. He comes up to the bar where I was and I was afraid he was going to tackle me and Pietz, he said, 'Come on outside, and we'll knock your brains out.' Not wanting no more trouble in fighting he went outside and they walked outside and then I walked out. So Swanson was standing from Pietz about three or four steps and they were saying something to each other, then they says, 'Let's get him,' and Swanson throws his chest out and turns on toward me and Swanson stepped forward and they was so close that I thought they would both get me and I hit him and when he gets up I hit him again and Swanson came running down the road after me as I ran away. I ran about twenty-five to thirty yards. I knew he was close to me and I thought he would stop and of course I doubled up my fists; as I was afraid he would kill me sir. I kept back, backing away from him and then I came back down there after Paul, Sergeant Paul, parted us. I seen the crowd and Swanson quit chasing me and he stopped me then. I don't know - - - I seen the crowd and I went there and I seen Pietz laying down and I thought he was knocked out. And I kneeled down to give him artificial respiration and I was helping Pitts pick him up and by that time the weapons carrier came and we walked off with him and Swanson hit me a glancing blow, like this, and I handed him over to Paul and they took him and I got by the weapons carrier and I even punched a hole in my leg going there and then Swanson was trying to fight with Pitts then. So I thought I had better get out of here and started down the road and he said he would catch me down there and Swanson keeps running me. Pitts

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was then with me and he said, 'Let's get our raincoats,' and I said, 'Let's forget about the raincoats.' He said he was going back to get them and he goes and then all at once he runs down and said that they were all after him. I saw Swanson running him too. And I said 'Let's turn in to the OD, I might have hurt him.' I seen the OD on the sidewalk and I hollers and stops him, I said, I told him, come here. I told him about it and he said for me to come with him. Sir, I do not know why they started an argument with me. I was just talking to the French girl and the first time and the second time he said, 'Shut your damn mouth.'" "I don't believe Swanson would have come at me if Pietz he, didn't say, 'Come on, we can whip him.' When they first came in the bar I didn't think there would be any trouble. I was sitting in the bar just drinking. I could tell what was wrong with them but when I was talking to the French girl they, well, Pietz was egging Swanson on. He said, 'Let's get him and Swanson stepped towards me and I hit him. That is all I have to say" (R. 35,36).

4. It thus appears from evidence that at the place and time alleged accused attacked Private Marvin E. Pietz, the person named in the Specification, and struck him with his fist on his head with such force as to knock him to the ground. Accused then withdrew momentarily and when Pietz was assisted to his feet and was being held helplessly in the arms of another soldier accused returned and again struck Pietz on the head with his fist, thereby knocking him to the ground for the second time. While Pietz lay on the ground accused kicked him in the head with his booted foot with sufficient force to tear the middle meningeal arteries on both sides of his head, fracture the petrous portion of the temporal bone, and injure the middle ear, inner ear, and mastoid cells, thereby causing inner-cranial hemorrhages. Pietz died shortly thereafter on the way to the hospital.

Accused's attack on Pietz followed a petty dispute between accused and another soldier, and there is evidence that it was wholly unprovoked by Pietz. The circumstances exhibit nothing approaching legal excuse or justification. The homicide was deliberate, willful and unlawful. Accused's version of the incident was for consideration by the court. Assuming, as stated by accused, that Pietz joined in an assault upon accused, the proof permits a conclusion that the assault was not of such severity as to justify the vicious retaliation by accused. There is evidence that accused was the aggressor throughout insofar as Pietz was concerned.

The court's action in reducing the fatal assault upon Pietz from murder to voluntary manslaughter may have been induced by the belief that the homicide was committed "in the heat of a sudden passion, caused by adequate provocation" (MCM, 1928, par. 149a), or, in the language of Section 274 of the Criminal Code of the United States (18 U.S.C.A., sec. 453), "upon a sudden quarrel or heat of passion". The evidence justified a conclusion that the homicide was willfully, deliberately, feloniously and unlawfully committed, as found. That the court saw fit to find accused guilty of manslaughter only was a disposition favorable to him and certainly without injury to any of his substantial rights (NATO 581, Grant).

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There was some evidence that accused was under the influence of intoxicating liquor when he assaulted Pietz. While one witness testified that accused was drunk, he was described as being steady on his feet and as able to walk and talk normally. His own statement demonstrated a full recollection of what had transpired before and at the time of the assault. Moreover the blows he inflicted on his victim showed a directed malevolent design with malicious intent. The court, in the light of these circumstances, was justified in concluding that accused had sufficient control of his faculties to entertain the specific intent to commit the crime of which he was found guilty (NATO 951, Chastain).

5. The charge sheet shows that accused is 23 years of age, was inducted into the Army 23 September 1942 and had no prior service.

6. The court was legally constituted. 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 and the sentence. Penitentiary confinement is authorized for the offense of manslaughter here involved, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Donald K. Mackay, Judge Advocate.

(Did not participate), Judge Advocate.

Henry C. Yenick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
3 July 1944.

Board of Review

NATO 2697

UNITED STATES	)	PENINSULAR BASE SECTION
v.	)	Trial by G.C.M., convened at Naples, Italy, 31 May 1944.
Private OBERY R. TUCKER (33 189 975), 305th Quartermaster Railhead Company.	)	Dishonorable discharge and confinement for 12 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Simpson, Mackay and Irion, 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 Obery R. Tucker, Three Hundred Fifth Quartermaster Railhead Company, having received a lawful command from First Lieutenant Harry E. Williams, Three Hundred Fifth Quartermaster Railhead Company, his superior officer, to go immediately to the company area, did at Naples, Italy, on or about April 22, 1944, willfully disobey the same.

CHARGE II: Violation of the 63d Article of War.

Specification: In that Private Obery R. Tucker, Three Hundred Fifth Quartermaster Railhead Company, did, at Naples, Italy, on or about 22 April, 1944, behave himself with disrespect toward First Lieutenant Harry E. Williams, Three Hundred Fifth Quartermaster

Railhead Company, his superior officer, by saying to him, "I don't belong to your Goddamn company and I don't want you to fuck around with me----I don't want nobody to fuck with me," or words to that effect.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by special court-martial for disobedience of orders of a commissioned and a noncommissioned officer in violation of Article of War 96 was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 25 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to 12 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that in Naples, Italy, at about 1945 hours on or about 22 April 1944, First Lieutenant Harry W. Williams, the company commander of the 305th Quartermaster Railhead Company, was making an inspection outside a ration dump. Lieutenant Williams testified accused had been a member of that organization for approximately three weeks and was "definitely acquainted" with witness "as his company commander". Witness also testified that while he was making the inspection,

> "I came upon Private Tucker who was outside the company area. I knew he had no pass, he was dressed in fatigues, and did not have a hat. I asked the man to go into the company area. He refused and started to walk away. I asked the man what his name was and he replied, 'I don't have to tell any God Damn person my name', or words to that effect. I then asked the man to give me his dog tags. He refused and I then ordered him to give me his dog tags. He refused, and said, 'I don't have my dog tags and there is only one person who can get them, and that is me,'. I then ordered the man to go immediately in the company area and he said, 'I don't belong to your God Damn company and I don't want you to fuck around with me. I don't want anybody to fuck around with me', or words to that effect. I then ordered him two or three more times to return to the company area and he would not go. I went and got the acting sergeant of the guard and returned within two or three minutes with the guard. Private Tucker was still there and I then gave him three more orders to return to the company area. He refused, saying, 'I'm not going to go any damn place'. The man then walked off. Approximately 20 minutes later he was returned to the company area by the sergeant of the guard." (R. 6,7)

Private Richard J. Jackson, a member of the organization, testified

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for the defense that he was present on or about 22 April 1944 when Lieutenant Williams had "a conversation" with accused, just outside the company area. Witness testified he was with some friends "from the church" and that when Lieutenant Williams left he saw accused enter the company area unassisted. (R. 8) Witness also testified that as far as he knew accused was not escorted or forced to return to the area by anyone. Witness further testified that there were three or four other soldiers from the company outside the area at that time and that Lieutenant Williams did not speak to them. (R. 9)

Accused elected to remain silent (R. 9).

4. It thus appears in evidence that at the place and time alleged in the Specification, Charge I, accused's company commander repeatedly ordered him to return to the company area, substantially as alleged, and that accused deliberately and persistently disobeyed the order. Accused's willful refusal to obey it constituted a violation of Article of War 64 (MCM, 1928, par. 134b).

It also appears in evidence that at the place and time alleged in the Specification, Charge II, accused addressed profane and obscene language to First Lieutenant Harry E. Williams, his company commander, substantially as alleged. This was manifestly disrespectful behavior and the court was justified in finding accused guilty of violation of Article of War 63 (MCM, 1928, par. 133).

5. The charge sheet shows accused is 26 years of age, that he was inducted into the Army 7 May 1942 and had no prior service.

6. The court was legally constituted. 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 and sentence.

Gordon Simpson, Judge Advocate.

Donald K. MacKay, Judge Advocate.

William R. Sloan, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
5 August 1944.

Board of Review

NATO 2707

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at APO 464, U. S. Army, 24 May 1944.
Private JOE M. LOPEZ (38 121 735), Company F, 337th Engineer General Service Regiment.	)	Dishonorable discharge and confinement for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 arraigned upon the following Charges and Specifications:

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

Specification: In that Private Joe M. Lopez, Company F, 337th Engineer General Service Regiment, alias "Enzo Pino", did, at or near SALERNO, Italy, on or about 30 September 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at the 2nd Replacement Depot, BAGNOLI, Italy, on or about 13 January 1944.

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

Specification 1: In that Private Joe M. Lopez, Company F, 337th Engineer General Service Regiment, alias "Enzo Pino", did, at PAESTUM, Italy, on or about 8 January 1944, knowingly and wilfully apply to his own use and benefit rations for 48 men,

of the value of about $36.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Private Joe M. Lopez, Company F, 337th Engineer General Service Regiment, alias "Enzo Pino", did, at PAESTUM, Italy, on or about 9 January 1944, knowingly and wilfully apply to his own use and benefit rations for 48 men, of the value of about $36.00, property of the United States furnished and intended for the military service thereof.

The defense moved that the words "alias 'Enzo Pino'" be "dismissed" from the Specifications, which motion was granted. Accused was tried upon the Charges and Specifications so amended. He pleaded not guilty to and was found guilty of the Charges and Specifications as amended. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the findings as to Charge I and the Specification thereunder as found "accused guilty of absence without leave from his organization from 26 November 1943 to 14 January 1944, in violation of the 61st Article of War", 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 under Article of War 50½.

3. The evidence shows that accused, who had joined Company F, 337th Engineer General Service Regiment, "in the States" (R. 6), met Private Archie Motton, of the Peninsular Base Section Stockade, in Salerno, Italy, the middle or last part of November 1943 (R. 14,15). Motton testified that at that time he had been "AWOL" since 25 September (R. 19). Witness further testified

> "I asked him where was his pass and if he had a pass, and he said 'No', he didn't have no pass and I said I didn't have none either" (R. 15).

Witness also testified that he and accused thereafter "sticked with each other" until 9 January 1944 "when he got picked up" (R. 15). They went to a small town near Vietra where they stayed with "an old man and a lady that could speak English" and later when they met two Italian girls they spent "the rest of the time" in Vietra with them (R. 16). Witness testified he did not learn accused's name for "a pretty good while" and finally learned it in January 1944 by seeing his "dog tags" (R. 16,17,19,20). Witness also testified that during the time he and accused were together they were living approximately 45 yards from a United States Army installation (R. 18) and that accused stated on one occasion "he wasn't going back until the M.P.'s picked him up" (R. 17). Witness further testified that on 8 January 1944 he and accused went to a ration dump in Paestum where they drew rations for 48 men, which they took to the house in which they were living. The rations consisted of "coffee, sugar, vegetables, fresh meat and different things". Witness testified accused had said "All that we don't eat we will sell some of it". Witness also testified that on 9 January

"We went up to the same ration dump and he said that he signed for the first load and he wanted me to sign for the second, and I signed for the second load and we took them to the same house" (R. 17)

and that later that day (R. 16)

"When the M.P.'s were in the house with me they told me I was under arrest. Joe Lopez was in the bed and when the M.P.'s took me out Joe Lopez disappeared" (R. 19).

A clerk from "Dump Q512 near Paestum", "part of the United States Army", identified accused and testified that the accused came to the dump about 8 January 1944 with Archie Motton, "another American soldier ***, a colored man", and that

"The accused along with his companion came into the office of the ration dump and requested that they be issued rations. Since there wasn't an officer with them, I asked them their unit and the number of men that were supposedly in their unit and if they had a strength return. They replied that they didn't have a strength return with them, but would make out one. The strength return was made out and rations were issued for 48 men" (R. 9,10).

Witness testified that accused stated "that he was with a detachment of the 37th Quartermaster that had come into the area" (R. 13,14). The rations which were "United States Army rations" (R. 12), were issued to the accused and Motton. Witness further testified that the following day accused and Motton returned, requested rations, made out a strength return, and were again issued rations for 48 men "the same as the first time" (R. 10). Witness testified accused had used the name of "Enzo Pino". He also testified he did not see accused with the rations in his possession and could only say accused was authorized to get them. (R. 13)

A written statement of accused which an agent for the Criminal Investigation Division, North African Theater of Operations, testified accused signed after witness advised him he "didn't have to say anything" and that anything he did say could be used against him, was admitted in evidence over objection by the defense that "a proper foundation for the introduction of a conversation" had not been laid (R. 21,22). Therein accused stated:

"We landed on Sept 9th, 1943, in the invasion. I stayed two days in Italy. I got sick and they shipped me back to the hospital in Bizerte--to some Evacuation Hospital. I was there about a month and then I was shipped back to Italy. They put me in the 29th Replacement Bn. in the Salerno area. They gave me a place to stay. I stayed there about a month. Then I met this boy, Archie Motton, in Salerno. He said he was A.W.O.L. and he asked me if I was A.W.O.L. I told him 'No,' I was just walking around, and I didn't have no pass. We loafed around Salerno for sometime. We used to eat down at the American ships. We came to Naples, and here we stole a truck to go back

to Salerno. Archie said, 'Let's get this truck and go back to Salerno and we can get some rations from ration dumps.' We got rations for 48 men twice for the 37th QM. I signed for them once and Archie the other time. We took the rations to our girl friends' house and put them in the bed room. We had been living with these two girls for about two months. We used to bring them food from different camps around that we went to. I wasn't in the house the first time the M.P.'s come there. And when I went back to the house, the girls told me they had picked up Archie and put him in the jug. I took off and put myself in the 29th Replacement Center in Naples. They brought me over here to the P.B.S., then locked me in here one night. And then they took me back, and again brought me in here."

"Question: 'What were you going to do with those rations you drew for 48 men?'
Answer: 'We got them for the girls and us to eat.'
Question: 'What did you do with the truck?'
Answer: 'We left the truck on the streets in Salerno.'
Question: 'Did you ever sell any rations?'
Answer: 'No.'" (Ex. E).

The law member admonished the court to disregard all references to the stolen truck (R. 22).

It was stipulated that the value of 48 rations was $36.00 and that "accused voluntarily surrendered himself to the 2nd Replacement Depot, Bagnoli, Italy, on or about 13 January 1944" (R. 22,23). It was further stipulated that accused was shown on a roster of the 29th Replacement Battalion compiled on or about 22 November 1943 (R. 23).

Over objection by the defense the court admitted in evidence an extract copy of the following entry from the morning report of Company F, "337th Engineer Regiment" for 6 March 1944:

"6 March 1944

38121735 Lopez, Joe M. Pvt
AWOL as of 30th Sept 43, enroute to join Orgn fr 7th Repl Depot, asgd to 337th Engrs per par 44 SO #195 Hq 7th Repl Depot, dtd 23 Sept 43" (R. 8; Ex. C).

Accused testified that he was in Italy in the early part of September 1943 as a member of the "337th Engineers" but was hospitalized due to a foot infection and that early in October he was sent to the 29th Replacement Depot where they "took little hikes but had no roll calls or anything like that". Accused also testified he had Thanksgiving dinner with that organization and met Motton about five days later. Accused further testified he did not intend to desert and "turned in" to the "29th Replacement" on 13 January. (R. 24,25)

4. The evidence as to Charge I and its Specification shows that accused absented himself without leave from his organization near Salerno, Italy, on or about 26 November 1943 and remained so absent until he surrendered himself on or about 13 January 1944. Accused's own testimony established all the elements of violation of Article of War 61 and there is ample other evidence to support the findings of guilty of this Charge and Specification as approved.

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Similarly, undisputed evidence shows that at the place and on the dates alleged in Specifications 1 and 2, Charge II, accused, acting in concert with Motton, fraudulently obtained the property set forth in the Specifications and applied it to their own use and benefit. It likewise appears that the property was property of the United States furnished and intended for the military service. Accused in his statement admitted the rations were taken to the house of their female companions and clearly indicated the rations were obtained for consumption by the four or for other unauthorized purposes. Each of the men was a principal and responsible for the acts of the other done in the course of the accomplishment of their common purpose. The obtaining of the rations was willfully and knowingly done on each occasion and the value of the property was established by stipulation to be as alleged. Application by the accused to his own use and benefit, of property belonging to the United States, furnished and intended for the military service thereof, as alleged in both Specifications, was established by the evidence and warranted the court in finding accused guilty of violations of Article of War 94 (MCM, 1928, par. 150i).

5. The morning report of Company F, 337th Engineer Regiment, for 6 March 1944, admitted in evidence over objection by the defense, was properly received for the recited facts of assignment to the unit and absence without leave therefrom following assignment were within the personal knowledge of the officer making the entries (MCM, 1928, par. 117). That they pertained to accused appeared from the identity of names.

6. The admission over the objection of the defense of accused's statement given to the Criminal Investigation Division agent was proper. The statement appears to have been voluntary and made after accused had been fully warned of his right to remain silent and that whatever he said might be used against him. Whether the statement be regarded as a confession or as a mere admission against interest, it was admissible.

7. The court properly admitted previous inconsistent statements of accused which the prosecution offered in attempting to diminish his credibility. The foundation for the introduction of the evidence was appropriately laid by asking the accused on cross-examination if he had not made the inconsistent statements, directing his attention to the time, place and other circumstances of such statement. Either a denial by witness that he made the statements or a response that he did not remember making them rendered admissible evidence that he did in fact make them. (MCM, 1928, par. 124b).

8. Upon arraignment the defense made a motion that the Specifications, Charge II, be "dismissed" upon the ground that another soldier had been tried for the offenses involved (R. 4). The motion was properly denied. The fact that another person may have taken part in the offenses and been convicted as a participant did not affect the amenability to prosecution of accused.

9. The charge sheet shows that accused is 22 years of age. He was inducted into the Army 22 June 1942 and had no prior service.

10. The court was legally constituted. 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 and sentence.

Ronald K. Maclay, Judge Advocate.

Thomas P. Gerrity, Judge Advocate.

Henry C. Glueck, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
10 August 1944.

Board of Review

NATO 2766

UNITED STATES	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Pozzuoli, Italy, 30 March 1944.
Private FRANK CAFAZZO	)	Dishonorable discharge and
(33 693 249), Company B,	)	confinement for 20 years.
7th Infantry.	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 FRANK (NMI) CAFAZZO, Company "B", 7th Infantry, did near Bagnola, Italy, on or about 7 March 1944, desert the service of the United States by absenting himself from Military Control with intent to avoid hazardous duty, to wit; embarkation for a combat area, and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 2120 hours, 9 March 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 40 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of

confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 7 March 1944 accused was among the personnel in a shipment of Third Division prisoners being loaded upon ships at the port of Nisidi, near Bagnoli, Italy, for transportation to the Anzio beachhead (R. 5,6). Second Lieutenant Seymour Hartman, 15th Infantry Regiment, testified that on that date his duties were "to ship men that return from hospitals to the beachhead. To put them aboard transportation to sail. They are loaded on trucks and from there aboard the ship that takes them to Anzio." (R. 4) Lieutenant Hartman "personally called the roll" at the port within five minutes after the men had detrucked, and accused answered to his name and was checked. Lieutenant Hartman "accounted for each man" as he stepped aboard, and testified that he "saw the accused enter the ramp of the ship", which was "an LST". (R. 5) At about 2100 hours 9 March 1944 accused was arrested on the Via Roma in Naples, Italy, by a military police sergeant on "jeep" patrol, and was "booked" for not having a pass (R. 6,7). When Lieutenant Hartman next saw accused, on 11 March 1944, in the office of the Provost Marshal at the Replacement Depot, accused complained to him "of backaches and legaches" but did not request permission to go to the hospital (R. 5,6).

Second Lieutenant Israel J. Korenbaum, 7th Infantry, testified that accused signed and swore before him to a "document", that in obtaining it there was no coercion or reward offered, that "accused's rights" were explained to him before signing, and that he told accused "that anything he might say could be used against him". The statement, dated 11 March 1944, introduced in evidence without objection (R. 7-9; Ex. A), reads as follows:

> "I was a new replacement to the 7th Infantry and went up with a bunch of fellows I had come over from the states with. When I joined the 7th, I understood they were in the line, and the replacements stayed back in a field. The next day we moved up a couple of miles and the 1st Bn of 7th came back into reserve. We joined them about 2400 the second night and dug our holes right in with them. I was with the 7th five or six days while we were in secondary reserve. I went on sick call and I was evacuated through hospitals to the 52nd hospital for four days and then to the 53rd V.D. Hospital. The doctor took a blood test and a spinal test. They were both negative. I laid in bed for a couple of days because my back and legs were bothering me. The doctor then discharged me from the hospital and sent me to the 29th Replacement Battalion.
>
> "Approximately February 28, 1944, when I first got to the 29th, they couldn't find my records, so they had me sleep in the supply tent. I got mixed up because I didn't know where to go and they didn't have my records. I slept in the supply tent several nights and was told by a supply man that I belonged in the medical ward, but later he said that I had missed a shipment but no one had ever told me I was on a shipment. I slept several different places because I was not assigned any place. Finally, one day,

at a time when I was sleeping with some fellows in the 10th Replacement Battalion, a sergeant came and got me and they put me in the stockade. This was March 6, 1944. They told me I would be shipped the next morning. The next morning I asked to go on sick call to tell them about my back and legs and that I couldn't take that kind of duty. They were going to let me go but when they found I was on shipment they wouldn't let me go. On the 7th of March I was put on a truck to go to the boat. When we got to the docks, I got off the truck and I met a fellow named Basile, who was also supposed to ship out.

"We took off and spent the first night in a camp near the docks and then went to the house of some people he knew. We spent the night of the 8th at their house. Basile told these people we had a pass. We took a train to Naples on the way to the 29th Replacement Depot. The last train to Bagnoli had already left. We were on a side street near Via Roma, trying to get a place to spend the night, when we were picked up by the MP's and put in the city jail. A lieutenant from the 29th got us out the next morning and took us to the 29th to the stockade. Major Frye talked to me this morning but Lt. Hartman did most of the talking. He was going to send me to the medics but Major Frye said no, that I had done general service in civilian life and I should do it in the army. I told them I had not done general service in civilian life. I was treated just like a baby and I couldn't do this kind of duty. It was too hard for me. Major Frye said I would be shipped to the beachhead today, but I said I couldn't do this kind of service. I knew he meant to ship me back to the outfit at the beachhead, but I said I wouldn't go.

"Before I made any of the above statements, I was told what my rights were and that I did not have to say anything unless I wanted to. It was explained to me that anything I said could be used against me, as well as for me. I make this statement willingly and truthfully" (Ex. A).

The court was asked "to take judicial notice of the fact that the Anzio beachhead is a combat area and it was such on 7 March 1944" (R. 9).

Accused made an unsworn statement through counsel as follows:

"The accused was 18 years old when he was inducted into the army and has been in the army 9 months. He is at present 19 years old. He was assigned to the 3rd Infantry Division in February 1944. He reported to the Anzio beachhead and was with his unit for several days but because of backaches and aches in his legs he reported for sick call. He was evacuated through hospitals back to Naples; that while at the stockade he asked to be sent to a hospital; that inasmuch as he was

scheduled for shipment it was refused him. He didn't get on the boat but started back to the 29th Replacement Depot to see the Chaplain and see if arrangements could be made to see a doctor. He has been bothered with these aches in his back and legs all his life. While in the states he was excused from marches because of this condition" (R. 9).

4. It thus appears from uncontradicted evidence, including accused's own statement, that at the place and time alleged accused absented himself without proper leave from a group of soldiers being returned by ship, an "LST", to the Anzio beachhead, and remained absent until he was apprehended two days later. He "took off" from the ship and thus from military control as alleged, and was not returned thereto until two days later, when he was "picked up" by a military policeman in Naples for being without a pass. Duty on the Anzio beachhead was combat duty and was manifestly hazardous. Accused complained that his back and legs hurt him and that he could not for that reason do duty in the line, but under the circumstances and in view of the other statements made by accused, the court was justified in concluding that when accused absented himself he did so with the intention of avoiding the hazardous duty of embarkation for a combat area as alleged, in violation of Article of War 58 (MCM, 1928, par. 130a).

The Specification alleges that accused absented himself from "Military Control", rather than that, in the language of Article of War 28, he quit "his organization or place of duty". However, when accused absented himself from the detachment with which he was being returned to the beachhead he did in fact absent himself from his place of duty. The omission of the technical words was harmless and it does not appear that accused was misled or injured thereby.

5. The charge sheet and record show that accused is 19 years of age, was inducted into the Army 12 June 1943, and had no prior service.

6. The court was legally constituted. 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 and the sentence.

Ronald W. MacKay, Judge Advocate.
Thomas G. Lemon, Judge Advocate.
Henry C. Merrick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
28 July 1944.

Board of Review

NATO 2767

U N I T E D S T A T E S	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Pozzuoli, Italy, 22 March 1944.
Private THOMAS F. CARROLL (34 281 390), Reconnaissance Company, 601st Tank Destroyer Battalion.	)	Dishonorable discharge and confinement for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification 1: In that Private Thomas F. Carroll, Reconnaissance Company, Six Hundred First Tank Destroyer Battalion did, at Caserta, Italy on or about 15 November 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Pier A, Port of Duko, Italy on or about 17 December 1943.

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

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

Specification 1: In that Private Thomas F. Carroll, Reconnaissance Company, Six Hundred First Tank Destroyer Battalion, did, at

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Naples, Italy, on or about 15 November 1943, feloniously take, steal, and carry away a three-quarter ton Weapons Carrier vehicle, number 2164452, of the value of over $50.00, property, of the United States furnished and intended for the military service thereof.

Specification 2: In that Private Thomas F. Carroll, Reconnaissance Company, Six Hundred First Tank Destroyer Battalion, did, at Pier A, Port of Duko, Italy on or about 17 December 1943, feloniously take, steal, and carry away five cases of cigarettes of the value of over $50.00, property, of the United States, furnished for the military service thereof.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specifications of Charge I except, as to each, the words "desert the service of the United States" and "in desertion", substituting therefor, in each, the words "without proper leave absent himself", of the excepted words not guilty, of the substituted words guilty, not guilty of Charge I but guilty of a violation of Article of War 61, and guilty of Charge II and its Specifications. Evidence of one previous conviction by special court-martial for willfully and knowingly misappropriating a vehicle, property of the United States, in violation of Article of War 94, and for assault with intent to do bodily harm in violation of Article of War 93, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 50 years, three-fourths of the members of the court present concurring. The reviewing authority disapproved the finding of guilty of Specification 2, Charge I, approved the sentence, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused was admitted to the 8th Evacuation Hospital 9 November 1943. An index record of patients, Form 52a, Medical Department, United States Army, from that hospital was admitted in evidence with the consent of the defense. (R. 5; Ex. I) It showed the source of admission was another evacuation hospital and contained the following hospital memoranda:

"Psychoneurosis, anxiety state. Pt went AWOL from hospital before he had anything but preliminary examination.

"LD - Yes

"AWOL 15 November 1943" (Ex. I).

A military policeman testified that on the night of 20 November 1943 while he was on duty at a bridge at Capua checking passes and blackout regulations he stopped a three-quarter ton truck, also known as a weapons carrier, which was using bright lights in violation of regulations. Witness testified that the number of the vehicle which he got from the vehicle itself

was 2164452 and that it was being operated by accused, whose identity he established by his dog tags. Asked if he could identify the driver in the court room witness testified "I think it is the man at the table but I couldn't swear to it". Witness testified he saw some civilians in the vehicle but that accused was the only soldier therein. (R. 10-14) He saw accused again the following morning in the same truck with civilians therein. Witness testified that on this occasion he made the civilians get out of the truck and told accused "to go about his business". (R. 11,13)

Another military policeman testified that about 1430 hours on 17 December 1943 he was on "roving patrol" checking a building on Pier "A" "in the port" when he observed a weapons carrier "pulling away" from a building with five cases of "special service" Camel cigarettes which were packed 50 cartons in a case. Witness testified that he apprehended accused and when accused failed to produce a requisition for the cigarettes, which accused had stated he possessed, witness took him to "Port Police Headquarters" and that he told accused "to sit there with the other person who was with him because the commanding officer wanted to speak to him" (R. 14,15,29), but that accused "got up and drove off in the weapons carrier" unobserved (R. 16). Witness testified he believed accused was the man he apprehended and added "I cannot be too sure". The man apprehended gave accused's name when booked and had a dispatch ticket with accused's name on it. (R. 14,15)

A quartermaster officer testified that the value of a three-quarter ton weapons carrier, in condition to be operated, was in excess of $50.00 (R. 20) and that the value of cigarettes packed 50 carton to the case would be $20.00 a case (R. 21).

Captain James A. Artis, 111th Reconnaissance Squadron, testified that on 21 December 1943 while he was driving on the Naples-Caserta highway he observed a weapons carrier numbered 2164452 being driven by accused. Witness recognized the vehicle as one belonging to his organization by the word "Snoopers" written on the bumper, by the words "Jilted Again" on the hood and by the organizational designation on the side. Witness also testified that this vehicle had been "stolen" from a parking lot in Naples about 1630 hours 14 November 1943. Witness testified that when he asked accused on 21 December why he had the vehicle accused replied his captain had given it to him "when his tank was shot from under him". (R. 6-8) Witness also testified that there were two 15-year old Italians and two negro soldiers in the rear of the weapons carrier. Accused had been drinking, but was not intoxicated and did not have a dispatch ticket. Witness went to the "Police Station" with accused where witness testified accused was booked. (R. 8) Witness was "sure" the vehicle accused was driving belonged to witness' organization and that no one else ever claimed it after the recovery (R. 7).

The defense called as a witness a clerk in the provost marshal's section of VI Corps Headquarters who identified a "blotter card" he received from the desk sergeant (R. 22). He testified that the card, which had to do with accused, contained a notation that accused was released to his unit about 17 December 1943 (R. 23) and that "since this case was not an unusual case they would release this man instead of having someone pick him up" (R. 25).

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The defense introduced a stipulation that if Captain J. B. O'Connor, Chief of the Neuropsychiatric Section, 262d Station Hospital, were present he would testify:

"1. That accused was able to understand the nature of the proceedings at a Court Martial.

"2. That accused was able to object to any member of the Court.

"3. That accused was able to instruct his defending officer.

"4. That accused was able to understand the details of the evidence.

"5. That accused is able, with the advice and assistance of legal counsel, to conduct the defense of his case.

"6. That accused at the time of the alleged offense was not suffering from a defect of reason resulting from disorder of the mind.

"7. That such defect of reason did not prevent him from knowing the nature and quality of the act which he was doing.

"8. That such defect of reason did not prevent accused from knowing the consequences of such an act.

"9. That the accused, if he did know the consequences of such act, possessed a mental state in that he is unable to refrain from such act.

"10. The accused was suffering at the time of the offense from an emotional or physical disorder which might affect his behavior.

"11. Accused is classed as a 'Constitutional psychopathic state.'

"12. This state might affect accused's behavior in that due to this condition he possesses traits of character that shows itself irresponsible conduct, a lack of usual normal restraining feeling of others and a seeming inability to resist compulsive whims and desires of a criminal nature or a foolish nature.

"13. Punishment is not likely to diminish the chances that he will repeat this or similar offenses.

"14. Punishment is not likely to increase or decrease his efficiency as a soldier.

"15. No treatment is required immediately during detention, or after release.

"16. Punishment is not likely to aggravate his mental condition or precipitate other mental disturbances.

"17. It is recommended that accused be 'Sectioned VIII' after sentence.

"18. It is the opinion of the examiner that the best interest of the army would be served by discharging the accused from the service" (R. 27,28; Def. Ex. 1).

Accused elected to remain silent.

4. It thus appears from the evidence with respect to Specification 1, Charge I, that at the time alleged accused absented himself without proper leave from the 8th Evacuation Hospital, which was, at the time, his place of service and station. The initial absence was shown by the entry on Form 52a. Paragraph 71, Army Regulations 40-1025, October 12, 1940, provides that W.D., M.D. Form No. 52a (Index Record of Patients) will be maintained in time of peace or war by all hospitals wherever they may be located. It further provides that in a theater of operations the index card will serve as a "nominal list of patients and also will be used for the purpose of recording brief clinical notes, extracts from field medical records, and other data pertaining to the patient and deemed desirable by hospital commanders". That form, which is a permanent record the maintenance of which is thus required by regulation, was introduced with the express consent of accused and was competent to prove the truth of the facts recited. Any objection based on the theory that the record may have been compiled from other, original, sources was effectively waived by the consent to its introduction (MCM, 1928, par. 117a). Though the evidence does not show the exact place of the commencement or termination of the absence the record sufficiently shows that both occurred in the vicinity of Naples, Italy.

The evidence with respect to Specification 1, Charge II, shows that at the place and time alleged the vehicle described in the Specification, of value as alleged, was stolen. While there is no direct evidence that the vehicle was the property of the United States it does appear that it had been furnished for the military service and ownership as alleged may reasonably be inferred from the character of the article and the other circumstances in evidence (MCM, 1928, par. 150). Accused was shown by the evidence to have been in possession of the vehicle on 20 and 22 November and 17 and 21 December 1943, using it in each instance for non-military purposes. His only explanation of his possession of this recently stolen property was that his company commander had given it to him "when his tank was shot from under him". The finding of larceny by accused was warranted by the evidence.

The evidence with respect to Specification 2, Charge II, shows that a man giving the name of accused and driving a vehicle similar to that stolen by accused, was apprehended with five cases of special service cigarettes, of value as alleged, in his possession. He stated he had a requisition therefor but was unable to produce it. When apprehended and told to wait for questioning he left without permission. Accused's story of legitimate possession was

negatived by the fact that he effected the asportation of the cigarettes by means of a recently stolen Army vehicle, as well as by the other circumstances. The fact that the cigarettes were property of the United States, furnished for the military service, was inferable from the circumstances. The court was justified in concluding accused stole the cigarettes as alleged, in violation of Article of War 94.

5. No question was raised as to accused's ability to distinguish right from wrong but there was a suggestion contained in the stipulated testimony of the psychiatrist that accused is a constitutional psychopath with a subnormal ability to adhere to the right, "a seeming inability to resist compulsive whims". This testimony was for consideration by the court. Upon all the evidence the court was justified in concluding that accused was legally responsible for his acts, with the mental capacity to distinguish right from wrong and to adhere to the right.

6. The charge sheet shows that accused is 33 years of age and was inducted into the Army 17 April 1942, with no prior service.

7. The court was legally constituted. 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 as approved by the reviewing authority and the sentence.

Donald W. MacBoy, Judge Advocate.

Montgomery P. Lomax, Judge Advocate.

Henry C. Kenick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
27 July 1944.

Board of Review

NATO 2840

U N I T E D S T A T E S	)	3D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Nettuno, Italy, 1 May 1944.
Private JAMES E. TOLBERT (35 637 885), Company L, 15th Infantry.	)	Dishonorable discharge and confinement for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private James E. Tolbert, Company "L", 15th. Infantry, did near Nettuno, Italy, on or about 13 April, 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until about 15 April, 1944.

CHARGE II: Violation of the 64th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

Accused pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification and not guilty of Charge II and its

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Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, all members of the court present concurring. The reviewing authority approved the sentence, reduced the term of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 12 April 1944 accused was a member of a group of 19 prisoners who were being taken from Naples, Italy, to the Anzio beachhead. The noncommissioned officer who was in charge of the group testified that when accused asked what would happen after he got back to the beachhead, witness replied he had orders to return accused to his organization. Witness testified accused then said "Well, you can take me to the beachhead but I won't go back to the infantry". Witness also testified the same conversation was repeated "a couple of times" before they disembarked at Anzio. (R. 16,17)

In the morning of 13 April 1944 accused rejoined his organization, Company L, 15th Infantry Regiment, which had moved from a rest area on the beach into the line near Nettuno, Italy, as "division reserve" and was under artillery fire. A few men including accused's platoon sergeant were killed. The members of accused's platoon "were all working on the dugout roofs and fixing them up". Accused's squad leader assigned accused to a dugout with a "Private Middlebrook" and "told them to go to the next house and get some lumber, which was the last time I seen Private Tolbert". He also testified that accused had not been present for duty since and that no one had given accused permission to remain absent. (R. 8-10)

Private Jack W. Middlebrook, Company L, 15th Infantry, testified that after accused had been assigned to his dugout they went to a near-by house in search of lumber, accused leaving his pack and blankets in the dugout. Witness told accused to go in some of the buildings and search for lumber while witness did likewise in some others. Witness also testified that after he had gathered up some lumber he could not find accused though he looked around "for quite a while". Witness returned to his area and reported that accused was nowhere around. Witness further testified that he did not see accused in the company area after that time and that no one gave accused permission to remain absent. (R. 11,12)

First Lieutenant Donald A. Butler, Headquarters Company, Third Infantry Division, testified that on or about 15 April accused was brought to him by "an M.P. officer". Witness testified that after he had warned accused he could remain silent if he so wished and that anything he might say could be used for him or against him, accused made the voluntary oral statement that he believed he should be reclassified and that for that reason he did not want to return to his organization and had left it. (R. 13,14)

Second Lieutenant Herbert C. Bardes, Headquarters Company, 3d Battalion,

15th Infantry, testified that he was the investigating officer and had a conversation with accused during which the latter made a voluntary oral statement after witness informed accused that anything he said could be used "for or against him in a court-martial and if he didn't want to say anything he did not have to". Witness testified he "made notes" on accused's statement, and identified a document as a copy of those notes. The trial judge advocate told witness he might use the document to refresh his memory and then asked witness what statement the accused made. Witness asked "Do you want me to read this?" referring to a statement purporting to be an affidavit of accused. The trial judge advocate stated "If they are your notes. You can do what you like." Thereupon witness read the document to the court. (R. 19,20) Then, directed by the court to "relate that part that has a bearing on the allegations" (R. 21) witness read the following:

> "'Then I was sent up here and joined my outfit on 13 April, while they were in division reserve. The same day at about six or seven o'clock in the evening, I took off and went down to Nettuno. I left my outfit because I can't take that stuff, I'm not an infantryman. I was picked up by an M.P. Lieutenant about two days after I left my outfit.'" (R. 22)

First Lieutenant George S. Burks, Company L, 15th Infantry, testified that on 16 April 1944 he was accused's company commander and on that date he talked with accused at the regimental "CP". Witness testified that when he said to accused "I want you to report back to the company for duty at once" accused replied "I can't, sir I am not able". (R. 23,24) Witness also testified that he "stood there for a minute and wanted to see if he wanted to say anything else" but accused did not make any further remark (R. 26). Witness further testified that as he left he "had a feeling that he (accused) might not comply with the order *** to come back to duty" (R. 28).

Accused stated at the trial "Sir, I don't see much use in making a statement. I told it so many times" (R. 31).

Before the court was closed to consider the sentence the president asked if there was any evidence "as to the physical or mental capability of the accused that might have a bearing on the case" to which the defense replied "No more questions are raised by the defense of physical or mental disability with regards to the specification." The court then asked the trial judge advocate if he had a "report of the Division Psychiatrist on this case" (R. 32) to which he replied "not with my papers" (R. 33).

4. It thus appears that at the place and time alleged accused was returned to his organization which was then in combat with the enemy and under artillery fire. He was assigned to a dugout and ordered to get lumber and construct a top for it. Accused left his equipment in the dugout and accompanied another soldier in search of lumber, but did not return and remained absent until he was apprehended two days later. The absence was shown to have been without leave and from accused's statements made both before and after he absented himself as well as the other evidence, the court was warranted in concluding that accused had the intent to avoid the

hazardous duty of combat with the enemy when he so absented himself from his place of duty (MCM, 1928, par. 130a).

5. The investigating officer was permitted to read to the court from a document described as a copy of his notes, but which was in fact a statement prepared by witness for accused's signature. The rules relative to the use of a memorandum permit a witness to refresh his memory or a part of it by reference to memoranda and if a witness does not actually remember the facts but relies on the memorandum exclusively the memorandum may be admitted in evidence if the witness can state that the memorandum accurately represented his knowledge at the time of its making (MCM, 1928, par. 119b). The procedure followed in the instant case did not conform to either rule. However, the defense did not object to the procedure and did object to the admission of some of the material on the ground that it was hearsay, by implication approving the method of proof. Other competent evidence established the material parts of the testimony thus adduced, and it does not appear that any substantial right of the accused was injuriously affected by the error (AW 37).

6. At the close of the trial the court inquired if there was any evidence as to accused's mental or legal responsibility. The response of the defense made it apparent that no issue was raised as to accused's mental condition. There is attached to the record of trial a psychiatric report on accused, dated 21 April 1944, stating that accused was not suffering from any mental disease, defect or derangement. The report contains the following:

> "MENTAL STATUS: As of April 20th 1944. No mental disease or derangement. No combat induced nervouse state.
>
> "Intelligence; Mental age 10 years (Kent Test). General knowledge barely consistant with claimed Grade VII educational level. Calculation and general thought processes sluggish but correspond to measurable mental capacity which is in lower range of normal.
>
> "Military Attitude; Soldier is lazy and apathetic, no apparent sense of shame or obligation. Deaf to argument or threat. Prefers court martial to opportunity to redeem himself. Hope of improvement by punishment slight. Ultimate Section VIII probable if ever returned to any duty."

7. The charge sheet shows that accused is 21 years of age and was inducted into the Army 31 October 1942. No prior service is shown.

8. The court was legally constituted. 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 and the sentence.

Donald K. MacBay, Judge Advocate.

Mariner G. Emrich, Judge Advocate.

Henry C. Plenick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 July 1944.

Board of Review

NATO 2843

U N I T E D S T A T E S	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Rome, Italy, 13 June 1944.
Private ARTHUR C. PHILBROOK	)	Dishonorable discharge and
(31 267 856), Company L,	)	confinement for 25 years.
30th Infantry.	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private Arthur C. Philbrook, Company "L", 30th Infantry, did, at or near Anzio, Italy, on or about 20 May, 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: Combat against the enemy, and did remain absent in desertion until he surrendered himself at or near Foglino, Italy, on or about 21 May, 1944.

CHARGE II: (Finding of guilty disapproved by reviewing authority.)

Specification: (Finding of guilty disapproved by reviewing authority.)

He pleaded not guilty to and was found guilty of the Charges and Specifications.

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No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 50 years, three-fourths of the members of the court present concurring. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved the sentence but reduced the period of confinement to 25 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The undisputed evidence shows that about 1230 hours 20 May 1944, Sergeant James W. Halford, Company L, 30th Infantry, accused's squad leader, spoke with accused when he was in the "chow-line", at Anzio, Italy, and "told him to get ready, that we was ready to move out at 4 o'clock". This noncommissioned officer testified that the squad was a member of "these M-3 sled teams" that were "pulled by a tank", that the squad was going forward to the assembly area where their "sleds" had been left (R. 5,6) and that the squad knew that it must be ready to go on call at any time. Witness also testified,

> "I told him we were going to move out. An infantry guy knows where you got to go when you say move out. I also told him we were going to a forward assembly area". (R. 7)

Witness further testified "the company commander and the battalion commander informed everybody" that an attack was about to begin and the organization was moving forward (R. 8). Witness testified he looked for accused 15 minutes later to tell him "to change to fatigues" but could not find him "at service company, the Red Cross" or "the area" and did not see accused until about noon the next day (R. 7,8). This witness also testified that he did not give accused permission to be absent and that if anyone else had done so witness "would have known about it" (R. 8).

A military policeman testified that at Foglino, Italy, at about 0800 hours 21 May 1944 accused "came to the stockade to give himself up" and that after witness had warned accused that he might remain silent and that anything he said would be "held for or against him", accused stated to witness that

> "he left his company at 1 o'clock in the afternoon of May 20th and went to the area of the 10th Engineers and found an empty dugout and stayed there that afternoon and that night and the next morning he turned into the 3rd Division PWE".

When he turned in accused did not have a weapon or a pack. (R. 9)

The company clerk of Company L testified that accused was brought back to his company about 1000 hours 21 May and placed under an armed guard; that later in the day when the company commander asked accused if he would go back and join his squad accused said he could not go, or words to that effect. Witness also testified accused, when ordered by the officer to join his squad and "move out with the company" replied "Captain, I haven't the guts

and I can't go". (R. 10,11) Captain Robert B. Pridgen, 30th Infantry, accused's company commander, testified substantially as the company clerk had done (R. 13).

Accused's company "moved out" to attack the enemy at about 1830 hours 21 May and engaged with the enemy (R. 12). The sled team engaged in combat with the enemy on 23 May 1944 (R. 14).

Accused elected to remain silent.

4. It thus appears from the evidence and accused's admissions that at the place and time alleged accused absented himself without proper leave from his organization, went to an area occupied by another organization where he stayed during the afternoon and night, and surrendered himself to a member of the military police the following morning as alleged. Accused left his organization shortly after he had been warned by his squad leader that in a few hours the organization was going forward to engage the enemy. Under the circumstances and in view of the statements by accused the court was justified in concluding that when accused absented himself he did so with the intention of avoiding the hazardous duty of combat, as alleged, in violation of Article of War 58 (MCM, 1928, par. 130a).

5. The report by the staff judge advocate accompanying the record of trial contains the following:

> "Shortly after the accused arrived at the beachhead in January he was evacuated with a wound in his foot. After he was released from the hospital he told the Third Division liaison officer at the replacement depot that he would not return to the front at that time. He also told the liaison officer that the wound he had received was intentionally self-inflicted. Accordingly, he was placed in the stockade to await trial for the self-inflicted wound. Investigation, however, did not disclose beyond a reasonable doubt that the accused had actually inflicted the wound. Rather, the circumstances indicated that the accused might actually have been wounded by the enemy but was confessing to an offense he did not commit in order to be tried by court-martial. It was, therefore, decided to send the accused to the Division Psychiatrist at the beachhead for further observation to determine whether he was mentally fit for combat. After observing the accused for six days, the Division Psychiatrist determined that he was fit and returned him to his unit which was then in a rest area. When the time came for the unit again to enter combat the offenses with which the accused is now charged took place."

6. The charge sheet shows that accused is 20 years of age, that he was inducted into the Army 10 March 1943 and had no prior service.

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

Ronald W. MacKay, Judge Advocate.
Wolfgang R. Jhon, Judge Advocate.
Henry C. Merrick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
25 July 1944.

Board of Review

NATO 2844

U N I T E D S T A T E S	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 3, U. S. Army, 14 April 1944.
Private PAUL J. MANGERPAN (32 308 731), Company I, 15th Infantry.	)	Dishonorable discharge and confinement for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 PAUL J. MANGERPAN, Company I., 15th Infantry, did, in the vicinity of Mirlo, Sicily, on or about 11 August 1943., desert the service of the United States, and did remain absent in desertion, until he was apprehended at Bari, Italy, on or about 2 March 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 50 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence,

reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused absented himself without proper leave from his organization on 11 August 1943 (Ex. 1) and was apprehended on 2 March 1944 in Bari, Italy, by a military policeman who was inspecting passes (R. 7). When apprehended accused exhibited a pass which had expired 18 days before, issued by the 389th Port Battalion in the name of Alfred Jenkins, and told the military policeman detaining him that he would return to his organization if he were released. (R. 8)

Captain H. C. Auld, Jr., 15th Infantry, the officer who investigated the charges, testified that after he had warned accused that he might remain silent and that whatever he said could be used against him (R. 9), accused made a voluntary oral statement. Witness testified,

> "The accused told me without my mentioning any dates at any time during the time he made the statements, that while in combat with his company in Sicily, that one night his company was subjected to a heavy artillery fire; and again without being specific as to exact time of of night or early morning, he stated that he suffered from concussion from artillery fire; that not being able to find his platoon leader or 1st sergeant, that he had attempted to try to find the medics; that several days after this, without filling in the gap of time, he stated he had been picked up in Palermo by an MP and that he was confined there for approximately one month at which time he was taken to Italy to the 29th Replacement Depot; that after being in the 29th Replacement for a length of time he had taken off with some other casuals and had gone to Naples where he met the clerk of his company. He did not know or remember the name of this clerk. He stated that this clerk told him that 'They would shoot his ass off if he went back to his company' and that as a result he told him if they felt that way he would not return. The period from that time on until he was apprehended in Bari, he did not offer any information regarding this" (R. 9,10).

Witness further testified accused's company had been in combat with the enemy, but he could not say whether it was "during that period" (R. 11).

Accused made the following unsworn statement:

> "Late in the evening of about August 26th we were guarding a road-block when artillery registered in our position. We were told to scatter. This I did. I ran some distance. Others were with me. We stopped intending to collect ourselves and wait to see what ahppened. I wasn't feeling well, we had no sleep for some-

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time. I said I am going to see a medic. Later in the day, I don't remember, I was taken to Palermo. I stayed with the medics in Palermo for awhile and then I went to a concentration area. I stayed in the concentration area for awhile and then was sent to the 29th Replacement Depot. I didn't like the way the 29th Replacement Depot non-coms, who had never done any fighting, handled the men there who had done fighting. Several of us decided to go back to our organization. We left and while in Naples I met the company clerk. I don't recall his name. I asked him where the organization was and was told that I had better not go back as they would shoot my ass off. I thought I would try to get in some other organization. I stayed with different outfits, I stayed with the British, not knowing what to do. I drifted over to Bari" (R. 13).

4. It thus appears that on the date alleged accused absented himself without proper leave from his organization and remained so absent until he was apprehended as alleged more than six months later. There is no evidence as to the exact place the absence commenced, but there is evidence indicating it occurred in Sicily as alleged. However, as absence from command is the gravamen of the offense of absence without leave, it is immaterial that there was no proof as to the exact place where the offense occurred. Accused asserted he was under military control for a time during his absence. This assertion was for consideration by the court. In any case, he was absent from his place of service. Intent to remain permanently absent was inferable from the prolonged absence, from the circumstances of the absence as related by accused, and from the circumstance of apprehension. Intent to avoid hazardous duty was also implicit in accused's account of his actions. Conviction of desertion in violation of Article of War 58 was justified.

Accused's statement as to the date on which he absented himself, 26 August, was in error for it is a matter of common knowledge that active hostilities in Sicily had ceased before that time, but his admission that his company was under enemy fire when he absented himself, is clear.

5. The charge sheet shows that accused is 29 years of age and was inducted into the Army 15 June 1942. No prior service is shown.

6. The court was legally constituted. 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 and the sentence.

Ronald W. MacKay, Judge Advocate.

Mortimer Rahm, Judge Advocate.

Henry C. Slemick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
23 August 1944.

Board of Review

NATO 2876.

UNITED STATES	)	XV AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Bari, Italy, 28 April 1944. Dismissal.
	)	
Second Lieutenant DAVID C. GAY, JR. (01 592 847), 1248th Quartermaster Company Service Group Aviation.	)	

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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.

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

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

Specification: In that Second Lieutenant David C. Gay Jr., 1248th Quartermaster Company Service Group Aviation was at Torremaggiore, Italy, on or about 3 April 1944, drunk in camp.

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

Specification: In that Second Lieutenant David C. Gay Jr., 1248th Quartermaster Company Service Group Aviation was at Torremaggiore, Italy, on or about 3 April 1944, found drunk while on duty as Officer of the Day.

Accused pleaded not guilty to the Charges and Specifications and was found guilty of Charge I and its Specification, guilty of the Specification, Charge II, not guilty of Charge II, but guilty of a violation of Article of War 96.

No evidence of previous convictions was introduced. He was sentenced to forfeit $100.00 of his pay per month for six months. The reviewing authority returned the record of trial to the court for revision. The court reconvened, revoked the sentence and sentenced accused to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1150 hours on 2 April 1944 accused, a member of the 1248th Quartermaster Company Service Group, assigned to the 38th Service Group, stationed at Torremaggiore, Italy, was posted for a 24 hour tour of duty as officer of the day of Service Center Number 38 by Major Franklin S. Longan, adjutant of the 38th Service Group (R. 5,6,10,27,29). In addition to giving accused the customary instructions Major Longan testified he warned him that if he saw him drinking on duty or if he became drunk witness would relieve him and press charges against him (R. 8,9).

The adjutant of the 1248th Quartermaster Company testified he observed accused about 0830 or 0900 hours on 3 April 1944 with two enlisted men in the cook's tent in the company area and that although he did not see accused take a drink at that time from his manner of speech and appearance he "would say that he was partially drunk" (R. 14). About 1000 hours the adjutant observed accused walk some 50 feet from the cook's tent to the orderly room, and testified accused "wasn't staggering at that time" but was "most uncertain" and "his speech was heavy and not at all normal and I could smell alcohol on his breath" and he was "partially drunk". Witness testified he again saw accused at about 1115 hours in the cook's tent at which time he was drunk, that he "came out of the tent and staggered over the tent ropes and could hardly control himself" and further "His eyes were very glassy. He had no bearing or balance. He couldn't get along at all" (R. 15).

Major Longan testified that when accused reported to him at about 1150 hours on 3 April 1944 to be relieved as officer of the day he was drunk (R. 6). Witness testified further:

> "When he came into my office to be relieved he staggered slightly. His countenance was flushed and his eyes were extremely bloodshot. He stepped up to my desk and rendered a salute which was mechanical and I asked him to step into the Commanding Officer's Office and he staggered slightly into the Commanding Officer's office, which was adjoining mine, and I closed the door and told him to wait there until the new officer of the day reported in" (R. 7).

Asked whether he believed accused's retention in the service was desirable, witness replied:

> "I want to make a qualified answer. The answer is, yes. My opinion is based upon his conduct since I placed him under arrest" (R. 8).

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An officer who succeeded accused as officer of the day testified he was present when accused reported to Major Longan to be relieved and that in his opinion accused was drunk at the time. Witness based his opinion on accused's condition which he described as follows:

> "Well, his eyes were bleary. His general bearing. He was standing on his feet weaving to and fro. I could smell the liquor on his breath, and as Major Longan questioned him he couldn't give a coherent reply to any of the questions." (R. 10)

With reference to the conduct of accused immediately after he was relieved as officer of the day witness testified,

> "Well, I was ordered to return Lieutenant Gay to his quarters under arrest and I noticed, while he was walking down the stairs, that it was very difficult for him to remain on his feet, and, while we were riding in the Jeep, if I hadn't held him in and steadied him he probably would have fallen out" (R. 11).

An enlisted man from accused's company testified for the defense that he saw accused on a bed in the cook's tent at 1015 hours on 3 April 1944, at which time he did not notice anything peculiar about accused's actions or speech and that in his opinion accused was not drunk at the time but he saw accused drink about half a canteen cup of "what the people in Italy call vino" (R. 19-21).

The supply clerk of accused's company, a witness for the defense, testified when he entered his tent about 0800 hours on 3 April 1944 he saw accused lying on witness' "bunk", thought he was asleep, but later talked with him and observed him as he left the tent about 1100 hours and he did not stagger and talked in a normal manner and in the opinion of witness accused at the time was not drunk. During this time witness saw accused "drinking something once" but did not know what it was; however, he was not watching accused all the time and accused could have had a drink without witness seeing him. (R. 22-24)

The mail orderly of accused's company testified for the defense that he was in the rear of the truck which took accused "down to headquarters to be relieved from guard" on 3 April 1944 and that accused did not talk with him but he observed accused get out of the truck in a normal manner and he would say accused was sober but "he looked sleepy" (R. 25).

Accused's company commander, a witness for the defense, testified that in the afternoon of the day accused went "on duty as Officer of the Day" he found accused asleep in his tent and awakened him but was unable to form an opinion as to whether accused was drunk or sober at the time. Later, about 1830 hours, witness talked with accused for three or four minutes in the presence of a Captain Saunders at which time accused's speech was "a little slow" and he "didn't look very well" but witness "wouldn't say" he was drunk.

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Witness testified further he observed accused later in the presence of Major Longan and at that time accused was not drunk. Witness believed accused was a "very useful" officer. (R. 27,28)

Accused testified that about noon on 2 April 1944 he reported to Major Longan "to take on the duties of Officer of the Day", at which time he had not been drinking. Major Longan explained the duties incident to the office, "mentioned about drinking", and said "a man on duty as Officer of the Day would do no drinking". He had no reason to doubt the validity of the order appointing him officer of the day and he had never served as officer of the day since his arrival at the 38th Service Group. Accused testified further he did not drink anything during the course of the afternoon, checked the guard at 2200 hours, slept in the chaplain's office until 0730 hours when he checked with the sergeant of the guard and found nothing unusual had occurred. At about 1100 hours he "drank some vino from a canteen cup" which did not taste "particularly strong", and was "not much more than those little small glasses you have down here at a restaurant", and he had nothing else to drink during his tour of duty. He testified further he put chewing gum in his mouth to "keep the smell of vino down" when he reported to Major Longan, that he didn't stumble but stepped over the tent ropes to get in the weapons carrier and he did not remember being held in a jeep by anyone. (R. 29-32)

4. It thus appears from substantial evidence that at the place and time alleged in the Specification, Charge I, accused became drunk in camp and was at the time on duty as officer of the day of Service Center Number 38. Accused himself testified that although at the time he was posted he was specifically admonished by the group adjutant not to do any drinking while on duty he did drink "some vino". Three officers who had ample opportunity to observe accused during his tour of duty, none of whom were shown to have had any animosity toward him, testified accused was drunk, giving in detail the facts upon which they based their opinions. Four defense witnesses, including one who accompanied accused when he reported to Major Longan to be relieved, testified that in their opinion accused was not drunk when they saw him. It was within the province of the court to determine the issue of fact thus raised by the evidence. There is substantial evidence to support the findings of guilty.

5. At the close of the case for the prosecution the defense made a motion for findings of not guilty of Charge II and its Specification, upon the ground that accused was "never legally on duty". This motion was based on the restrictions upon the command powers of officers of the services, as distinguished from officers of the arms, prescribed by Army Regulation 600-20; on a directive contained in War Department Circular 24, January 19, 1943, providing, in substance, that an officer of a service should not be detailed to duty as officer of the day unless the entire guard be composed of troops of his service; and on an opinion of The Judge Advocate General that detail of a Quartermaster Corps officer as officer of the day would be in violation of a regulation then (1915) in effect and similar to the current Army Regulation herein above referred to. The motion was denied (R. 18).

The evidence does not expressly show that accused was an officer of the Quartermaster Corps or that he was detailed for duty in that corps but does show that he was assigned to a Quartermaster Company (1248th Quartermaster Company Service Group). It may be inferred that he was an officer of the Army of the United States detailed for duty in the Quartermaster Corps.

Neither does the evidence expressly show the composition of the guard with which accused was placed on duty as officer of the day. Whether or not the guard was composed wholly of members of the accused's unit, as may have been the case, does not affirmatively appear. The guard was detailed by the commanding officer of the 38th Service Group, a command which included 20 units of Air Corps, Ordnance and Quartermaster troops including the company of accused. There is no express proof that accused was specifically directed by order of any superior authority to exercise command over troops other than those of his own service.

Paragraph 3, Army Regulation 600-20, Subject: Personnel Command, in effect at the time of accused's detail to duty as officer of the day (Change No. 5, 3 May 1943), reads as follows:

> "3. Certain officers limited in exercise of.--a. Chiefs of supply and administrative services or officers on duty in the offices of such chiefs, officers of any of the services, or an officer of the line detailed for duty in any of the services or with the National Guard Bureau, or an officer of any of the services detailed with the General Staff Corps, though eligible to command, according to his rank, will not assume command of troops except those of his service or bureau or that in which he is on duty, unless put on duty under orders which specifically so direct by competent authority, but any staff officer, by virtue of his commission, may command all enlisted men like other commissioned officers. An officer of the Medical Department or Corps of Chaplains may not assume command of troops except those of his own service."

Construing a similar regulation The Judge Advocate General has expressed the view, as digested, that

> "Service as officer of the day involves command of troops, and the detail by a post commander of an officer of the Quartermaster Corps for that duty would be in violation of paragraph 18, A.R. 1913 (par. 3, AR 600-20). 20-012.2, Aug. 16, 1915" (Dig. Op. JAG, 1912-40, p. 979).

The War Department circular, likewise invoked by the defense, Section III, War Department Circular 24, January 19, 1943, prohibited the detail as officer of the day of an officer belonging to a service unless the entire guard was composed of troops of that service. This circular was, however, rescinded by Section I, War Department Circular 98, April 9, 1943. Neither it nor its equivalent was in force at the time accused was detailed.

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Although it appears to have been assumed by the defense that the detail of accused as officer of the day involved non-compliance with the instructions of an applicable Army Regulation, interpreted in the light of the opinion of The Judge Advocate General as noted, such non-compliance was not established by any competent evidence. It follows that in the absence of any direct proof or implication that such was not the fact, the court was justified in presuming that accused was regularly detailed, that is, that the commanding officer performed his duties properly and in accord with the applicable rules and regulations (MCM, 1928, par. 112a). Applying this presumption of regularity the motion was without factual basis and was therefore without legal merit.

In this view of the case it is unnecessary to determine whether, within the meaning of the quoted regulation, the commanding officer of the Service Group was a "competent authority" with power to issue orders specifically directing that accused exercise command over troops other than those of his own service.

But even assuming that the detail of accused involved contravention of Army Regulations, the Board of Review is of the opinion that accused was, when found drunk, legally "on duty" within the purview of Article of War 85. Accused was an officer of the Army and had the legal power, by virtue of his office, to exercise command. He was not prohibited by statute from doing so. A guard was in fact formed and accused was in fact detailed thereto as officer of the day. He entered upon his prescribed duties, some of which, it must be assumed, involved the ordinary military duties of vigilance, intelligence, maintenance of order and protection of government property. Although his detail as officer of the day may have involved an administrative error in so far as it purported to clothe him with command power incident to his duties, that error did not deprive him of his inherent power as an officer of the Army and was not such as to relieve him of his normal military obligations. If the purpose of the Congress to punish drunkenness occurring while an officer is about the business of the Army, is to be accomplished, an accused person must not escape amenability because of an administrative irregularity in his selection and detail for the duty.

6. Accused under the Specification of Charge II was charged with having been found drunk while on duty as officer of the day in violation of Article of War 85, the mandatory punishment for which, when committed in time of war, is dismissal together with such other punishment as a court-martial may direct. The court found accused guilty of the Specification, not guilty of the Charge but guilty of violation of Article of War 96, and sentenced him to forfeit $100.00 of his pay per month for six months. The reviewing authority did not approve the sentence but returned the record of trial to the court for revision in accordance with paragraph 83, Manual for Courts-Martial, 1928, advised the court that the fact it substituted Article of War 96 for Article of War 85 did not relieve it "of the responsibility of adhering to the mandate of the 85th Article of War since the accused was by the Court found to be drunk on duty asOfficer of the Day ***", and directed that the court reconvene, vacate the previous sentence and adjudge an "appropriate" sentence. Pursuant thereto the court, with the exception of one member and the defense

counsel, reconvened, with the personnel of the prosecution, accused, assistant defense counsel and reporter present, duly revoked its former sentence and sentenced accused to be dismissed the service.

The finding of not guilty of the technical charge of the 85th Article of War remained unchanged although, upon the facts disclosed as presently considered, it might well have been made the subject of reconsideration even under the exception set forth in clause (c) of Article of War 40. This raises the question whether in view of the general inhibition of Article of War 40 against the reconsideration of a sentence originally imposed with a view to increasing its severity, the record is legally sufficient to support the sentence as finally adjudged.

Article of War 85 provides in part:

> "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct ***".

In the instant case the record shows a finding of guilty of a Specification clearly apposite to Article of War 85. There is also no doubt that the court intended to find that accused was found drunk on duty in time of war and that the court, cognizant of the import of its finding of guilty of an offense denounced by Article of War 85, attempted to circumvent the mandatory sentence of dismissal by finding accused guilty of a violation of Article of War 96. By convicting accused of the offense set forth in the 85th Article of War, the court was without authority to impose a lesser punishment than that prescribed. Therefore, as originally imposed the sentence was illegal and void (Bull. JAG, October 1942, sec. 443). By its final action, the court in effect reaffirmed its conviction of accused for acts constituting the offense under the 85th Article of War and thereupon imposed an effectual sentence by complying with the provision of paragraph 103a of the Manual for Courts-Martial that "Punishment as adjudged by the court for any such offense must be in conformity with the pertinent article." The reconsideration of the sentence was proper (AW 40, clause (d)).

Irrespective of the particular Article of War under which it is set forth, the offense is definitely one under the 85th Article of War. There is no ambiguity or contradiction in the finding as to the acts of accused. The characteristic elements of the offense, properly laid under the 85th Article of War, were not changed by the wrongful substitution of a different Article of War. Where as here, the court actually intended to find accused drunk on duty in time of war and the specification upon which accused was found guilty is unequivocal in its appropriate allegations, the mere designation of the general Article of War instead of the specific one, cannot be of material consequence or affect the legal consequences incident to the finding of guilty of that offense. Because of the peculiar circumstances of the instant case, the punishment must be held determinable by the offense that is described in the specification and not by the technical charge of the Article of War under which the specification stands. The accused was fully apprised of the nature of the offense for which he was tried and found guilty

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and in view of all the circumstances any errors or irregularities in procedure relating to the matter here considered must be deemed not to have injuriously affected his substantial rights (AW 37).

7. The charge sheet shows that accused is 30 years of age. He was commissioned and entered upon active duty 18 June 1943 as a second lieutenant, with prior service as an enlisted man.

8. The court was legally constituted. 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 and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

(sick), Judge Advocate.

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CONFIDENTIAL

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
23 August 1944.

Board of Review

NATO 2876

UNITED STATES	)	XV AIR FORCE SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Bari, Italy, 28 April 1944. Dismissal.
Second Lieutenant DAVID C. GAY, JR. (01 592 847), 1248th Quartermaster Company Service Group Aviation.	)	

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

R. E. MacKay, Judge Advocate.
Wilmer A. Irion, Judge Advocate.
(sick), Judge Advocate.

NATO 2876 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 23 August 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Second Lieutenant David C. Gay, Jr. (01 592 847), 1248th Quartermaster Company Service Group Aviation, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved.

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NATO 2876, 1st Ind.
23 August 1944 (Continued).

Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2876).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 56, NATO, 23 Aug 1944)

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
9 August 1944.

Board of Review

NATO 2878

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 306, U. S. Army, 14 April
Technician Fifth Grade	)	1944.
RUSSELL ROBINSON (33 141 612),	)	Dishonorable discharge and
3424th Quartermaster Truck	)	confinement for life.
Company (Detached).	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 92d Article of War.

Specification: In that Technician 5th Grade Russell (NMI) Robinson, 3424 QM Trucking Co. did, at Section 6, Area "B" Ammunition Supply Point 04207, near Nettuno, Italy, on or about 1045 hours 29 February 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Di Nicola Marco fu Augusto, a human being; by shooting him with a carbine.

He pleaded not guilty to the Charge and Specification but "guilty of the 93rd Article of War under the specification of voluntary manslaughter". He was found guilty of the Charge and Specification, all members of the court present concurring. No evidence of previous convictions was introduced. He was sentenced to be shot to death by musketry, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the

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record of trial pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 1045 hours on 29 February 1944, accused entered "an Italian house" near ammunition dump #04207 in the vicinity of Nettuno, Italy, carrying "a case of 5-1", a carbine and a five-gallon water can, and remarked to another colored soldier in the house that he was going "to trade that ration for wine" (R. 8; Ex. 1). A soldier who was unloading ammunition at a near-by dump testified that he saw accused enter and leave the house, and that:

> "I was out there unloading a truckload of ammunition. Close to that house a truck pulled out and a fellow (accused) got out of the truck with a five-gallon water can and a case of 5-1 ration, slung his carbine on his shoulder and walked to the house and was gone about five minutes or a little more and I was unloading ammunition and then he came out of the house and there is a pigeon box sitting up on the corner of the house and he reached up on the corner of the house and took a little pigeon and an old pigeon and came to the truck and there was a lady standing outside the house and told the fellow in the house that the fellow got the pigeons; and he came out and they was talking in Italian and the fellow in the truck told him 'I told you to get the can full of vino. If you don't, I will shoot you'" (R. 9, 10).

and:

> "The fellow in the house *** motioned to him and spoke like he was telling him to bring back his pigeons; I couldn't tell what he was saying, he was talking in Italian" (R. 10).

and further:

> "When he went back to the truck then, he told the 'paisano' that he was going to shoot him if he didn't fill his can of vino. The 'paisano' kept arguing and then came toward him, and the fellow in the truck started to fire his carbine. I don't know where he fired and I got in my truck and started to pull out and he said 'Goddam it, if you don't fill up that can of vino, I will shoot you.' And the paisano broke and ran over to where I was and he started firing the rifle and I started around the truck and he had the rifle pointed right at me and the 'paisano' grabs his stomach and he goes around and at that time he grabs his side and falls right in front

of me and I stopped to keep from going over him and he rolled over three or four times and we stopped the truck. The people and children were around there and I took my squad out there and went around them" (R. 10).

This witness testified further that at the time accused fired he was in a truck, about 30 yards from his victim, with his rifle "across his arms". Accused fired five or six rounds then got out of the truck and started toward the wounded man but after going five or six feet he "broke off and went in the truck and went down the road" (R. 10-13).

A military police officer testified that on the morning of the date alleged he was in "the vicinity north of the town here, in the vicinity of the ammunition dumps" when he heard a "commotion about people screaming and yelling about a half mile down the road", proceeded there immediately and found a group of people standing around a man he "would say, was dead". Witness felt for his pulse but "couldn't feel any". (R. 13,14) Witness took this man and another Italian civilian who professed to be his brother, to a hospital. Witness testified he had identified a body removed from a vault on the day of the trial as the dead body of the man he carried to the hospital. Witness testified he remembered "his hair line, his mustache and certain features about his face". (R. 14,15)

An ordnance officer who testified he was familiar with small arms ammunition identified a "slug" marked "K" and introduced in evidence by the prosecution, as "a .30 caliber carbine slug" (R. 15,16).

An Italian civilian, Signore Julio Di Nicola, testified through an interpreter that a body exhumed the day of the trial was that of his deceased brother Marco Di Nicola (R. 17).

An officer testified that on the day of the trial he, together with "the previous witness who testified through an interpreter", was present at the exhuming of a body, that the witness mentioned "identified" the body which was taken to the 15th Evacuation Hospital where "Dr. Krumwick performed an autopsy thereon" (R. 20,21). Witness testified further that written in pencil on the tomb from which the body was removed was the name "Di Nicola Marco fu Augusto" (R. 21).

It was stipulated that Captain Newton Krumwick, Medical Corps, Pathologist, 15th Evacuation Hospital, performed an autopsy "on a body alleged to be Di Nicola Marco fu Augusto", on 14 April 1944, and if present would have testified as follows:

"The body of this man is moderately decomposed. There is a miss(i)le wound 6mm across, in the left abdominal wall 9cm above and 6cm to the left of the left anterior superior iliac spine. The chest and abdomen are opened in the usual manner. There is much blood in the abdominal cavity. There are 3 perforations of the small bowel and two of the mesentary.

There is a large perforation of the abdominal aorta about 2.5 cm above the bifurcation. There is much retroperitoneal hemorrhage. There is a large perforating wound of the right lobe of the liver. There is a wound in the right diaphragm. There is a bruise of the lower lobe of the right lung. There is a fracture incomplete of the 7th right rib 11 cm to right of the midline. A miss(i)le lies in the muscles of the right chest wall. This miss(i)le is identified by scratching a 'K' on the butt end. It was removed from the body in the presence of Lts. Ruby and Westerman who also witnessed the method of identification. Cause of Death: 1. GSW pen wound abdomen with course of miss(i)le upward, forward, and to the right. 2. Perforations, multiple, small bowel. 3. Perforation abdominal aorta. 4. Intra-abdominal and retroperitoneal hemorrhage, marked. 5. Perforation liver. 6. Perforation diaphragm. 7. Contusion lung. 8. Fracture 7th rib right. 9. Miss(i)le in muscles right chest wall.
The miss(i)le found in this body was the direct cause of death" (R. 19,20).

Accused elected to remain silent. The defense stated it wished the plea of guilty of voluntary manslaughter in violation of Article of War 93 to stand. (R. 22) No witnesses were offered by the defense.

4. It thus appears from the evidence as well as from accused's plea of guilty to the offense of voluntary manslaughter that at the place and time alleged accused killed Di Nicola Marco fu Augusto, the person named in the Specification, by shooting him with a carbine. Shortly preceding the shooting accused entered the premises occupied by deceased carrying a carbine, a case of Army rations and a five-gallon water can, stating he intended to trade the rations for wine. The trade apparently was not consummated and as he left the building accused took from their nests two pigeons belonging to the occupants. Di Nicola Marco fu Augusto attempted to persuade accused to return his pigeons whereupon accused twice threatened him, saying "I told you to get the can full of vino. If you don't I will shoot you". Di Nicola Marco fu Augusto then ran, apparently in an effort to escape, and accused fired five or six rounds at him with a carbine killing him almost instantly. The evidence shows that the homicide was intentional, wanton and without legal justification, provocation or excuse.

With the exception of malice aforethought, all elements of the offense charged were admitted by accused's plea of guilty to the crime of voluntary manslaughter. Malice is clearly inferable from the declaration of accused immediately preceding the shooting, from the possession and use of a deadly weapon and other circumstances in evidence. Accused was properly found guilty as charged.

5. Attached to the record of trial is a letter signed by accused dated 21 June 1944, in which accused requests that there be considered "as not sufficiently entered" as a part of his testimony on the trial the following:

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"a. At the time of the incident I was under the influence of alcohol to such a degree that I was not aware of the incident.

"b. I was informed of my actions of the previous night while on guard duty by Pvt. Alger Jones when he parked his truck in the motor pool which was my post at that occasion.

"c. It was not until after completing my tour of guard duty that Lt. Bernstein placed me under arrest and I was informed of the charges and specifications."

After having had the meaning of the plea explained to him accused pleaded guilty to the offense of voluntary manslaughter. After the prosecution rested the defense announced that the rights of accused as a witness had been explained to him and he elected to remain silent. The president of the court then asked if the defense was sure accused thoroughly understood his rights and accused himself replied that he did, and remained silent. The law member then inquired if the defense desired the plea of guilty to voluntary manslaughter to stand and defense replied it was so desired. No witnesses were presented by the defense. The principal prosecution witness, an eyewitness to the homicide, and three other prosecution witnesses were cross-examined by the defense. There is nowhere in the evidence a suggestion that accused was intoxicated at the time of the offense.

6. The charge sheet shows that accused is 24 years old. He was inducted into the Army 17 February 1942. No prior service is shown.

7. The court was legally constituted. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Donald K. MacRae, Judge Advocate.
Walter R. Lynn, Judge Advocate.
Henry C. Kenick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
9 August 1944.

Board of Review

NATO 2878

UNITED STATES	)	VI CORPS
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 306, U. S. Army, 14 April
Technician Fifth Grade	)	1944.
RUSSELL ROBINSON (33 141 612),	)	Dishonorable discharge and
3424 Quartermaster Truck	)	confinement for life.
Company (Detached).	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Roger W. MacKay, Judge Advocate.
Wilmer R. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

NATO 2878 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 9 August 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Technician Fifth Grade Russell Robinson (33 141 612), 3424th Quartermaster Truck Company (Detached), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally

NATO 2878, 1st Ind.
9 August 1944 (Continued).

sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2878).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 54, NATO, 9 Aug 1944)

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
21 August 1944.

Board of Review

NATO 2880

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 30 May 1944. Death.
	)	
Private RAY WATSON (33 139 251), Company B, 386th Engineer Battalion (Separate).	)	

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 92d Article of War.

Specification: In that Private Ray (NMI) Watson, Company B, Three Eighty Sixth Engineer Battalion (Separate) did, at Secondigliano, Italy on or about 15 April 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private John W. Brockman, One hundred and twelfth, Military Police, Prisoner of War Detachment, a human being by shooting him with a Pistol.

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

Specification: In that Private Ray (NMI) Watson, Company B, Three Eighty Sixth Engineer Battalion (Separate) did, at Secondigliano, Italy on or about 15 April 1944, with intent to do him bodily harm, commit an assault upon Private First Class Philip E. Tobeas, One hundred and twelfth, Military Police Prisoner of War Detachment, by willfully and feloniously

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shooting the said Private First Class Tobeas in the leg with a Pistol.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction by summary court-martial for breaking of curfew restrictions in violation of Article of War 96, was introduced. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 15 April 1944, Private "John Brockman" and Private First Class Philip E. Tobeas, both of the 112th Military Police Prisoner of War Detachment, were on "walking" patrol duty in Secondigliano, Italy (R. 9-11,19,29). They were dressed for duty in "O.D.'s", with belts, leggings, and plain issue helmets (not white), and wore Military Police brassards (R. 23,35). Brockman was armed with a riot gun and Tobeas with a "Tommy gun" (R. 23,36). At about 1345 hours (R. 22,30), while patroling on Via Roma, they were called across the street by a colored soldier who asked them to go into a near-by building and there disarm another colored soldier who "was threatening to shoot" (R. 29,31). They crossed the street and entered a room in the building which opened directly onto the sidewalk, holding their weapons at high port arms (R. 29,36,37). Accused was pointed out to the two military policemen by the colored informant. Accused was standing at the bar at the time and was dressed in "O.D." uniform, with a sleeveless slip-over sweater and an "O.D." cap with red and white braid. (R. 12,18,21,29-31) The room was crowded and there were other colored soldiers there (R. 31,36).

Immediately prior to the time that Brockman and Tobeas entered the building, Private James W. Stewart and Private James H. Nichols, both members of the 128th Military Police Detachment, also on patrol duty and armed with sawed-off shot guns, approached the building (R. 9,10,12-15,18,20,21). The sequence of events, as testified to by the three principal witnesses, Tobeas, Stewart and Nichols, varies in detail at this point.

According to the testimony of Tobeas, immediately after the informant had pointed out accused and said "This is the man", accused "whipped the pistol out of his pocket and started firing at us" (R. 29). Accused was then "not more than two feet" away from witness and Brockman (R. 31-34,36). Witness testified that, "Just as the accused drew the pistol from his pocket" Brockman "made an attempt to secure the weapon" (R. 35). There was no exchange of conversation (R. 32). Accused then "backed or side-stepped out" of the room, followed by Tobeas and Brockman, whom he continued to face as he left the room and got outside (R. 31,33-35). After all three of them had stepped out of the room and onto the sidewalk, accused continued to fire rapidly with his pistol which was in his left hand (R. 31-33). Tobeas was hit first by a bullet which broke his left leg and knocked him to the ground (R. 30,33,35). Accused then continued to shoot until he hit Brockman (R. 30,31,33), after which he "turned and ran down the street", pursued by Privates Stewart and Nichols who fired at him (R. 30).

According to the testimony of Stewart, Brockman was pushed backward out of the room by the accused (R. 10,11,13,16). Brockman had "a twelve gage shot gun" in his hand, "holding it up over his head" and accused had hold of him, accused's hand being "right on his chest pushing" (R. 13,17). Tobeas followed "after but right at the same time" (R. 17). Accused commenced shooting "just after they got out of the door" (R. 18). He fired "from the hip" with his right hand; "he didn't aim it" (R. 15-17). There was "just one shot at each of them" (R. 14). At a distance of five or six feet he fired one shot at Brockman, who fell forward on his face, "shot through the chest". When accused fired, Brockman was bringing his gun down from over his head, but "he didn't have time to use it". (R. 11,17) He was about ten feet out of the building when he fell (R. 11). Accused then fired one shot, "just as quick as he could after the first", at Tobeas, hitting him in the leg, and Tobeas "went down" (R. 11,12,17). Then accused fired at Private Nichols and fired three shots at Private Stewart (R. 10,12,14). Private Stewart and Private Nichols each fired two shots at accused, the latter apparently hitting accused: "We could tell the way he was walking up the street that he had been hit" (R. 10,14,15). Accused then "went up the street", "about half running and half walking", and then "went in some alley" followed by Stewart and Nichols (R. 10,12). They did not pursue him any further for "we thought he still had the gun and we knew he was wounded and we could pick him up later" (R. 10,15). They then returned to the scene of the shooting and found Brockman dead and Tobeas shot in the leg (R. 10,11). Stewart was "close to ten yards" from accused when the shooting occurred, there was no one between him and accused, and he observed accused's face at the scene for "about a minute" (R. 15-18).

According to the testimony of Nichols, Tobeas came out of the door first, and accused "sort of pushed" Brockman "out of the door and jumped over to the right side and shot them both" (R. 19-21). Accused's pistol was in his right hand (R. 21,24). Brockman was about eight to ten feet from accused (R. 23), facing him, and was holding a "shot gun" at port arms when accused shot him (R. 21). Accused "shot Brockman first through the heart", then "shot Tobeas through the leg", took two shots at Nichols and one at Stewart (R. 20). Witness testified:-

> "I started shooting at him and he shot twice at me. One shot was at Private Stewart and then he turned and ran towards Naples. He ran for about one hundred yards and turned and went up an alley and we followed him around the corner and when we turned the corner, he fired two shots at us and Private Stewart fired two shots back at him. I ran out of ammunition and I turned and went back to get *** Tobeas' and Brockman's guns and when I got back, he had escaped and was gone and so I chased him I would say three hundred yards the way I thought he went and never could find any trace of him and then I turned around and went back" (R. 20).

Witness did not know if any of the shots fired by him and Private Stewart took effect, but observed that after accused had gone about 50 yards, he

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"limped the least bit" (R. 21). Witness saw accused's face for a minute and a half or two minutes (R. 22).

L. A. C. Ivan R. Hope, British Army, from a near-by point of observation (R. 25,28), saw the exchange of gunfire between accused and the military policemen. He testified:

> "At approximately half-past two on the 15th of April I was lying on my bed and I was aroused by the sound of gun shots. I rushed over to the balcony which overlooks the street and saw a colored United States soldier firing a revolver at American Military Police",

and that:

> "The soldier that fired the shots at the United States Military Police turned and ran up the lane and I could just see a weapons carrier stationed a short time in the lane. I didn't see him actually get in the weapons carrier but as soon as he got anywhere near the weapons carrier it moved away and that was the last I saw him" (R. 25).

Witness identified accused in court as the assailant (R. 25). Accused's right hand was bandaged (R. 25,27), he did not appear to witness to be wounded (R. 27).

After accused went into the alley he stopped a weapons carrier driven by Private Stephen Fredericks, Headquarters and Headquarters Squadron, 316th Service Group, in which Corporal Ray S. Griffith, of the same organization, was a passenger (R. 38,39,42). Accused said "Hold it, Joe", jumped on the right hand fender of the weapons carrier, with a pistol in his hand, said "drive away and drive away fast" and told them "to drive as he directed" (R. 39-43). Griffith testified:

> "We drove along and we said he better jump off and he was looking for a place to hide. After he was on the vehicle we drove up the road and he said we were to drive and go where he said to. We got part way up this road and he was looking for a place to jump off the vehicle where he could hide in someplace along there and we finally came to a field and we slowed down and he told us to slow down and then he jumped off and after he jumped off he told us to beat it" (R. 40).

The driver turned around and started back in the direction from which they had come. They met Private First Class Earl M. Smith, 56th Military Police Company, a military policeman on patrol near Secondigliano, and reported what had happened (R. 40,41,44,45). Smith returned with them to the place where accused had jumped off the truck (R. 40,45). Accused was running in the grass, about 50 or 60 yards from the road, "stooped over and crouching" (R. 46). Smith testified that he ordered accused to halt, and fired two

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shots. Accused fell and witness went up to him. Witness asked for his "gun" but accused said he did not have one. He also said he had not halted because he did not have a pass. (R. 45,47). Accused had blood on his leg (R. 45) and it seemed "that one of his hands were bandaged" (R. 46). Accused talked sensibly and rationally and did not appear to witness to be drunk (R. 47). Some colored soldiers took accused in their weapons carrier to the dispensary (R. 43,45,47).

Shortly after accused was captured, a pool of fresh wet blood, about nine inches across, was found on the right fender of the weapons carrier driven by Fredericks (R. 41,43).

All witnesses to the killing of Brockman, the shooting of Tobeas, the exchange of fire between accused and Stewart and Nichols, and accused's attempted escape, identified accused (R. 9,10,14,17-19,21,22,25-28,30,32-34, 39,40,42,45,46).

At about 1400 hours on 15 April 1944 Captain David Gurin, Medical Corps, 262d Station Hospital, performed an autopsy on a body identified as that of "John H. Brockman", a member of the military police, by the "dog tags" he was wearing and the emergency medical tag (R. 7-9). Captain Gurin testified:

> "The cause of his death was a bullet wound which entered the left side of the chest just below the left collar bone and passed through the upper part of the left lung then through the arch of the aorta and then through the fourth thoracic vertebra. The bullet finally lodged in the skin just to the right of the fifth thoracic vertebra. The immediate cause of death was hemorrhage from the aorta to the left chest" (R. 7).

There was "only one wound of entrance"; "the bullet entered the left chest just below the collar bone and the course was backward and to the right". Witness believed death had occurred about two hours prior to the autopsy (R. 8).

Captain Jack Dolman, Medical Corps, 386th Engineer Battalion, testified that he gave accused first aid treatment for "a gunshot wound in the right calf" at about 1430 or 1500 hours on 15 April 1944 and that he saw no evidence at that time that would lead him to believe that accused was intoxicated (R. 55).

An officer who investigated the shooting at about 1600 hours on 15 April, testified that after he told accused anything he might say could be used against him in court, that he could make a sworn or unsworn statement, or he could remain silent, accused "just made the statement, 'I did the shooting and I'll take my medicine'" (R. 49).

Private Obediah Johnson, Company B, 386th Engineer Battalion (Separate), testified for the defense that he was with accused about two hours on the morning of 15 April 1944 and that they had two drinks together. "There was approximately two quarts on the table at one time of 'Strega'" (Italian whiskey) and "there was a couple of more fellows in there being sociable". He testified that accused, when he left, at about 1130 hours, was "pretty well intoxicated" and acted as though he "was feeling pretty good". Witness

added however, "I couldn't say he was drunk because I can't distinguish a drunk person". (R. 51-53).

Accused testified as follows:

> "I was in the room drinking with some fellow. Somebody on the outside had hit him and I felt sorry for him and took him next door and bought him a drink and while we were in there drinking a fellow brought the M.P's. over and I turned around towards the door when they charged in. As they came in I charged out the door with the gun in my hand--in my left hand."

He testified that,

> "The only thing I remember was when I came out the door and was shooting. I don't know if I hit anybody or not. I started to run and so I ran until I saw the weapons carrier and when we we came to a field, I got off and ran into the field and then when I was going across the field I saw the M.P. and the M.P. shot twice. I was chased from Secondigliano by two M.P's. and I thought it was them. It was the second shot that hit my leg and I ran all the way down the alley and just about fifty yards from where I fired my shots up that alley, well, there was a little turn in the alley and there was a weapons carriers parked there. I jumped in the weapons carrier and showed them my gun. My hand was cut at the time and it was bandaged. After that we drove away and followed the street on out of the alley. When we got on that road the boys in the truck said, 'You can hide here, you can hide here' and so I told them to slow up and I jumped off and went up into the field and was going to make my way to the dump and I knew I was hit in the leg. I felt my shoe and sock and there was blood in it and as I bent down to look at it I saw this M.P. and I started running and he shot twice at me and I fell down and he ran up and stood behand a tree and told me to throw my gun away and I told him I didn't have a gun. By that time another man came up and he told the other man to search me. The other boy frisked me and didn't find any gun and then this M.P. went looking for the gun. Some more boys came across the field and spoke to me and I told them I was shot in the leg. They asked the M.P. if they could take me and he said it was alright and so they picked me up and carried me into a weapons carrier and asked the boy to drive to the dispensary. In the dispensary I received first aid by them and I think it was Captain Dolman who found out which hospital to send me to and I was taken there and operated on for my leg." (R. 54)

4. It thus appears from the evidence that at the place and time

alleged, accused shot with a pistol and instantly killed Private John Brockman, the person named in the Specification, Charge I, and that he also committed an assault upon Private First Class Philip E. Tobeas, the person named in the Specification, Charge II, by shooting him in the leg with the pistol. Brockman and Tobeas were military policemen, armed and wearing the characteristic brassards. They had just been accosted by a soldier who stated that a soldier inside a near-by barroom was "threatening to shoot". There is evidence that as they entered the room accused, who was pointed out to them as standing at the bar, drew a pistol and fired at them. Accused thereupon, still watching the military policemen, stepped out onto the street where, when Brockman and Tobeas appeared, accused fired a shot which killed Brockman and another which wounded Tobeas in the leg, breaking it. Other military policemen who came upon the scene fired shots at accused who returned the fire. Upon entering an alley accused commandeered a weapons carrier and, menacing the driver with his pistol, ordered him to drive as directed. After riding some distance accused left the vehicle and proceeded across a field. The driver reported his experience to a military policeman and after a chase the accused was apprehended.

The principles of law governing the crime of murder are set forth in the Manual for Courts-Martial, 1928, as follows:

> "Murder is the unlawful killing of a human being with malice aforethought."
>
> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: ***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; *** 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, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed" (par. 148a).

At the time of the shooting, Brockman and Tobeas were engaged in the performance of their duty as military policemen. It is inferable that their

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presence at the barroom was due to some disturbance caused by accused who, upon observing Brockman and Tobeas and recognizing them as military policemen, direfully aggravated his apparent misconduct by the ensuing acts of violence. With respect to the resultant death of Brockman, the specific intent involved in the crime of murder was not only indicated by this willful opposition by force to lawful authority but by accused's manifest ill-will toward personnel representing such authority. There was likewise a knowledge on the part of accused that his acts would probably cause the death of, or grievous bodily harm to, his intended victims. The circumstances exclude any theory of legal justification or excuse. Although accused had been drinking, there is nothing to indicate that he did not have full command of his faculties or was not mentally responsible for his acts. The evidence is devoid of any matters of extenuation or mitigation.

With respect to Tobeas, accused was charged merely with assault with intent to do bodily harm, an offense fully proved but of a less serious nature than that which the facts and circumstances would indicate. For this apparent inconsistency on the part of the pleader, the accused can have no justifiable cause for complaint.

5. The person killed by accused was described in the Specification, Charge I, as "Private John W. Brockman, One hundred and twelfth Military Police, Prisoner of War Detachment". Witnesses to the shooting described him as Private John Brockman, 112th Military Police Prisoner of War Detachment (R. 9,19,29); and the medical officer who performed the autopsy testified that the body bore identification tags of "John H. Brockman", a "member of the Military Police" (R. 7). The variances are not material. The evidence sufficiently shows that a Private John Brockman of the unit described in the specification was killed by accused, and the entire record leaves no doubt but that one person only was killed and that he was the person described in the specification. It has been held that error in proof of the middle name or in the initials of a deceased is not material (30 C.J. 94,95). Under the circumstances of this case it is clear that the variance could not operate to prevent the successful pleading of double jeopardy in a subsequent prosecution for homicide at the time and place here alleged (NATO 861, Guy).

6. The charge sheet shows that accused is 20 years of age, was inducted into the Army 7 February 1942, and had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. A sentence to death or imprisonment for life was mandatory upon the court-martial upon conviction of accused of murder in violation of Article of War 92. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Donald W. McKay, Judge Advocate.

Mortimer G. Lynn, Judge Advocate.

Henry C. Kunst, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
21 August 1944.

Board of Review

NATO 2880

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 30 May 1944. Death.
	)	
Private RAY WATSON (33 139 251), Company B, 386th Engineer Battalion (Separate).	)	

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Daniel W. Mackay, Judge Advocate.
Wilmer C. Irion, Judge Advocate.
Harry C. Remick, Judge Advocate.

NATO 2880 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 21 August 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private Ray Watson (33 139 251), Company B, 386th 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 sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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NATO 2880, 1st Ind.
21 August 1944 (Continued).

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2880).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 55, NATO, 21 Aug 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 August 1944.

Board of Review

NATO 2881

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 6 June 1944.
Private GUS SINGLETON	)	Dishonorable discharge and
(34 136 446), 564th Port	)	confinement for life.
Company, Transportation	)	U. S. Penitentiary, Lewisburg,
Corps.	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 92d Article of War.

Specification: In that Private Gus Singleton, 564th Port Company, Transportation Corps, did, at Naples, Italy, on or about 28 March 1944, forcibly and feloniously, against her will, have carnal knowledge of Barese Nunzia.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by summary courts-martial, one for leaving his battalion area without a pass and one for wrongfully entering a house of prostitution, both in violation of Article of War 96, was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge, forfeiture

of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 28 March 1944 Barese Nunzia, a married woman, was living with Joseph Mantone (Mantone Giuseppe) at 21 Via Carmine, Naples, Italy. They were not married but had lived together for about eight or nine months. (R. 6,12,14-16) About 1830 hours, while they were eating, accused knocked on the door of their living quarters, which were located on the first floor of a building and were reached by a flight of stairs (R. 7, 10,14). Accused asked for "a woman" or "signorina" and Mantone replied "No". Mantone testified that accused struck the door "a hard bang" and said "there is a woman here". Mantone opened the door and accused entered. Accused then struck Mantone, knocking him to the floor and stunning him, and grabbed Barese, who called for help and yelled. She told Mantone to call the police and he went out on a balcony and called for the "MPs". (R. 7,12,14)

Barese, who identified accused saying "It must be that one. Maybe, but I do not know too well", testified that accused, whom she had never seen before, grabbed hold of her by the throat and knocked her to the floor, that he choked her, struck her on her face and breasts because she was yelling, got on top of her and penetrated her "privates" with his penis. She testified that accused tore her underclothes, that she pushed him when he was hitting her and that she shouted "No, no, no", that she did not consent to accused's getting on top of her, and that after accused "bad-handled" her she fainted and "he did whatever he wanted". She testified she remained unconscious "a little while", but recalled his putting his penis into her and testified that she did not consent thereto. She also testified she was afraid of accused and when asked if she kicked accused she replied that she "was afraid of his beating" and did not scratch or bite him and that the only thing she did to keep him off was to yell. She further testified she was afraid to hit accused as "he was killing me and my husband" and that she was so afraid of him she did not notice whether or not he had a knife or other weapon with him. Barese also testified that she resisted, calling her husband, when accused got on top of her, and that she fainted because accused choked her, and from fright. She testified that accused spoke certain words which she did not understand and that accused was on her a "very long" time before the police came. She further testified that her underclothes "broke" because he had flung her to the ground. Witness also testified she had never taken money from American soldiers. (R. 14-17)

Mantone testified that when the military police entered, about ten minutes after he called for them, accused was "in a little corridor towards the rear" and was on top of Barese, between her legs, "exactly in the position that we call natural", that her dress was raised and accused's trousers were lowered. He testified that the police "dragged" accused off of Barese and that his penis was then exposed. Witness testified "the panties were torn" and that though it was dark in the room the police had flashlights which they used. (R. 7-10) Witness testified he had never seen Barese with American soldiers or take money from them and testified that as far as he knew she was not a prostitute (R. 10,11). Witness also testified that when accused first

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entered the house accused grabbed hold of witness and demanded money, and that witness said he did not have much money as he was a manual worker (R. 11). Witness testified that he saw accused grab Barese by the shoulders and push her towards "this little corridor", saw her lying on the floor with accused on top of her and testified "she wanted to shout but he had his hand on her mouth". Witness testified he did not see Barese get to the floor but he knew accused threw her down because he heard her yell, "Hurry up, because he is knocking me on the ground, he is killing me". Witness "would run in again" because of Barese's yells and he also testified he saw accused had his hand on her throat. Witness testified he saw Barese "wanted to push him (accused) but she could not". He also testified accused "had drunk much". (R. 11,12) Witness also testified that some prostitutes occupied an adjoining building which had a separate entrance (R. 10).

Two military policemen, members of the 1179th Military Police Company, were on "jeep" patrol. One of them testified:

> "we were riding our patrol when we came towards this house where a lot of civilian people were standing in front. We stopped and they said that there was a colored soldier upstairs in the house, so we stopped the vehicle and went upstairs" (R. 22);

that they there saw accused in a doorway at the top of the stairs

> "on top of a white woman lying on the floor in a little closet in the hallway, half in and half out. He was holding his left hand over her mouth and had his right hand against the floor bracing himself, and he was having intercourse with the woman" (R. 22)

and that

> "We put the light on him and told him to get off the woman. He said, 'Take the light out of my eyes, you motherfucker.' We grabbed him by the feet and dragged him off. We told him to get dressed. As he got dressed, he continued calling us motherfucker, and said he was going to fuck all these white women around here" (R. 22).

This witness testified that when they pulled accused off of the woman "his pants were down and all opened up in front. His condition was half drunk, half-intoxicated. His penis was wet and moist" and that he could walk and talk all right and was not too drunk to know what he was doing. Witness testified that when they entered, Barese was "trying to scream or moan", that he saw accused on top of her, that he got the impression she was "sincerely unwilling" and that sexual intercourse was actually in progress. (R. 23,24)

The other military policeman testified that he flashed a light on accused and saw he had his hand over Barese's mouth, that she was "struggling to free herself and she could not" (R. 20,21) and that accused "had his left hand on

her mouth and his other hand was holding her head down. She was squirming around trying to get free. She was crying when she got up." (R. 18) Witness also testified Barese "seemed to be seriously unwilling" for accused to be on top of her (R. 21). Witness testified that he saw accused's overcoat on the floor underneath Barese, and that it had been "just thrown down, it had not been laid out" (R. 20). Witness also testified that accused had been drinking and that his penis was out, "moist and erect". Witness further testified that accused was "pretty drunk" but able to carry on a conversation and that witness thought accused knew what he was doing (R. 19). This military policeman testified that when accused was getting in the "jeep" to go to the military police station he told the military policemen "he was going to fuck all these white women" (R. 18).

Private William Hooks, 562d Port Battalion, a witness for the defense, testified that prior to 28 March 1944, in company with a boy who had asked him "soldier, two signorine?" he went to

> "Via 21 Carmine and he takes me upstairs on the first floor and takes me into this room. I walks into this room and this lady was sitting there in her home and I asked her to wash these clothes I had with me. She asked me, 'Signorina?' I said, 'No, no signorina.' We had some cognac and I bought two glasses of cognac from her and paid her 20¢, and I drank those two glasses. And just before I finished the second two MPs came in. The MPs asked me, 'Soldier do you know this house?'" (R. 26).

Witness testified he did not know who the woman was, but knew she was the same woman who had testified (Barese Nunzia) (R. 26,27).

It was stipulated that

> "if Captain Maurice L. Zee, Medical Corps, 52nd Station Hospital, APO 376, U.S. Army, were present, he would testify as follows:
>
> "At about 1930 hours, 28 March 1944, the above woman was brought to this hospital by the military police for examination, a civilian woman named Barese Nunzia. Vaginal inspection showed no evidence of external injury of vulva or vagina. Vaginal speculum was inserted without difficulty. No evidence of injury was noted of vaginal wall or cervix. This woman is a multi-para. There were no evidences of external cuts or bruises on the woman" (R. 27),

and that "multi-para" means "a woman who has had more than one child".

Accused elected to remain silent.

4. It thus appears that at the place and time alleged accused had unlawful carnal knowledge of Barese Nunzia, the woman named in the Specifica-

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tion, by force and without her consent. After she was forced to the floor accused had sexual intercourse with her, placing a hand over her mouth, choking her and striking her on her face and breasts when she yelled and sought help. Accused terrorized his victim and by force overcame all resistence. Accused, when pulled off his victim by two military policemen who had witnessed the forcible intercourse and the victim's struggles to escape, employed obscene epithets towards the police and stated "he was going to fuck all these white women". When accused was pulled off Barese it was observed his penis was exposed, erect and moist. The court was warranted in finding accused guilty of rape in violation of Article of War 92. All elements of the offense are amply established by competent evidence (MCM, 1928, par. 148b; Winthrop's, reprint, pp. 677,678).

The circumstances fully justify the inference that if Barese failed or ceased to resist accused as much as she was able, which is by no means established, that absence or cessation of resistence was attributable to her fear of great bodily harm and in no way would negative the intercourse constituting rape (Bull. JAG, December 1942, sec. 450 (9)). It is likewise immaterial that Barese was living in adulterous cohabitation with Mantone. While evidence of want of chastity on the part of the victim and similar considerations may well have, in certain cases, some probative value on the issue of consent, once the lack of consent is established such factors are immaterial (52 C.J. par. 109).

5. The charge sheet shows that accused is 28 years of age. He was inducted into the Army 2 December 1941 and had no prior service.

6. The court was legally constituted. 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 and the sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 2501, Title 22, Code of the District of Columbia.

Donald W. MacBay, Judge Advocate.

Mortimer G. Fox, Judge Advocate.

Henry C. Renick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 August 1944.

Board of Review

NATO 2881

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 6 June 1944.
Private GUS SINGLETON	)	Dishonorable discharge and
(34 136 446), 564th Port	)	confinement for life.
Company, Transportation	)	U. S. Penitentiary, Lewisburg,
Corps.	)	Pennsylvania.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Daniel K. Mackay, Judge Advocate.
Martiner Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

NATO 2881 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 26 August 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private Gus Singleton (34 136 446), 564th Port Company, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions

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NATO 2881, 1st Ind.
26 August 1944 (Continued).

of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2881).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 58, NATO, 26 Aug 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 July 1944.

Board of Review

NATO 2887

U N I T E D S T A T E S	)	FIRST ARMORED DIVISION
v.	)	Trial by G.C.M. convened at APO 251, U. S. Army, 17 June 1944.
Private CHARLES E. DURHAM (15 047 362), Company C, Sixth Armored Infantry.	)	Dishonorable discharge and confinement for 20 years. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private Charles E. Durham, Company "C", Sixth Armored Infantry, did, at bivouac near Qualiano, Italy, on or about 19 January 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Caivano, Italy on or about 10 March 1944.

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

Specification 1: In that Private Charles E. Durham, Company "C", Sixth Armored Infantry, did, near Caivano, Italy, on or about 1 March 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Technician Fifth Grade Wayne E. Farrar, a wrist watch, the property of Technician Fifth Grade Wayne E. Farrar of some value.

Specification 2: In that Private Charles E. Durham, Company "C", Sixth Armored Infantry, did, near Caivano, Italy, on or about 1 March 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Technician Fifth Grade Wayne E. Farrar, a truck load of flour the property of the United States of some value.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions, one by summary court-martial for being in an off-limits house of prostitution and disorderly in a military police station in violation of Article of War 96 and the other by special court-martial for wrongfully applying to his own use a vehicle, property of the United States, furnished and intended for the military service, in violation of Articles of War 61 and 94, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence with respect to Charge I and its Specification shows that on 19 January 1944, when accused's organization was bivouacked in the area of Qualiano, Italy, accused absented himself without proper leave from the organization and did not return thereto prior to the date of trial (R. 5; Ex. A). It was stipulated accused was apprehended 10 March 1944 at Caivano, Italy.

The evidence with respect to Charge II and its Specifications consisted of the deposition of Technician Fifth Grade Wayne E. Farrar, 3608th Quartermaster Trucking Company, which was admitted in evidence, the defense stating it had no objection. (R. 6; Ex. B) In pertinent part the deposition reads as follows:

"I left the Naples docks 2000 hours. Headed for Depot 575, on March 1, 1944. As I left 'R' route to go to the Depot there was two men dressed as American soldiers and spoke fluent English. They were walking down the road one on each side. One of these men was the accused, Durham. I slowed down to the rate of about 8 miles per hour to turn the corner. While at the slow rate of speed, the two men I took as soldiers jumped on the running board of my truck, opened the doors of both sides. Thrusting firearms through the open doors, they ordered me to stop. I stop(p)ed as ordered. They said, 'Come on'. Two other men came from around the corner of a building. One of these men was dressed as an American soldier and spoke Italian. The other was dressed as an Italian civilian. These two climbed on the back of my truck. The other two climbed in the front seat with me. One drove while the other held a gun in my side. They turned

around and came back down 'R' route. Near Caivano they turned left before reaching the town. They went down a side road about 2 miles. This was 2200 hours. There was a small farm house off the road on the left side of the road, about 200 yards. We stopped there. The two from the back of the truck got off the truck and went in the house, leaving the other two in the truck with me. They returned after approximately 15 minutes. The accused, Durham, held a gun on me, ordered me out of my truck and into the house while the other three took the truck load of flour and unloaded it. They said they would return in an hour or two. However they did not return until 0230 hours.

"They ordered me out of the house into the truck. Then we left the house and came back out to the main highway ('R' route), turned left. Between Caivano and Cardito they got out of the truck. Durham took my watch while departing. One went on one side of the road and one on the other side.

"I came back down 'R' route looking for M.P.'s. At about 0400 hours 3 M.P.'s and an Italian interpreter came to the dispatch office, picked me up and I directed them back to the farmhouse. They searched the house. They found 7 bags of flour. They questioned the farmer. However they did not find out any thing from him" (Ex. B).

The defense read into the record the following "statements from the psychiatric report",

"Psychiatric examination reveals patient to be evasive, sullen, seems somewhat indifferent with impaired judgment, and shows no remorse over conduct. Kent Test indicated his mental age was 10 years.

"Findings:

"4 e. If he could distinguish right from wrong concerning the particular acts charged, did such mental defect, disease or derangement prevent him from adhering to the right?

"A. No, although his ability to adhere to the right is not as strongly developed as is that of a normal individual" (R. 6).

The accused elected to remain silent.

4. It thus appears that at the place and time alleged in the Specification, Charge I, accused absented himself without proper leave from his organization and remained so absent until he was apprehended on the date alleged, over seven weeks later. Intent to remain permanently absent was inferable from the prolonged absence as well as from the circumstance of

apprehension. A further consideration warranting such an inference was the fact that accused so threw off all semblance of military control that he committed robbery not only upon a fellow soldier but also of government property. Conviction of desertion in violation of Article of War 58 was proper (MCM, 1928, par. 130a).

It also appears with respect to Specification 1, Charge II, that at the place and time alleged accused took and carried away a watch, the property of Technician Fifth Grade Wayne E. Farrar, the person named in the Specification, under circumstances compelling the conclusion that it was done with the fraudulent intent to deprive the owner permanently of his property. The court was warranted in concluding the watch was of some value, as alleged, from the very nature of the article. Accused and his companions had threatened Farrar with firearms and effected the robbery of a truck load of flour from his presence immediately before the taking of the watch. Under the circumstances the victim was warranted in not objecting to or protesting the act. The court was justified in concluding the taking was by force and violence and by putting in fear, as alleged (MCM, 1928, par. 149f).

With respect to Specification 2, Charge II, the evidence shows that at the place and time alleged accused, acting in concert with others, threatened Technician Fifth Grade Wayne E. Farrar with firearms and, holding a firearm against his side, drove his truck loaded with flour to a small farmhouse some distance off a side road. There they detained him, accused menacing Farrar with a firearm while the other three took the truck away and returned some hours later without the flour. Accused, being a party to the joint venture, was responsible for the acts of his confederates in the attaining of their common aim which was shown to have been the theft of the truck load of flour. That the flour was property of the United States and of some value was properly inferable from the nature of the commodity and the circumstances of the case. It is not necessary in order to constitute robbery that the property be taken from the owner, it being sufficient if the taking is by force and violence or putting in fear, and from the presence of the person alleged to have been robbed. All elements of the offense charged appear in or are properly inferred from the evidence (MCM, 1928, par. 149f).

5. The charge sheet shows that accused is 22 years of age and that he enlisted in the Army 3 December 1940. No prior service is shown.

6. The court was legally constituted. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 463, Title 18, United States Code.

Robert N. McKay, Judge Advocate.

Whitney P. Gibson, Judge Advocate.

Henry C. Merrick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
24 August 1944.

Board of Review

NATO 2892

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 17 May 1944.
Private CARMINE G. DELLA VECCHIA	)	Dishonorable discharge and
(32 805 210), attached to	)	confinement for 20 years.
Headquarters Detachment, 29th	)	U. S. Penitentiary, Lewisburg,
Replacement Battalion, 2d	)	Pennsylvania.
Replacement Depot.	)	

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 93d Article of War.

Specification 1: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, 2nd Replacement Depot, did, at Naples, Italy, on or about 30 January 1944, with intent to commit a felony, viz, robbery, commit an assault upon Mario Frontera, by willfully and feloniously pointing a small arms weapon toward the said Mario Frontera.

Specification 2: (Motion for finding of not guilty sustained.)

Specification 3: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, 2nd Replacement Depot, did, at Naples, Italy, on or about 30 January 1944, with intent to commit a felony, viz, robbery,

commit an assault upon Silvestrini Salvatore, by willfully and feloniously pointing a small arms weapon toward the said Silvestrini Salvatore.

Specification 4: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, 2nd Replacement Depot, did, at Naples, Italy, on or about 30 January 1944, with intent to commit a felony, viz, robbery, commit an assault upon Elena Fava, by willfully and feloniously pointing a small arms weapon toward the said Elena Fava.

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

Specification: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, 2nd Replacement Depot, did, without proper leave, absent himself from his station at Bagnoli, Italy, from about 22 December 1943 to about 30 January 1944.

ADDITIONAL CHARGES

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

Specification: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, did, without proper leave, absent himself from his station at 262nd Station Hospital, near Aversa, Italy, from about 16 February 1944, to about 24 February 1944.

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

Specification: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, having been duly placed in confinement in Peninsular Base Section Stockade on or about 30 January 1944, did, at 262d Station Hospital, near Aversa, Italy, on or about 16 February 1944, escape from said confinement before he was set at liberty by proper atuhority.

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

Specification: In that Private Carmine G. Della Vecchia, Headquarters Detachment, 29th Replacement Battalion, did, in conjunction with Private Maurice E. Aud, at Naples, Italy, on or about 23 February 1944, by force and violence and by putting them in fear, feloniously take, steal, and carry away about Eighty-one Hundred Italian lire (8100) from the person of Mario Sorrentino, about Ten Thousand Itali(a)n lire (10,000) from the person of Berti Cesare, about Forty-eight Hundred Italian lire (4800) from the person of Blandina Scotto di Tella, about Sixty Thousand One Hundred and Fifty

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Italian lire (60,150) from the person of Nazzaro Raffaele, and about Twelve Thousand Italian lire (12,000) from the person of Pagnozzi Adolfo, the property of such persons, respectively, of an aggregate value of about Nine Hundred and Fifty dollars and Fifty cents ($950.50).

Accused pleaded not guilty to the Charges and Specifications. On motion by the defense he was found not guilty of Specification 2, Charge I. He was found guilty of the Charges and other Specifications except, as to the Specification of Additional Charge III, the words, "them in fear, feloniously take, steal and carry away about Eighty-one Hundred Italian lire (8100) from the person of Mario Sorrentino, about Ten Thousand Itali(a)n lire (10,000) from the person of Berti Cesare, about Forty-eight Hundred Italian lire (4800) from the person of Blandina Scotto di Tella, about Sixty Thousand One Hundred and Fifty Italian lire (60,150) from the person of Nazzaro Raffaele, and about Twelve Thousand Italian lire (12,000) from the person of Pagnozzi Adolfo, the property of such persons, respectively, of an aggregate value of about Nine Hundred and Fifty dollars and Fifty cents ($950.50)."; substituting therefor the words, "him in fear, feloniously take, steal, and carry away about Eight Thousand Italian lire (8,000) from the person of Berti Cesare, the property of such person, of a value of about eighty dollars ($80.00)", of the excepted words, not guilty, of the substituted words, guilty. Evidence of three previous convictions by summary courts-martial, two for absence without leave in violation of Article of War 61 and one for entering a restricted area in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. There is evidence with respect to Charge I and Specifications 1, 3 and 4 thereunder that about 27 January 1944 accused and another soldier with whom he was living in an apartment, not furnished by the Army, were approached by a civilian who suggested that they assist him in robbing some "black market" people (R. 9,12). It likewise appears that about 1400 hours 29 January 1944 accused and two other American soldiers accompanied the civilian to an apartment in Naples which they entered, accused armed with an automatic weapon which had been furnished by the civilian, and some of the group wearing "MP bands". In the apartment there were about 20 civilians engaged in gambling. Accused, speaking in very good Italian, told the group in the apartment "If you move, I will just shoot you". (R. 9-11,13,14) Among the group of civilians were Mario Frontera, Silvestrini Salvatore and Elena Fava (R. 12-14). Accused, holding the gun, sat on a table and watched while one of his companions searched the civilians (R. 10,13). General Prisoner Joseph Doglione, Peninsular Base Section stockade, testified he "patted the people down to see if they had weapons" but that they took nothing and "had decided to leave the place without doing anything" when "the MP's came in" (R. 10).

Mario Frontera testified that Doglione searched the civilians "to see if

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they had any money or anything on them", that the American soldiers "touched them near the suit, but they didn't put their hands in the pocket", and that when the military police came in accused ran into another room and threw away the gun (R. 13). Asked if accused pointed the pistol at anyone, witness replied that, "It was in general" (R. 14). Doglione testified that accused, who had been holding the weapon at his side all of the time, turned it over to witness after 20 or 25 minutes, and that accused did not raise it except when so turning it over (R. 11,12).

The evidence with respect to Charge II and its Specification shows that the morning reports of accused's organization, evidenced by an extract copy thereof, carried accused "Duty to Awol" as of 22 December 1943 and "Awol" to confinement as of 30 January 1944 (R. 8; Ex. 1).

The evidence with respect to Additional Charges I and II and their Specifications shows that on 16 February 1944 when accused was a prisoner, confined in the confinement ward of the 262d Station Hospital (near Aversa, Italy) and a member of the Detachment of Patients, he absented himself therefrom before he was set at liberty by proper authority and without proper leave. The confinement ward was under guard maintained by the "P.B.S. Stockade" and was barred throughout (R. 16,17). Accused had previously been transferred to the hospital from the Peninsular Base Section stockade (R. 15, 16).

The evidence with respect to Additional Charge III and its Specification shows that on 23 February accused and a companion, who was armed with a gun, entered a private home in Naples where Berti Cesare and a group of ten or twelve people were present. Mr. Cesare testified one of the two said "Hands up. Take all your money and put it on the table", that accused took about 8,000 or 8,500 lire from witness, and that "after they took all the money and they took jewelry and things, rings belonging to them and they stepped out." Accused was not armed. (R. 17,18)

An agent of the North African Theater of Operations Criminal Investigations Division testified that after he warned accused that he need not make a statement, and if he did volunteer to do so whatever he said could be used "for or against" him in the event of trial, accused signed a statement on 31 January 1944, which was received in evidence (R. 15) and reads as follows:

> "Both Pvt. Jos. Diaglione and I were AWOL from Co. D, 29th Repl. since Dec. 20, 1944. We rented a room at 9 Via Baglivo. We met Andrew Sund, AWOL from our company, about 3 weeks later. He slept occasionally at our room. About 5 days ago, the three of us met an Italian civilian named Luciano in Gallo's cafe near the foot of Via Roma. He asked where we lived. Two days later, in our room, he suggested we rob a gambling house. Sund and I gave him $65 to buy guns, the money to be returned later. Luciano brought us an Italian Beretta and an English automatic containing live cartridges. We agreed to rob the gambling joint when Luciano said the time was right. Luciano came on Saturday, and suggested Sunday, around 4:00 P.M. On

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Sunday, leaving the room, Luciano carried both weapons. Entering the gambling joint, I carried the Beretta and Sund the English pistol. About 20 people were gathered around a roulette table. Diaglione shouted in Italian, 'Everybody put their hands in the air,' and Sund and I displayed the guns. Luciano stayed and watched at the front door. Diaglione frisked about 10 persons, and then took my gun. Before I began searching, M.P.'s entered the room and caught Sund and Daglione in the room. I escaped temporarily by hiding on a balcony, but was caught a half hour later about a half block away from the place" (Ex. 2).

Another agent of the same department testified that after accused

"was told that it was his right under the 24th Article of War to make a statement if he desired, or not to if he wished, and that if he did make a statement, anything he said would be used for him or against him as the case would be",

accused signed a statement dated 29 February 1944 (R. 21). The statement, which was admitted in evidence (R. 22), reads as follows:

"On or about 1800 hours, on 17 February 1944, I escaped from the PBS Stockade. I slept in a haystack of a farm in Aversa that night. I was dressed in pajamas. I called over a soldier whom I did not know and I asked him for some G.I. clothes. After receiving the american G.I. clothes I went to Naples. I then went to a civilians home whom I knew. I obtained civilian clothes which I wore over my G.I. clothes. At my friends house I obtained a civilian identification card from one Pasquale Russo. This card bore my picture in civilian clothes. On the 22 February 1944, I met an american soldier Maurice and I met him through a civilian known as Alberto. Alberto told me he knew an american soldier who had held up people. Alberto also told me that he (Alberto) knew of a civilians home where a game of poker was going on that could be robbed easily. Alberto told me that he would help rob the place, so he arranged an introduction between Aud and I. On or about 1930 hours, on 23 February 1944, Alberto and another civilian whom I do not know brought Pvt. Aud and I to the 5th floor of #7 Anzio Porto Galleria. The two civilians waited downstairs while Aud (who was armed with a 45 automatic) and I went to the 5th floor of the above mentioned building and held up and robbed about 25 or 30 civilians. Pvt. Aud held the civilians at bay with a 45 automatic while I spoke to the civilians in Italian and I told them to put their wallets on the table. I then took the money out of the wallets and put the money in a pillow case which I carried with me. I then

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took one (1) ring, and (2) watches from two people and put them in the pillow case also. I then told the people to turn around and face the wall for five (5) minutes. Aud and I then left and joined the two civilians downstairs. We then walked three or four blocks went into a building to the top floor and received $120.00 apiece. We were supposed to divide the money in the morning I then slept there in the hallway. In the morning I went back to the home where I was staying. I was then picked up by the M.P.'s" (Ex. 3).

This witness testified that accused told him that "this incident" took place in Naples, Italy (R. 22).

Accused elected to remain silent.

4. It thus appears from the evidence, including accused's statement dated 31 January 1944, that at the place and time alleged in Specifications 1, 3 and 4 of Charge I accused in company with three confederates, pursuant to a prearranged plan to commit robbery, entered an apartment in which there then were about 20 people, including the persons named in the three Specifications. Accused menaced the group generally with an automatic weapon saying, "If you move, I will just shoot you", while one of his confederates searched the occupants of the apartment. It is indisputable that accused assaulted each of the persons present; that he did so with a concurrent intent to commit the offense of robbery is conclusively shown by the uncontradicted evidence and accused's statement. All elements of the offense are established (MCM, 1928, par. 149l).

It likewise appears from the evidence, including accused's statement dated 31 January 1944, that at the place and time alleged in the Specification of Charge II accused absented himself from his station without proper leave and remained so absent until 30 January 1944. Though it does not appear that the offense occurred at Bagnoli, Italy, this omission was immaterial (NATO 1715, Kinlow). All elements of the offense are established by the evidence and accused was properly found guilty of violation of Article of War 61 (MCM, 1928, par. 132).

With respect to Additional Charge I and II the evidence, including accused's statement of 29 February 1944, shows that at the place and time alleged accused absented himself from his station without proper leave and remained so absent, as alleged. At the time accused absented himself he was a prisoner of the Peninsular Base Section stockade, duly placed in arrest, and confined in the confinement ward of a hospital which was under guard maintained by that stockade, and barred throughout. Accused, by leaving, both absented himself without proper leave from his station in violation of Article of War 61 and escaped from confinement in violation of Article of War 69. Both findings were warranted by the evidence (MCM, 1928, pars. 132,139b).

With respect to Additional Charge III the evidence, including accused's statement of 29 February 1944, shows that at the place and time alleged

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accused and an accomplice armed with a gun, acting jointly and in furtherance of a common design, took from Berti Cesare, a person named in the Specification, 8,000 or 8,500 lire, property of Cesare. That the lire was of the value found by the court was warranted and that accused had the fraudulent intent to deprive the owner permanently of his property was manifest both from the testimony of Cesare and from accused's statement. The larcenous taking was committed with a showing of force and violence and it is inferable from the circumstances that it was accomplished by putting Cesare in fear. All elements of the offense of robbery, in violation of Article of War 93, were amply shown by the evidence (MCM, 1928, par. 149f).

Accused was charged with robbing Cesare of about 10,000 lire, but in conformity with the evidence the court by exceptions and substitutions properly found accused guilty of robbing Cesare of about 8,000 lire.

5. At the close of the trial the defense moved

> "for a finding of not guilty on specifications two, three and four of Charge I on the Charge Sheet dated 20 February 1943, on the grounds that said specifications are a multiplication of charges, as specified in Specification one, and also on the grounds that specification one is the only specification to which proof has been submitted to the court" (R. 22).

The court granted the motion with respect to Specification 2 but denied it as to Specifications 3 and 4. In view of the sentence as approved it is needless to consider whether these Specifications constituted an improper multiplicity of charges.

6. The charge sheet shows that accused is 34 years of age, was inducted into the Army 13 February 1943, and had no prior service.

7. The court was legally constituted. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 463, Title 18, United States Code.

Donald W. MacKay, Judge Advocate.

Mortimer G. Lemi, Judge Advocate.

Henry C. Pelnick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
20 September 1944.

Board of Review

NATO 2893

UNITED STATES	)	FIFTEENTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at APO 520, U. S. Army, 20 June 1944.
Private WILLIAM C. KOPETCHNY (33 353 838), 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy).	)	Dishonorable discharge and confinement for eight years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 C. Kopetchny, 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy), then Staff Sergeant, 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy), did, at Grottaglie, Italy, on or about 2 March 1944, misbehave himself before the enemy by refusing to participate in an aerial flight with his command which had then been ordered airborne by Captain, William C. Nosker, Commanding Officer, 718th Bombardment Squadron (Heavy) 449th Bombardment Group (Heavy) to engage with and conduct a bombardment mission against the enemy, which forces the said command was then opposing.

Specification 2: In that Private William C. Kopetchny, 718th Bombardment Squadron (Heavy), 449th Bombardment Group

(Heavy), then Staff Sergeant, 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy), did, at Grottaglie, Italy, on or about 3 March 1944, misbehave himself before the enemy by refusing to participate in an aerial flight with his command which had then been ordered airborne by Captain, William C. Nosker, Commanding Officer, 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy) to engage with and conduct a bombardment mission against the enemy, which forces the said command was then opposing.

He pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight 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 under Article of War 50½.

3. The evidence shows that on the dates alleged in the Specifications, the 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy), of which accused was a member, was located about 200 air miles behind the front lines at Grottaglie, Italy (R. 5,8). On 1 March 1944 accused was assigned and alerted as a member of a crew scheduled to participate in a combat mission against the enemy over enemy territory the following morning (R. 5,6,8, 9,11). Accused was awakened by the chief operations clerk an hour before briefing time, which was 0530 hours, on the morning of 2 March 1944 but did not participate in the assigned mission. At the last moment a replacement was secured and the crew to which accused had been assigned flew a combat mission against the enemy over enemy-occupied territory. (R. 5,8,9,11)

The afternoon of 2 March 1944 accused informed Major (then Captain) William C. Nosker, his squadron commander, he "didn't want to fly", and was ordered to report to the squadron surgeon (R. 5,6,8). About 1830 hours the same day, after having consulted the squadron surgeon and also the chaplain, accused advised his squadron commander he "would fly" to which the squadron commander replied: "Private Kopetchny we will assign you on a flight since you have decided you can fly". Accused was again alerted and assigned as a member of a crew scheduled to fly a combat mission against the enemy over enemy territory the following day. (R. 6,8-11) When awakened by the chief operations clerk the following morning accused "definitely refused to fly" saying he was "afraid", he "just couldn't go" and that "fear kept him up", he had not rested all night, and the "more he thought, the more he felt that he couldn't fly" (R. 12). Accused did not participate in the flight, a replacement was secured, and the flight took off but later returned because of weather conditions (R. 5,10). While the flight was airborne accused advised his squadron commander he "would not fly" but gave no reason (R. 7). Accused was advised by his squadron commander that he would be court-martialed and replied he would take the consequences (R. 7). Out of about 20 previous missions flown by the squadron, accused had participated in about 13 (R. 7).

The squadron operations officer testified that on the morning of 3 March 1944, after receiving a report from the chief operations clerk, he went to accused's tent where he found accused in bed. Witness then testified:

> "I asked him if he would fly. He answered, 'No.'. I then asked him if he realized the consequences of not flying. He said that he did, and said he would just have to take them. I repeated the statement again, if he knew the consequences of not flying. He again refused, and I left the tent." (R. 10.)

Witness testified further that accused "simply stated, 'I can't fly'" and offered no reason (R. 8-10).

The chief operations clerk testified it was his duty to wake the crews and get them up for briefing and that he awakened accused an hour before briefing time at 0530 hours on the morning of 2 March 1944, and also alerted him that evening for a flight the following day (R. 11).

A member of the flight evaluation board of the 449th Bombardment Group testified accused was brought before the board on 22 March 1944 and asked why he refused to fly on two combat missions (R. 13,14) and

> "He wouldn't give any definite reason. He just said he refused to fly. We asked him to explain himself. We told him we were there to help him, that he could present his side of the story. We were trying to see it his way. He gave no explanation. He just said he wouldn't fly anymore" (R. 13).

Witness testified further that accused was asked "what he thought would happen if he refused to fly" and that accused replied he thought he would be court-martialed and sentenced to from three to five years at hard labor and given a dishonorable discharge (R. 13).

The president of the flight evaluation board testified accused upon being asked if he would be willing to fly again replied he would not, and further:

> "He was asked what his reasons were. He was not very clear, mainly that he was worried, and further interrogation brought out what he was worried about. He was worried about his wife. However, we didn't find any specific reason for his refusal to fly" (R. 15).

The squadron surgeon testified that accused did not report to sick call on 2 March 1944 but saw witness after he was ordered to. Witness testified accused stated:

> "***he got into flying not because he wanted to particularly;

> but because he desired to avoid duty like K.P. and along those lines. At that time, too, I found out he had difficulty in previous squadrons" (R. 16),

and further:

> "At that time he also stated that he was having, not that he was having; but that he was worrying about certain things happening at home, and other worries due to his religion, besides he was having a fear of flying, and was perturbed by the recent loss of his crew. I found, also, that he had done very little high altitude flying, and that because he had certain religious differences in his family, he was having a fear of death because of the infractions of these religious feelings and differences in this mixture of marriage" (R. 16,17).

This witness testified further that accused's worries were sufficient to be the basis of anxiety neurosis and that

> "Signs of anxiety neurosis are usually trembling, unusual sweating of the palms, trembling of the hands, dilation of the pupils, stumbling speech, a general appearance of tension" (R. 17),

and further:

> "In one instance on February 22, 1944, I have in my Squadron Medical records a history that he returned from a flight early because of abdominal cramps. He stated that they started twenty (20) minutes after takeoff, and that he could control them for a little while; but they got worse and they had to return after one hour of the flight. He also stated that he hadn't eaten a full meal for two days because of no appetite. So he showed two of these signs previously" (R. 17).

Witness testified further that when he examined accused on 2 March 1944 accused did not show any signs or any symptoms normally associated with anxiety neurosis (R. 18). Witness testified further that accused saw him on 3 March 1944 but did not attend sick call and did not consult him concerning any symptoms or signs of anxiety neurosis. Asked what accused consulted him about, witness replied:

> "He came up to me saying that he was scheduled to fly; but he refused to saying he would rather undergo a court-martial than fly again". (R. 18)

Witness testified further that accused revealed his crew had been lost on a day when he himself was grounded and as a result he experienced a feeling of guilt (R. 23,24).

A psychiatrist, admitted by defense to be qualified, testified he examined accused on 12 March 1944 and that:

> "Well, Sergeant Kopetchny talked about and stated that he had considerable fear in connection with his combat flying. He was afraid he might be killed or that he might be injured. Those are normal fears of individuals, particularly in combat, they do have fears of this kind. I felt as a result of my talk with him that those fears were not excessive. I felt that they were present; but not to an unusually severe degree. Frequently the men will joke about it to relieve the tension. You can tell from his bearing, his manner, and his words that he has a certain amount of anxiety. You can usually tell from his manner whether he is perturbed. Like for instance, a person may be composed. One person may talk in a more composed manner than a person that is perturbed about something. In this case there were evidences of some anxiety; but not of the severe type. It is our policy, medically, that individuals are bound to have some anxiety, even when they are not actually flying. Anxiety during combat missions is present in practically everybody actually faced with danger. It increases when they leave the ground and decreases when they land. In this particular instance there was some anxiety present; but it was not to any very severe degree" (R. 29).

Witness testified further:

> "In my opinion, he was fit to continue in combat from all medical, or from a medical point of view" (R. 30),

and further

> "Well, the main thing about Captain Conway's report, was he listed these things that you have mentioned as sources for possible severe anxiety state. The result of my examination, going into the case, I didn't see much anxiety or very severe symptoms. Therefore, these things that might have been disturbing him, I didn't discover. I don't think that they had very serious or severe effect" (R. 32).

Accused elected to remain silent.

4. It thus appears from the evidence that on the dates alleged in Specifications 1 and 2 the 718th Bombardment Squadron (Heavy), 449th Bombardment Group (Heavy) of which accused was a member, was stationed at Grottaglie, Italy, about 200 air miles behind the front lines, where allied ground forces were engaged with the enemy. On the date alleged in Specifi-

cation 1 accused, after having been duly assigned and ordered by Major (then Captain) William C. Nosker, his squadron commander, to participate in an aerial combat mission against the enemy, failed to go on the flight. Accused's dereliction necessitated the securing of a replacement at the last moment. The scheduled mission was flown against the enemy and over enemy territory. Accused's only explanation was that he "couldn't fly". After consulting the squadron surgeon, pursuant to an order of the squadron commander, and also the chaplain, accused reported to his squadron commander that he "would fly", and was assigned to participate in an aerial combat mission against the enemy the following day. The following morning, 3 March 1944, as alleged in Specification 2, accused refused to go on the mission, saying he was "afraid", which again necessitated the securing of a replacement. The flight on which accused was assigned took off on the scheduled mission but later returned because of weather conditions.

There is no suggestion in the evidence that accused was not properly alerted and equipped for both missions. The squadron surgeon, after examining accused, testified he did not show any symptoms normally associated with anxiety neurosis. A psychiatrist, admitted by the defense to be qualified, testified accused was fit to continue in combat. That accused himself was acutely aware of the gravity of his conduct was clearly shown by his statements that he would "just have to take" the consequences and he thought he would be court-martialed and sentenced to from three to five years confinement at hard labor and dishonorable discharge. The uncontroverted evidence together with the admissions of accused forecloses any inference other than that accused's conduct was motivated solely by normal fear.

Article of War 75 provides in pertinent part:

> "Any officer or soldier who, before the enemy, misbehaves himself***shall suffer death or such other punishment as a court-martial may direct."

It is clear that accused's conduct, as shown by the uncontroverted evidence, constituted misbehavior (NATO 1614, Langer). The sole remaining question is whether, at the time of his derelictions, accused was "before the enemy" within the purview of Article of War 75.

The Manual for Courts-Martial, 1928, Paragraph 141a, in discussing Article of War 75, provides in pertinent part:

> "Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire."

Article of War 42 of the Code of 1874, partial predecessor of the

present Article of War 75, provided:

> "ART. 42. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct."

Commenting on the phrase "before the enemy", Winthrop says:

> "It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood, though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehavior committed will be 'before the enemy' in the sense of the Article."

And further:

> "Such acts by <u>any officer or soldier</u>, as--refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy" (Winthrop's, reprint, pp. 623,624).

The Board of Review (Washington) has held:

> "Actual engagement with the enemy at the time of the commission of the offense is not an essential prerequisite to conviction under A. W. 75, so long as there was a real 'contact with the enemy,' as the term is reasonably used" (Dig. Op. JAG, 1912-40, sec. 433 (2), quoted with approval in NATO 1186, Holmes).

And in another case:

> "Whether a person 'is before the enemy,' is not a question of definite distance; rather it is a question of tactical relation. It is not always a question of actual contact with the enemy, but exists also where the tactical

influence is exerted by reason of the fact that the presence in a particular place may be reasonably supposed to affect the movements of the enemy in a fairly short space of time" (Dig. Op. JAG, 1912-40, sec. 433 (2)).

A recent case somewhat analogous to the instant case in that it involves a failure to debark on a mission contemplating contact with the enemy is digested in the following words:

"Accused was found guilty of misbehaving himself before the enemy in violation of A.W. 75. At the appointed time for debarkation from a transport with his organization which was to land on a beach where stiffening resistance was expected, accused pretended to have lost his helmet, and although another helmet was promptly obtained for him he deliberately avoided debarkation by separating himself from his unit. Later, on the same day, he again failed to disembark with a mess detail which had temporarily remained on the transport. The accused disembarked on the day following but remained absent from his organization until he surrendered at a 'Stragglers collection point,' approximately 13 days later. Held: The record is legally sufficient to support the findings and sentence. The record shows that the misbehavior of the accused involved no mere sudden or temporary panic but rather a deliberate and relatively protracted evasion of a known and imminent danger which his duty as a soldier required him to face. CM 243319 (1943)" (Bull. JAG, March 1944, sec. 433 (2)).

Likewise a specification alleging that the accused abandoned his company when it was about to be engaged with the enemy has been held sufficient to charge a violation of Article of War 75 (Dig. Op. JAG, 1912-40, sec. 433 (1)).

Under the principles announced in the quoted authorities and applied in the above cases, the question of whether at the time of a dereliction an accused is before the enemy within the purview of Article of War 75 must be determined from a consideration of the existing tactical situation. The distance of accused from the enemy is relatively unimportant so long as contact with the enemy exists or is imminent.

It becomes pertinent therefore to analyze the tactical relation existing at the place and time of accused's derelictions in the instant case. The heavy bombardment squadron of which he was a member was stationed at an advanced air base. Only 200 air miles, about 40 minutes flying time, from this base allied ground troops were locked in battle with the enemy. As a coordinated operation, the mission was one which would have brought accused forward within a relatively short period of time. The distance, by this method of attack, was therefore of minor significance. On two successive days accused was duly alerted and ordered to participate in aerial combat missions against the enemy over enemy territory and it may be reasonably inferred

that within 40 minutes after the take-off on such missions accused would have been over enemy territory and in actual combat. That accused so evaluated the situation may be inferred from the fact that he gave fear as the only reason for his conduct. Considered in the light of aerial warfare operations in the present war a heavy bombardment squadron located within 200 air miles, or about 40 minutes flying time, from a front is, for all practical purposes, on the front. For obvious reasons such units are not located at the front lines. From such bases airplanes strike directly at the enemy. Such bases are the springboards for aerial assaults. Taking off from such a base on a combat mission against the enemy is the aerial counterpart of the action of ground troops leaving their positions for immediate attack. It is difficult to conceive how accused's heavy bombardment squadron could, consistent with reason, have been located so that he would be any more "before the enemy".

The precise point of time when accused's status as a participant in a tactical operation against the enemy became first fixed is of but academic interest and need not be determined by the Board. Upon the allegations of the specification in each instance and the evidentiary facts disclosed, it suffices to say that accused's failure to embark on the bomber at the scheduled time for departure on the mission constituted misbehavior before the enemy.

It is therefore the opinion of the Board that upon all the facts and circumstances accused was properly found guilty of the alleged offenses under the 75th Article of War. The misbehavior of accused in each instance was clearly established. It consisted of a fear-induced purpose to avoid a known and imminent danger incident to an active tactical movement against the enemy. The principle seems sound that a member of a bomber crew at an advanced airbase who has been ordered to participate in a bombing mission then in immediate prospect and purposed to coordinate with and support ground forces then engaged in combat with the enemy, is "before the enemy" within the purview of Article of War 75.

5. Declarations made by accused before the Flight Evaluation Board were, without objection by defense, related by two prosecution witnesses, members of the board. There was no affirmative showing that prior to making these declarations accused was informed of his rights under Article of War 24, or that they were voluntary. If error was committed in the admission of such testimony it was harmless and could not have injuriously affected the substantial rights of accused in view of the fact there is in the record other substantial, competent, unequivocal and uncontroverted evidence clearly establishing the alleged derelictions.

6. The charge sheet shows accused is 23 years of age. He was inducted into the Army 12 September 1942 and had no prior service.

7. The court was legally constituted. 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 and the sentence.

Ronald K. MacBay, Judge Advocate.
Mortimer Rothman, Judge Advocate.
Henry C. Kenick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
9 August 1944.

Board of Review

NATO 2894

UNITED STATES	)	FIRST ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 251, U. S. Army, 17 June
Private HENRY K. WILLIAMS	)	1944.
(34 054 092), Headquarters	)	Dishonorable discharge and
and Headquarters Company,	)	confinement for 30 years.
1st Battalion, 6th Armored	)	Eastern Branch, United States
Infantry.	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Henry K. Williams, Private, Headquarters and Headquarters Company, First Battalion, Sixth Armored Infantry, did, without proper leave, absent himself from his organization at St Barbe du Tlelat, Algeria, North Africa from about September 24, 1943 to about November 3, 1943.

Specification 2: In that Henry K. Williams, Private, Headquarters and Headquarters Company, First Battalion, Sixth Armored Infantry, did, without proper leave, absent himself from his organization near Villa Volturno, Italy from about December 16, 1943 to about January 8, 1944.

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

Specification 1: In that Henry K. Williams, Private, Headquarters and Headquarters Company, 1st Battalion, 6th Armored Infantry, did, on about February 22, 1944 enter the city of Naples, Italy, without an official pass, this in direct violation of Circular Number 43, Headquarters Fifth Army, dated December 27, 1943.

Specification 2: In that Henry K. Williams, Private, Headquarters and Headquarters Company, 1st Battalion, 6th Armored Infantry, was at Naples, Italy, on or about February 22, 1944, drunk in uniform in a public place, to wit: Naples, Italy.

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

Specification 1: In that Henry K. Williams, Private, Headquarters and Headquarters Company, 1st Battalion, 6th Armored Infantry, did, near Bagnoli, Italy on or about March 28, 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: Combat duty, and did remain absent in desertion until he was returned to military control at Santa Maria, Italy on or about March 30, 1944.

Specification 2: In that Henry K. Williams, Private, Headquarters and Headquarters Company, 1st Battalion, 6th Armored Infantry, did, near Anzio, Italy on or about April 3, 1944, desert the service of the United States by absenting himself without proper leave from his organization near Anzio, Italy, with intent to avoid hazardous duty, to wit: Combat duty, and did remain absent in desertion until he was apprehended at Capua, Italy on or about April 6, 1944.

He pleaded guilty to Charge I and Charge II and the Specifications thereunder, not guilty to Charge III and the Specifications thereunder, and was found guilty of the Charges and Specifications. Evidence of four previous convictions, three by summary courts-martial, two for absence without leave in violation of Article of War 61 and one for being drunk in uniform in a public place in violation of Article of War 96, and one by special court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 30 years, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence with respect to Specification 1, Charge I, shows that accused, a member of Headquarters and Headquarters Company, 1st Battalion, 6th Armored Infantry, absented himself without proper leave from that organization on 24 September 1943, when it was located east of "St Barbe",

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Algeria, and remained so absent until 3 November 1943 (R. 6,7; Ex. A).

The evidence with respect to Specification 2, Charge I, shows that accused absented himself without proper leave from his organization on 16 December 1943 in Italy after it had moved north of the Volturno River near Balona and remained so absent until 8 January 1944 (R. 6,8; Ex. A).

The evidence with respect to Specification 1, Charge II, shows that on 22 February 1944 accused was on Via Arenaccia in Naples, Italy, and did not have a "Naples" pass or a pass from his organization (Exs. D,E).

The evidence with respect to Specification 2, Charge II, shows that on 22 February 1944 accused was drunk while in uniform on Via Arenaccia, Naples, Italy. Two military policemen testified by deposition that they found accused sitting down, too drunk to stand and a number of people congregated about (Exs. D,E).

The evidence with respect to Specification 1, Charge III, shows that on 28 March 1944 accused's regiment was on the Anzio beachhead and was from time to time committed to combat. On that date accused was one of a group of prisoners that were placed on board an "LST" for transportation to the Anzio beachhead. When Second Lieutenant James E. Bacon, 68th Field Artillery, the officer in charge, checked the group, accused was present. This officer testified that he was sure all of the prisoners knew they were going to the Anzio beachhead. After receiving a report from a guard that accused was missing, witness made a search of the "LST", which was still at dock, but accused was not then on board and did not accompany witness to Anzio (R. 8-10; Ex. A). Two noncommissioned officers, whose testimony was admitted by stipulation, testified accused was on the "LST" under guard but was missing when the boat left (Exs. B,C). It was stipulated that accused was returned to military control at Santa Maria, Italy, on 30 March 1944 (R. 11).

The evidence with respect to Specification 2, Charge III, shows that on 3 April 1944, when accused was with his organization on the Anzio beachhead, it was committed to combat (R. 8,11). Accused remained with his organization approximately two hours and then absented himself without proper leave. Though searched for, for two and a half days, he was not found. (R. 12; Ex. A) It was stipulated that accused was apprehended at Capua, Italy, on 6 April 1944 (R. 11).

Accused elected to remain silent.

4. It thus appears from the evidence and from accused's pleas of guilty that at the places and times alleged in the Specifications of Charge I, accused absented himself without proper leave from his organization and remained absent as alleged. His conviction thereof in violation of Article of War 61 was proper and would alone sustain the sentence.

It also appears from the evidence and from accused's pleas of guilty that on the date alleged in the Specifications of Charge II accused entered

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the city of Naples, Italy, without a pass, in violation of competent orders, as alleged, and was there found drunk in uniform in a public place, as alleged, both being offenses violative of Article of War 96.

It also appears from the evidence that at the time alleged in each of the Specifications of Charge III, accused absented himself without proper leave from his organization. It was stipulated as to each that the absence terminated at the time and in the manner alleged. The evidence shows the absence alleged in Specification 2 commenced at the place alleged. Though there is no showing that the absence alleged in Specification 1 commenced at the place alleged, this failure of proof was immaterial (NATO 440, Gilbert; NATO 1279, Alex; NATO 1715, Kinlow).

Both absences alleged in Charge III occurred when accused's organization was on the Anzio beachhead and committed to combat with the enemy, manifestly hazardous duty. The absence set forth in Specification 1 commenced when accused was upon an "LST", under guard and in the company of other prisoners about to be taken to that beachhead. The officer in charge of the group testified he was sure that all of the prisoners knew where they were going. The absence set forth in Specification 2 commenced on the beachhead itself. The court was warranted in concluding, as it did, that at the time each absence commenced, accused had the intention of avoiding hazardous duty in violation of Article of War 58, as alleged.

5. A psychiatric report of an examination of accused, accompanying the record of trial, sets forth that "the soldier is not insane" and that while he could distinguish right from wrong and could adhere to the right "his ability to adhere to the right is be no means as strong as that of a normal individual", and contains the following:

> "Soldier states that he left the Beach-head for no reason. States he was drinking at the time and drinks whenever he gets a chance. He states that he has had over a dozen civilian arrests for drinking, over six Army arrest(s) prior to coming overseas, and over six court-martials since being overseas all for drinking. He says he never did any civilian work and wandered around the country, drinking and getting money from his father. *** Neurological examination is negative. Psychiatric examination shows patient is obstinent, sullen, uncooperative mentally, evasive, and apparently indifferent to others opinion. He feels he cannot stop drinking and makes no effort to do so, however, he seems to have no fear of combat conditions. Soldier impresses examiner as being a case of Constitutional Psychopat(h)ic State, Inadequate Personality with Chronic Alcoholism."

6. The charge sheet states that accused is 25 years of age. He was inducted into the Army 17 June 1941, and had no prior service.

7. The court was legally constituted. 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 and the sentence.

Donald K. MacRae, Judge Advocate.

Walter R. Tuer, Judge Advocate.

Henry C. Renick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
1 August 1944.

Board of Review

NATO 2896

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 10 June 1944.
	)	
Private EMORY A. HALE (33 142 181), 305th Quartermaster Railhead Company.	)	Dishonorable discharge and confinement for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Emory A. Hale, Three Hundred Fifth Quartermaster Railhead Company, having received a lawful command from First Lieutenant Harry E. Williams, Three Hundred Fifth Quartermaster Railhead Company, his superior officer, to report immediately to the company area, did at Naples, Italy, on or about 22 April, 1944, willfully disobey the same.

CHARGE II: Violation of the 65th Article of War.

Specification 1: In that Private Emory A. Hale, Three Hundred Fifth Quartermaster Railhead Company, did, at Naples, Italy, on or about 22 April, 1944, behave in a disrespectful manner toward Corporal Morrell C. Bates, Three Hundred Fifth

Quartermaster Railhead Company, a noncommissioned officer, who was then in the execution of his office, by calling him, "a Son-of-a-Bitch, Mother-Fucker and a Damn Corporal," or words to that effect.

Specification 2: In that Private Emory A. Hale, Three Hundred Fifth Quartermaster Railhead Company, did, at Naples, Italy, on or about 22 April, 1944, strike Corporal Morrell C. Bates, Three Hundred Fifth Quartermaster Railhead Company, a noncommissioned officer, who was then in the execution of his office, by striking him on the arms and chest with his fists.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of five previous convictions, one by special court-martial for wrongfully driving a vehicle in violation of Article of War 96, one by summary court-martial for speeding in excess of 20 miles per hour in violation of standing orders in violation of Article of War 96, one by special court-martial for absence without leave in violation of Article of War 61 and for wrongfully appearing in a public place in improper uniform in violation of Article of War 96, one by summary court-martial for absence without leave in violation of Article of War 61, and one by summary court-martial for being drunk and disorderly in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven 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 under Article of War 50½.

3. The evidence shows that on 22 April 1944 accused was a member of the 305th Quartermaster Railhead Company, stationed at Naples, Italy (R. 6-9). First Lieutenant Harry E. Williams, Commanding Officer of the 305th Quartermaster Railhead Company, testified as follows:

"On or about the 22nd of April at about 1945 hours while inspecting the company area outside my dump, I came upon Emory Hale who was outside the area without authority and in improper uniform. He was dressed in fatigues. I ordered Private Hale twice to go immediately to the company area and he refused. I went into the company area and got Corporal Bates, acting Sergeant of the Guard, and told him to accompany me outside the company area and that Private Hale who was out there had refused to obey my order. With Corporal Bates with me I ordered Private Hale three times to report immediately to the company area. He refused. He started to voice his opinions as to his rights, everybody else's rights and how the company should be run. Corporal Bates asked Private Hale to go with him into the company area. He refused. He (Corporal Bates) took his arm gently to lead him into the company area and he (accused) jerked away. He (accused) told him (Bates) to not mess with him. Corporal Bates took his (accused) arm again to lead him into the company area and he attempted to jerk away from him. Corporal Bates tightened his grip and Private Hale struck at him several

times flaying him on the chest and stomach and arms with his fists and arms and he (accused) called him (Bates) a mother fucker, son-of-a-bitch and no goddam good Corporal, mother fucking Corporal and anything that he (accused) could think of along those lines" (R. 8).

Corporal Morrell C. Bates, 305th Quartermaster Railhead Company, testified that he was corporal of the guard on 22 April 1944, that Lieutenant Williams ordered accused "to go to the camp", and that accused "said he wasn't going in and there wasn't anybody going to carry him in". Thereupon Lieutenant Williams "ordered him in" and asked witness "to carry him in. So, I caught him by the arm and asked him to go to the area. He pulled away. He hit me in the side with his elbow and pulled away and struck me a couple of times" with his arms, "once on the arm and face and in the chest". Accused cursed witness, calling him a "son-of-a-bitch, mother fucker, no good Corporal". Witness did not know what condition accused was in at that time; he detected no indication of intoxication and observed that accused "seemed to be sober". (R. 6,7).

Accused testified:

"On the evening of the 22nd of April, I finished my work and was on the outside of the area; it was 20 yards from the main entrance which no one ever uses to go out and get guard's orders. They had a little hole in the wall as you go through straight out in the street. Lieutenant Williams came up the street and told me to go inside there fast as I can. I started straight to the hole. While I was on the way to the hole, I stopped, before I went in. In the meantime Lieutenant Williams was up the street after another soldier. He went back in. When I saw him again, he had Corporal Bates with him. Corporal Bates was going to carry me but I shook him off but I didn't hit him" (R. 9).

He testified that he had been drinking, had had two or three bottles of cognac and was "pretty well intoxicated". He did not remember Corporal Bates "telling anything". (R. 10)

4. It thus appears from the uncontradicted evidence that at the place and time alleged in the Specification, Charge I, accused was ordered by First Lieutenant Harry E. Williams, his commanding officer, to report immediately to the company area and that accused refused to do so, persisting in his refusal until he was brought under the physical control of a non-commissioned officer. Lieutenant Williams was accused's superior officer, his command to report immediately to the company area was a legal and proper one, and accused's refusal to comply therewith constituted willful disobedience, in violation of Article of War 64.

It further appears from substantial evidence that at the place and time alleged in the Specifications, Charge II, accused called Corporal Morrell C. Bates a "son-of-a-bitch", a "mother fucker" and a "no Goddamn good Corporal",

or similar words, and struck Corporal Bates on the chest and arms with his fists. Accused was improperly outside the company area, had refused to obey his commanding officer's order to return to the area, and Corporal Bates, who was acting under the orders of the company commander in attempting to bring accused within the area, was manifestly in the execution of his office. Accused's conduct in addressing and striking Corporal Bates as he did constituted violations of Article of War 65.

Accused testified that he was drunk but Corporal Bates detected no signs of intoxication. The court was justified in rejecting accused's assertion and in finding that his conduct was willful and deliberate.

5. The charge sheet shows that accused is 26 years of age, and that he was inducted into the Army of the United States 18 February 1942. No prior service is indicated.

6. The court was legally constituted. 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 and the sentence.

Donald K. O'Mahoney, Judge Advocate.
Mortimer Rothman, Judge Advocate.
Henry C. Klenick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
28 July 1944.

Board of Review

NATO 2911

UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, U. S. Army, 7 July 1944.
Private CLINE W. ROBINSON (39 826 623), Company H, 157th Infantry.	)	Dishonorable discharge and confinement for 40 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Cline W. Robinson, Company "H", 157th Infantry, did, near Caserta, Italy, on or about 1 April 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat duty against the Axis forces, and did remain absent in desertion until he was apprehended near Naples, Italy, on or about 14 June 1944.

Accused pleaded guilty to the Specification except the words "Desert" and "By absenting himself without proper leave from his organization, with intent to avoid hazardous duty to wit: combat duty against Axis Forces" and "In desertion" substituting for the first and third exceptions, respectively, the

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words "Absent himself without leave from" and "Without leave", to the excepted words not guilty, to the substituted words, guilty, and not guilty to the Charge but guilty to a violation of Article of War 61. He was found guilty of the Specification except the words "1 April 1944" substituting therefor the words "6 April 1944", of the excepted words not guilty, of the substituted words, guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 40 years, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. An extract copy of the morning report of Company H, 157th Infantry, was received in evidence (R. 6). It showed the following remarks:

"17 April 1944: '39826623, ROBINSON, Cline W., Pvt., Duty to AWOL 0700, 1 April 1944.'

"15 May 1944: '39826623, ROBINSON, Cline W., Pvt., AWOL for period of thirty days, dropped from rolls 1 May 1944.'

"23 June 1944: '39826623, ROBINSON, Cline W., Pvt. Returned to duty after having been dropped from rolls for AWOL'" (Ex. A).

Accused's platoon sergeant testified that about 1 April 1944 the organization "moved up from a secondary position to a position near Padiglione" (on the Anzio Beachhead, Italy), where it was subjected to artillery and small arms fire and that accused remained with the organization "for awhile", but on 1 April 1944 went to a Caserta rest camp on a "regular five-day Caserta Pass". Witness testified that accused did not return from the rest camp at the expiration of the pass and that he next saw accused when he was "brought *** in" by two "MPs" about 14 June 1944. Witness also testified that when accused was so returned "we" were near Salerno, and that he did not know if anyone had given accused permission to "stay away". (R. 7-9)

Accused's acting squad leader testified that the company arrived in Padiglione, Italy, "a secondary position" on the Anzio beachhead, on 31 March 1944 and that artillery and small arms fire started when they got in the area. Witness testified that accused received a five-day pass to Caserta and left 1 April 1944, due back on 6 April 1944, but did not return to the company until 10 or 14 June 1944. Witness further testified the company stayed in the beachhead area about a month and then went to the vicinity of Salerno. Witness also testified he did not have any reason to believe the company would be removed from combat about 1 April 1944. (R. 10,11)

Accused elected to remain silent.

4. It thus appears from the evidence that on 6 April 1944 accused failed to return to his organization upon the expiration of a five-day pass. On 1 April 1944, when accused's pass began, he was with his company which was on the Anzio beachhead and being subjected to artillery and small arms fire. As accused's organization had moved into that forward area 31 March 1944 accused had reason to anticipate that on 6 April 1944 it would be still in a combat area, as in fact it was. Accused had been granted a pass to attend a rest camp at Caserta and when he failed to return to his organization on the proper date he became absent without proper leave from his organization. His intent to avoid hazardous duty as alleged can be inferred from the attendant facts and circumstances. The period of unauthorized absence as found by the court was established by substantial evidence. The place and manner of the termination of the absence was admitted by accused's plea (Dig. Op. JAG, 1912-40, sec. 416 (9)). The evidence supports the findings (NATO 1259, Crance).

5. In the review by the staff judge advocate it is stated,

> "The accused admits to three convictions by courts-martial although none were within the past year and could not therefore be considered by the present court. The fact that the accused deserted at the end of a pass shows him lacking in common appreciation. I find nothing to encourage a belief that the accused is possessed of the basic character requisite to becoming a good soldier."

From an inspection of the papers attached to the record it appears accused was absent without leave from 3 August 1942 to 15 August 1942, from 12 October 1942 to 31 January 1943 and from 25 July 1943 to 2 August 1943.

6. The charge sheet states that accused is 25 years of age and was inducted into the Army 6 April 1942. No prior service is shown.

7. The court was legally constituted. 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 and the sentence.

Donald W. MacBay, Judge Advocate.

Mortimer R. Snow, Judge Advocate.

Henry C. Heinrich, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
27 July 1944.

Board of Review

NATO 2912

UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, U. S. Army, 7 July 1944.
Private MANUEL M. VALENZUELA (38 010 708), Company B, 180th Infantry.	)	Dishonorable discharge and confinement for 55 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Manuel M. Valenzuela, Company B, 180th Infantry, did, at or near Venafro, Italy, on or about 20 November, 1943, desert the service of the United States, by absenting himself without proper leave from his company with intent to avoid hazardous duty, to-wit: combat operations against elements of the German Armed forces, and did remain absent in desertion until he was apprehended, at or near Naples, Italy, on or about 13 May, 1944.

Accused pleaded guilty to the Specification except the words "desert" and "by absenting himself without proper leave from his company with intent to avoid hazardous duty, to-wit: combat operations against elements of the German

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Armed Forces" and "In desertion" substituting for the first and third exceptions respectively, the words "absent himself without leave from" and "Without leave", of the excepted words not guilty, of the substituted words guilty, and not guilty to the Charge but guilty of a violation of Article of War 61. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 55 years, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. A certified extract copy of the morning report of Company B, 180th Infantry, was introduced in evidence showing that accused absented himself without proper leave therefrom 20 November 1943 and remained so absent until 13 May 1944 (R. 7; Ex. A).

It was stipulated that if Private Alfred A. Campbell, of accused's organization, were present, he would testify as follows:

> "On 20 November 1943 I was 1st Sergeant of Company 'B', 180th Infantry. On that date the Company was located at a point on an East and West line about mid-way between the towns of Venafro and Ceppagna, Italy. It was about 3/4 of a mile to a mile South of these towns that Company B was in Regimental reserve. We had just moved to this position about a couple of days before. We had been clear across the river South-east of Venafro. In our position we were not subjected to small arms fire but did receive infrequent artillery fire in the general area. I am acquainted with Private Manuel M. Valenzuela, a member of Company B, who went AWOL about the 20th of November 1943 while the Company was there near Venafro. I was with the Company from 20 November 1943 to about 11 March 1944 and at no time during that time, to my knowledge, did Pvt. Valenzuela ever appear in the Company. The way I learned that Private Valenzuela had gone absent without leave was from his platoon sergeant, Staff Sergeant York. Sgt. York is no longer with Company B. When I satisfied myself definitely that Valenzuela wasn't present, I picked him up on the morning report" (R. 7).

Second Lieutenant James E. Stodgel, 180th Infantry, testified that he was the officer who investigated the charges and that he warned accused of his rights under Article of War 24 and "also told him he could make a statement or remain silent, as he desired" and that any statement he did make "might be used in his trial against him". Witness testified accused then made a statement saying,

> "he went AWOL just after his outfit had been relieved by the

Rangers and were in a valley in Venafro. He and another fellow stayed in some small town overnight and on the next day went back to Naples. On or about the 28th or 29th of November he went back and tried to locate his outfit and said a 3rd Division MP couldn't tell him where it was located when he went back to Venafro, so he returned to Naples, and he later stated that he asked an MP in Caserta where it was and he said he didn't know. He later learned that his organization was on the Anzio Beachhead. When he was picked up in Naples, there were thirty-nine soldiers living there at that time, eight of them were picked up by some authority and because of them these others were picked up."

Witness further testified that accused stated he got as far as Venafro on the occasion he talked with the "MP" from the Third Division, that it was not his intention to stay away from his organization, that after the first night he had lived in a house in Naples all the time that he was absent except when he went to Venafro and Caserta, and that he heard his organization was on the Anzio beachhead the latter part of April. (R. 8-10)

Accused elected to remain silent.

4. It thus appears that at the place and time alleged accused absented himself without proper leave from his organization and remained so absent until he was apprehended approximately six months later. When accused absented himself his organization was before the enemy and subject to enemy artillery fire. Being in regimental reserve he had reason to anticipate early return to active combat. He stated that he spent the entire time of his absence, but for two trips, one to Venafro and one to Cáserta, in a house in Naples. Though accused heard the latter part of April that his organization was on the Anzio beachhead he made no effort to join them. Under the circumstances and in view of the statements made by accused, the court was justified in concluding that when accused absented himself he did so with the intention of avoiding the hazardous duty of combat as alleged, in violation of Article of War 58 (MCM, 1928, par. 130).

5. The review by the staff judge advocate, accompanying the record of trial, contains the following:

"The court has adjudged a period of confinement of 55 years. Although no record of previous convictions exists, the accused has been a disciplinary problem prior to this offense. He was involved in a stabbing case, as well as minor delinquencies in the States, and, as evidenced by the trial, has been absent without leave the greater part of his overseas service. A further matter for your consideration in determining the disposition of the accused is that he was apprehended by the Criminal Investigation Department in rounding up the participants on the Black Market operating in the vicinity of Naples. At the time of his arrest he was living with the soldiers who were actively

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engaged in Black Market activities. In view of the previous record of the accused, I can see no reasonable basis upon which to recommend either a reduction in the sentence or a suspension of the execution of any part thereof."

6. The charge sheet shows that accused is 24 years of age and that he was inducted into the Army 29 January 1941. No prior service is shown.

7. The court was legally constituted. 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 and the sentence.

Donald K. Mackay, Judge Advocate.
Walter Rohm, Judge Advocate.
Henry C. Kleinick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
4 October 1944.

Board of Review

NATO 2942

UNITED STATES	)	IV CORPS
v.	)	Trial by G.C.M., convened at Massa Marittima, Italy, 4 July 1944.
Private ROSCOE D. WILLIAMS (33 374 804), 3404th Quartermaster Truck Company.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 92d Article of War.

Specification: In that Private Roscoe D. Williams, 3404th Quartermaster Truck Company, did, at or near Cori, Italy, on or about 4 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private First Class Freddie Faison, 3404th Quartermaster Truck Company, a human being, by shooting him with a rifle.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of

his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 4 June 1944 the 3404th Quartermaster Truck Company, of which deceased and accused were both members, was in bivouac about a mile and a half from Cori, Italy. Second Lieutenant Roscoe E. Holman, of that organization, testified that on that date while standing in the door of his tent in the late afternoon, he saw deceased running "a little faster than a trot", 20 or 30 feet away, with a "fearful or a frightful look on his face***looking back at someone over his left shoulder" and that at that time witness saw accused, who was armed with a rifle, between 100 and 120 feet away, "in the opposite direction", "in the process of stopping". Witness saw accused raise his rifle, aim it in the direction of deceased and "fire a shot that hit Faison". He further testified deceased "let out one loud scream of anguish" and fell to the ground. (R. 19-21) Witness testified that he took deceased to a hospital where he was pronounced dead (R. 22). This testimony of Lieutenant Holman was undisputed and was in substance corroborated by all eye-witnesses of the incident who testified (R. 5,26,32).

The medical officer who performed an autopsy on the body of deceased, whom he identified as "Freddie Faison" by an emergency medical tag attached to the body (R. 45,46), testified he found a "through and through" wound made by a bullet, which "hit the liver, the inferior vena cava at its attachment to the heart and then went through the lung" and that such a wound would be competent to cause death. He also testified he did not have any doubt but that the bullet entered the back and emerged through the front. (R. 46,47)

Private Pender W. Cowan, of the same organization, testified that as he approached a tent he heard Williams and Faison have a few words and

> "I asked what was the matter. Roscoe said he was gonna stop this mother-fucker from fucking with him. He say he's going to punch him. I asked him not to jump on Faison. He tried to hit Faison in the mouth and Pvt. Akridge caught Roscoe's arm and Roscoe went to hit Akridge and Akridge ran off" (R. 6).

Witness testified Faison did not hit Williams, but that Williams

> "kept trying to hit Faison; Faison was holding on to him and dodging at the same time. Nobody could stop him so we just quit trying to stop him. We couldn't stop Roscoe from jumping on him. So they tussled and Roscoe got tired and Faison threw him down. As soon as he threw him down, Roscoe started yelling 'Somebody get this man off me(')" (R. 7).

Witness further testified Faison said to Williams, "I don't want to hurt

you Roscoe, you are full of vino"; that witness, asking Williams if he would bother Faison if the latter let him up and receiving a reply in the negative, told Faison to let Williams up, which he did and that thereupon Williams got a rock, spoke "a lot of cuss words", saying "I'm going to kill this mother-fucker" and threw the rock at Faison who dodged and ran toward his tent (R. 7,84). Witness testified that Williams then went to the motor pool saying he was going to kill Faison (R. 8) and returned with a rifle. On the way back, witness further testified, Williams

> "met Corporal John L. Jones and Private Harvey Williams, and they asked him not to go up there and shoot that boy. So he said he would shoot the first one that got in the way. So they backed up" (R. 9),

and that Williams came nearer and seeing Faison go past the tent of Private Herman E. Nickerson, of the same organization, took "a dead aim on him" and fired (R. 9). Witness also testified he did not see any firearms in Faison's possession at that time or after the start of the fight (R. 10) and that when Faison was shot he held onto his chest with both hands (R. 17,18). Witness was about 20 feet from Williams when the shot was fired (R. 15). Cowan further testified that Faison, who was his best friend (R. 12), was younger and faster than Williams (R. 15), being 18 or 19 years old (R. 16). Williams, who had been drinking but was not drunk (R. 17), had had an argument with witness when "on the boat" (R. 15) but never "did anything" to witness and witness liked him all right (R. 12).

Lieutenant Holman testified that Williams aimed his rifle for five or ten seconds before firing (R. 23). He also testified that Williams, who was the most capable mechanic he had ever known, had been motor sergeant, but was reduced to the grade of private late in January or early in February 1944. Thereafter witness had knowledge of "any number of statements and small arguments between various persons". Witness further testified that Faison was "tall but small, thin in posture". (R. 24,25)

Private Andrew J. Scott, of the same organization, testified that after Williams threw a rock at Faison, Williams went to a truck by which witness was standing and "got a carbine out of it". When witness told Williams "there wasn't any need for him to get in trouble with it, because he was in the army and knew what trouble is in the army" Williams threw a shell into the chamber of the rifle and said to witness "God damn it, get back". (R. 27) Witness stepped back and watched Williams return toward the scene of the scuffle. He saw Private Harvey Williams, of the same organization, try to talk to accused and observed that Harvey Williams also stepped back. (R. 27,28) Witness testified that after the shooting he went to the spot where Faison had been shot but did not see any gun near Faison (R. 28).

Harvey Williams testified he saw accused Williams approaching "two or three of us standing there" with a rifle held "about waist high" and pointed at them (R. 35), that witness grabbed one of accused's arms and someone else grabbed the other arm, that witness asked accused "if he wasn't going to hurt Faison" and that they released him when accused "said no, to turn him

loose". Witness left that spot but heard the fatal shot when he had gone 15 or 20 feet. (R. 33) Witness also testified that he saw Faison grab his chest with both hands and that he did not see any weapon "around" Faison (R. 33,34,94). Witness further testified accused had been drinking vino but "wouldn't say he was drunk" (R. 35,36).

First Lieutenant William F. Early, of the same organization, testified that he was in Lieutenant Holman's tent when he heard the shot and the scream. He ran out of the tent (R. 37) and saw accused about 100 feet away bending down, laying a rifle at the foot of a tree (R. 38). Witness beckoned to accused who "came down" to him. Witness testified that when he asked accused "What's this all about" Williams seemed "all wrought up" and said "Yes, I killed the son of a bitch" or words to that effect. Witness testified that when he then told Williams "to sit down at the foot of the tree there" Williams "insisted" he was going to leave but later did sit down when witness told some men near by to prevent Williams from leaving. Witness testified he then went to the spot where he had first seen Williams and found a carbine (R. 39), numbered 109779, loaded with a full clip and "another shot in the chamber" and that it had been fired (R. 40) recently (R. 43). Witness testified that he had seen that carbine before in the possession of Williams and that

> "He had been with my platoon on detached service for three or four days. Because of the nature of my work I was close enough to him to have known that he had it all along, at least for sometime. And on one occasion I had asked him where he got it or how he happened to have it" (R. 40).

Witness also testified that ten minutes later when he returned to the tree where he left Williams, Private Luther Coleman, of the same organization, handed witness another carbine of exactly the same model with very fresh blood stains on the front end of the barrel "on the top of the barrel between the front sight and the beginning of the woodwork". Asked, "What did Coleman report to you about this carbine", witness testified "He said that Faison had had it or he had gotten it from where Faison was, or words to that effect". He also testified "he (Coleman) didn't seem to know" what the carbine was doing there. (R. 41) Witness testified, when shown the weapon in court, that there was no difference in the condition of the gun and that at the time of trial it had a clip with live ammunition in it (R. 41,42). The men in his organization were not issued guns of that type but an entirely different type (R. 44). Williams was a mechanic "of the very highest type" but was a very poor shot when on the rifle range. Witness also testified that accused was "not drunk but under the influence of alcohol" (R. 42) and "under an intense emotional strain" which "might have been considered nervousness". Faison was "a model soldier" and not a trouble-maker. Williams, who had been reduced for unauthorizedly using a weapons carrier, was very rarely a trouble-maker or nuisance and only on one or two occasions had Williams been under the influence of alcohol. (R. 43) Witness testified further that he did not see any definite marks on Williams' face or neck, but was of the impression his face was more swollen than normal, which condition he attributed "to being under the influence of alcohol". A blood-alcohol test was requested when accused was arrested. (R. 101)

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The prosecution offered in evidence, "for what it's worth", "a piece of paper giving the results of a blood-alcohol test performed upon Pvt. Roscoe D. Williams on 4 June 1944, signed by Major Frank W. Allen, SnC," stating it was "with the consent of the defense". Defense stated "I have no objections" and the document was admitted. (R. 102; Ex. 6) The document contained accused's name and organization, a number the same as his serial number but for the last digit, the words "Blood for alcohol" and on one side, the entry "0.6 mg/cc", and an initialed rubber stamp with the name of Major Allen (Ex. 6).

Staff Sergeant Joseph C. McGarrigle, Criminal Investigations Division, 504th Military Police Battalion, testified that on 7 June 1944

> "I warned Williams, I said, 'Williams, I am going to ask you a series of questions which will compose a statement made by yourself. Now, before you make the statement, Williams, I want you to know you are not compelled to make any statement to me. You are not compelled to answer any question I ask you. You have a right to refuse to answer or make no statement at all.' I said, 'Do you understand that?' He said, 'Yes, I do.' I said, 'Well, then, do you understand that this statement may or may not be used for or against you?' He said, 'Yes, I do.' He said, 'I will talk. I have got nothing to lose.' So I then repeated it. He said, 'Yes, I understand that(')" (R. 51),

and that thereafter witness asked accused questions and wrote down the answers in longhand (R. 61) and that

> "After I completed the statement I had the man read it. He read it to himself. He didn't read it aloud. And I said, 'Do you understand it?' And he said, 'Yes, I understand it.' I said, 'I am going to type it up and you will sign it in the presence of an officer.' And he said, 'Yes, I will sign it in the presence of an officer.'" (R. 53).

He also testified that he typed up the statement, gave it to accused, saw him reading it and later saw accused and First Lieutenant Lewis Bernstein both sign it. He also testified the statement as typed was substantially the oral statements of accused. (R. 51,53,56,61) Witness did not at that time know if accused could read (R. 53,54). Prior to the interview accused was in the Fifth Army stockade, but witness did not know in what confinement he was held. Accused was shabby and needed a shave but did not ask for a drink of water when he walked in. (R. 54) The statement was admitted in evidence over objection (R. 56; Ex. 3) and read, in material part, as follows:

> "Before me, the undersigned authority to administer oaths in matters of this kind, personally appeared Private ROSCOE

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D. Williams, 33774804, 3404 QM Truck Co., APO # 464, who, after being warned by Agent Joseph C. McGarrigle, C.I.D., 504th MP Bn. Hq. that he did not have to make a statement, voluntary offered to do so and upon being duly sworn, made statement as follows:

"I am a mechanic of the 3404 QM Truck Co. On 4th June 1944, at about 1100 hours, my platoon, the 2nd platoon, started to move out of our bivouac area to join the company. While en route to the company bivouac area, we were supposed to transport an Italian soldier outfit from Torracchia. We reached the Italian camp at noon chow time and the soldiers were eating. I had some 'C' rations with me so I ate while waiting to load the Italian soldiers. There were 8 of our trucks there for the purpose of transporting the Italian unit. One of the Italians gave me some wine. I drank about one canteen cup full of the wine and had a canteen filled with wine. We loaded the Italian soldiers after about 1 hour's wait and then started to convoy the soldiers to a spot about 1 mile beyond our company headquarters. While riding in the cab of the truck driven by Pvt. Harvey Williams, I produced the canteen of wine and Williams (Harvey) and myself started to drink it. I had 3 or 4 swigs of the wine and Harvey Williams had a couple of swigs. When we reached our destination, we unloaded the trucks and all of the convoy drivers came up to our truck and started to drink some of the wine because they knew I had some. We left the Italians at their new bivouac area and we then left in convoy for our company headquarters. We arrived there at about one half hour before supper. When we got into the area, I spoke to one of the mechanics, T/5 Le Roy Compton, asking him how the area was and if there were any girls around. He told me that there was a girl in one of the tents. I asked him if she fucked and he said, 'yeah' so I asked him how much it was. He raised his hand and stuck up one finger so I figured it cost $1.00. He pointed to the tent where the girl was and I walked over to the pup tent which he had pointed out. When I reached the tent, I saw Pvt. Akridge and Pfc. Faison near the tent. I walked up to the tent and without saying a word to anybody, I looked inside the tent. There was an Italian girl lying on the cot covered with blankets. I did not talk to her as she was talking to Faison. She seemed to be about 20 years old. I turned around and said to Akridge, 'Is she doing any business?' and he said, 'yeah'. I then put my hand in my pocket to take some money out. I then turned and said to Faison, 'How about me fucking the girl?'. He said, 'I haven't had any of it myself yet'. I then said, 'Give me a break. I have to go back out with the 2nd platoon. We are leaving right away'. He told me that he didn't give a damn and I said, 'I don't give a damn either'. He got up and punched

me on the side of the face. We then started to tussle and I hit him a few times. He hit me hard and I fell down. I must have tripped over something. I was mad. He jumped on top of me and hit me a couple of times but I was strong enough to get up with him on top of me. When I got up we stopped fighting. Faison kept saying, 'I'm going to hurt you, I'm going to hurt you' and he turned his back and started to walk away. Neither Faison nor myself had a gun on our persons either before, during or after the fight. He was headed towards a pup tent about 50 to 75 yards away. I thought that he was going after a rifle because that's the only way I knew of that he could hurt me. I then walked over to my truck which was parked about 15 or 25 yards away. I opened the door of the truck and picked up my carbine. I was mad. I stood beside the truck and raised my rifle and aimed it at Faison who had his back towards me. He was right in front of the tent. I pulled the trigger after aiming and I heard him scream, 'Oh - oh'. He did not fall. I set my rifle against a tree and walked over to the C.O.'s tent. Lt. Early stopped me as I was walking towards the tent and he asked me if I had been drinking and asked for an explanation. I told him just what had happened. I didn't have any intention of shooting Faison. It was just one of those things'" (Ex. 3).

Private Linwood J. Akridge, of the same organization, a witness for the defense, testified that on the afternoon of 4 June 1944 he was outside of his tent, in which there was a girl, talking with Faison who was asking "about this girl doing tricks". He testified that at witness' suggestion Faison "asked the girl and she said 'no'", and that at that time accused "came rushing up" to the tent and

"said, 'Let me fuck this girl.' I said, 'She is not fucking,' just like that, and he brushed on past me and went over to the tent and Faison was standing up against the tent and said, 'No, I am going to fuck this girl first,' just like that. And so they started pushing each other. So I tried to separate them. So I seen that I wasn't going to do no good, couldn't separate them, so I told the girl to leave, and so when she left I left" (R. 64,65).

He testified Faison and Williams were "mostly grabbing each other around" and that when witness told them to stop Williams cursed at him and "swung" at him. He testified Faison did not "swing" at him. (R. 65)

Private First Class Luther Coleman, of the same organization, a witness for the defense, testified that prior to the shooting he was in his tent and heard someone passing the tent say "You got one. I can get one, too" (R. 66), and that "just a matter of seconds" later (R. 69) he heard a rifle followed by a scream. He "would say" the remark he heard was made by Faison, he recognized the voice as being familiar (R. 66). Witness testified

he did not see Faison when he fell nor when he was moved over underneath a tree, but that after Faison had been taken away

> "I walked out in the field someplace between my tent and where they had him underneath the tree and I found a rifle was laying there, a carbine, which I picked it up. It was mine" (R. 67),

and observed it had blood along the barrel. He testified that he then gave the rifle to Lieutenant Early. (R. 67,68) Witness further testified he had loaned the rifle to "the boys" who wanted it "to walk guard" and that he had loaned it to Faison the night before for that purpose, but that about 0800 hours on 4 June Faison

> "comes up with the rifle. Well, my truck has a gun rack right on the side, so he sticks the rifle in the gun rack and told me, 'This is your rifle.' I said, 'Okay.' He gets in the truck with me and he and I sit there and we had a couple of bottles. We sits there an hour and a half or more. The last I seen of the rifle it was setting in the rifle rack on the side of the truck until I picked it up out there in the field" (R. 68),

and that the truck was not moved thereafter, but remained backed up to his tent (R. 69,70). Witness testified that the tree under which he saw Faison was at least 50 feet from his truck and that he picked up the gun 20 or 25 feet from that tree (R. 70).

Private Herman E. Nickerson, of the same organization, a witness for the defense, testified

> "I was taken back by hearing a shot, and saw Pvt. Faison running toward me with a gun clutched in his left hand, clutching his breast with his right hand. Blood was gushing from his shirt front. He came approximately six feet abreast of me, and fell forward, prostrated, on his face" (R. 71,72),

and

> "I aided in turning him over, and it appeared to me that he was fatally wounded. I was under the impression that he had shot himself, and I, in turn, hollered to whoever was close to me to get medical aid" (R. 72).

He saw Faison was clutching the rifle after he was hit. Witness also testified that when he turned Faison over on his face he saw the rifle had been under Faison when he fell. (R. 72) Witness testified further that he noticed that the blood was fresh and that he was intercepted by "one of the soldiers who claimed it". Witness testified the gun had a clip in it and the stock was "folded" when he first saw it. (R. 73,74) He also testified

that Harvey Williams took the gun although Coleman wanted it. Witness further testified he found the gun laying out on the ground and assumed "it had been overlooked". He testified that Faison had been moved about 25 feet and that he picked the gun up between 20 and 30 minutes later where Faison first fell. (R. 92,93) Witness testified that he had been first sergeant of a service company and was asked why he was reduced and transferred. Witness asked "Am I compelled to answer that?", to which the trial judge advocate replied "absolutely" and defense counsel said "Go ahead and tell the court just what you told me yesterday". Witness then testified it was due to a misunderstanding with a superior officer. (R. 98)

Accused made an unsworn statement, through questions addressed to him by defense counsel, in pertinent part as follows:

> "I asked T-5 LeRoy Compton how was the area up there. It was the first time I had been there. He says, 'Things are just about as usual. We got a nice chick around here. We got a girl around here twenty years old.' I said, 'Yeah? Is she doing any business?' He says, 'Yes.' I said, 'How much?' He put up one finger. I said, 'Where is she?' He said, 'You see them curtains pulled around the cot with the shelter half and blanket and mosquito nets around it?' I said, 'Yes.' He said, 'She is right up there.' I readily went up and when I got there Freddie Faison and Linwood Ackridge was there and I asked Ackridge, because Faison was kneeling down. He was kneeling down with his head up under the mosquito bar, and I asked Ackridge was the girl fucking. I said, 'Is she fucking?' That's the very words I said. He said, 'Yes.' I said, 'How much?' He said, 'A dollar.' I put my hand in my pocket to get my pocket book and then I went over and spoke to Faison. I asked him to give me a break. He said, 'Hell, I haven't had any of it myself.' I said, 'Well, I am going right back out with the second platoon. You will be around. Come on, give me a break.' Then he said, 'God damn you. God damn you.' And I said, 'Well, damn you,' like that. I was still standing with my hand leaning up on the pole of the bed, so he jumped up and he hit me and I hit him, and I judge we fought there for about six or eight minutes. I stumbled and fell backwards. Faison, he got on top of me. He punched me a couple of times in the face. I got him up off me and I hit him. When I hit him he started to cry and run and said, 'You son of a bitch, I'm going to hurt you. I'm going to hurt you'" (R. 76),

and

> "Well, my truck was just sitting, I'd judge, about ten feet, because when we pulled in the convoy I was in the last truck. The rest of the convoy had gone by. I was almost just right

> opposite of his tent and then he was running and I stepped back, just stepped back of the truck and got my rifle, and just as I did that he turned and I shot and then I heard him holler"

and "I thought he was going after a rifle". Accused stated that he did not see Cowan during the afternoon and that he had had quite a few "runins" with Cowan and had to testify against him in an investigation. (R. 77) He stated he was positive he did not want to kill Faison and that he was a very poor shot, having made "14 out of a possible 200" the last time he went on a rifle range (R. 78). He also stated he had been in solitary confinement from Sunday night until Tuesday morning with C rations and a can of water prior to making his statement to a sergeant. He also stated:

> "I was kicking on the door and one of the British soldiers heard me and asked me what I wanted. I told him to go over and tell one of the guards to let me out because I had to go to the latrine. So I judge in the period of a half an hour a sergeant came over and told me to get my stuff, I was going on the other side of the street. I got over there and before I had a chance to get up stairs I didn't have anything. I didn't have no blankets or anything. I was sleeping there on the concrete floor. I didn't have a blanket or nothing. He told me that they wanted me to go up to the 504th M.P.'s. Then I forget whether it was a sergeant or somebody who came in to take me up there and I went--I'm trying to figure which room--I went in the room where Lt. Bernstein was there. I went in the room where Lt. Bernstein was. Then the sergeant carried me on over to the other room. That was down the hall" (R. 79),

and that he could not remember "exactly what he said", that he thought the sergeant was "just questioning" him "to find out how it happened" and that he did not know the statement could be used as evidence in a case (R. 79). Accused also stated that if he were under oath he would tell "the same story" (R. 80).

4. It thus appears from the uncontroverted evidence, including accused's admissions prior to trial, and from his unsworn statement, that at the place and time alleged accused killed Freddie Faison, the person named in the Specification, by shooting him with a rifle as alleged. It is undisputed that accused deliberately fired the rifle toward deceased while the latter was running away. Immediately prior thereto accused was heard to say "I am going to kill this mother-fucker" and shortly after the shooting he stated to an officer "Yes, I killed the son-of-a-bitch". The evidence warrants the inference that accused intended to kill Faison. Although the two men had been involved in a quarrel immediately before the shooting, it is clear that accused was the aggressor therein, that deceased did not participate in it except to the extent necessary to protect himself, that the dispute had terminated, and that deceased had peacefully left the scene. While there is

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some testimony to the effect that deceased was armed, most witnesses testified that they did not at any time see any weapon in his possession. But whether or not deceased was armed at the time of the shooting is immaterial in view of the undisputed testimony that he was running away from accused at the time. No provocation or legal excuse or justification for the killing appears. The profane threats, the deliberate use of the deadly weapon and the other facts and circumstances disclosed by the evidence clearly permit the inference that the killing was with premeditation and with malice aforethought. All elements of the crime of murder were established (MCM, 1928, par. 148a).

5. Private Nickerson, a witness for the defense, was required to testify as to the facts concerning his reduction from first sergeant and his transfer. Evidence of his prior attainments and proficiency had been introduced, over timely objection by the prosecution, in an apparent effort to attribute greater significance to his testimony than otherwise might have been accorded it by the court. The procedure was with the express consent of the defense counsel and cannot be said to have prejudiced any substantial right of accused (AW 37).

6. Defense sought to show that accused's pretrial statement was not voluntary and that accused was not warned of his rights under Article of War 24. However, the sergeant to whom the oral statements were made and who typed the confession testified explicitly to the contrary. The admission of the statement was justified by the testimony in evidence (MCM, 1928, par. 114a).

7. The charge sheet shows that accused is 35 years of age and was inducted into the Army 9 September 1942. No prior service is shown.

8. The court was legally constituted. 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 and the sentence. A sentence to death or imprisonment for life is mandatory upon a court-martial upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Randall W. McCay, Judge Advocate.

Westmore Rohm, Judge Advocate.

Henry C. Quick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
9 August 1944.

Board of Review

NATO 2959

UNITED STATES	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Nettuno, Italy, 10 April 1944. Dishonorable discharge and confinement for 40 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLARD NICHOLSON (35 391 867), Medical Detachment, 30th Infantry.	)	

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 64th Article of War.

Specification: In that Private Willard (NMI) Nicholson, Medical Detachment, 30th Infantry, having received a lawful command from Major R. H. Neddersen, his superior officer, to return to his proper place of duty, did, near Campo Morto, Italy, on or about 19 February, 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions, two by special courts-martial and one by summary court-martial, for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the

sentence but reduced the period of confinement to 40 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused was a member of the medical detachment attached to the 30th Infantry Regiment (R. 7,9). On 19 February 1944, he was "picked up" as a straggler by the regimental adjutant and brought before Captain A. S. Farrell, adjutant of the 1st Battalion, 30th Infantry, "in the Battalion C.P., on a road between Padiglione and Campo Morto" (Italy) (R. 8-10). Captain Farrell testified:

> "At this time it came up that this man (accused) was an aid man attached to 'A' Company. He said he had fallen out the night before to help a man from 'A' Company to go to the aid station" (R. 9).

Witness further testified that accused

> "then told me he knew nothing about first aid, and was of no help to the company as a first aid man. I called Major Neddersen and asked him to come over to talk to the man. Major Neddersen came over and talked to the man, and Private Nicholson told him he was not a first aid man, and he couldn't see why he should work with the men. He could do no good. Major Neddersen sent him to Doctor Booker, who is our Battalion Surgeon, and asked him for a verification of the fact" (R. 9,10).

Captain James Madley Booker, commanding the Medical Detachment, 1st Battalion, 30th Infantry, testified that on 19 February 1944, accused

> "was sent to me from the Battalion C.P. the middle of that day, with a statement from Major Neddersen that this man was unqualified as an aid man. I saw the man and asked him what he meant about this. He said he didn't know anything about aid work in the field. I asked him if he had any medical training, and he said yes, he had medical training in clearing stations. I asked him then, if he didn't think a company aid man's work was a little simpler than in a clearing station. He still stated that he didn't know anything about aid work, he said he was in the guard house in the States so much he didn't have a chance to learn about aid work. I then went into a discussion with him about his duties as a company aid man, and asked him if he didn't know anything about bandaging wounds, administering morphine, administering sulfathiazole, which are all a company aid man has to do. He still insisted he knew nothing about his aid work. He couldn't do the job. I talked to this man about his responsibilities and duties on this beachhead, but this seemed to awaken no response. I told the man he had to return

to duty with his company. He said he couldn't go back. I told him he had to go back. Then I directed him to the Battalion C.P." (R. 6-8).

Captain Booker's findings were that accused "was a qualified aid man, that he could return to duty, and that he should return to duty" (R. 8).

Captain Farrell testified that after Captain Booker had said that accused was a "qualified medic", "Major Neddersen", the commanding officer of 1st Battalion, 30th Infantry,

> "told the accused to go back to his unit. The man said he couldn't go back. The Major then warned him of his rights, and asked him if he knew what a direct order was. He then gave him a direct order to return to his unit and the man said he would not go back" (R. 10,11).

Accused's answer to Major Neddersen was "I am not going back", or words to that effect. "He didn't say anything more". Accused was then placed under guard and sent to the regimental adjutant (R. 10).

Accused elected to remain silent.

4. It thus appears from uncontradicted evidence that at the place and time alleged accused was brought before "Major Neddersen", the commanding officer of 1st Battalion, 30th Infantry, the accused's organization, and, after he had been found by the battalion surgeon to be a qualified aid man and fit for duty, was ordered by "Major Neddersen" to return to his unit. Accused answered "I am not going back" and was thereupon placed under guard. Major Neddersen was accused's superior officer; his command was legal and proper and called for instant obedience. The circumstances disclose an intentional defiance of authority as contemplated by Article of War 64. Accused's "unit" was for him his "proper place of duty" and therefore the command alleged did not differ substantially from that proved.

5. The review by the staff judge advocate, accompanying the record of trial, contains the following:

> "The accused's Company Commander reports that his previous service was unsatisfactory, that he lacks a sense of duty and had stated to other men that he was going to get out of combat as soon as possible. The accused has three previous convictions for absence without leave in the States. He was shipped overseas and came to the Anzio Beachhead a short time prior to his offense. When examined by the Division Psychiatrist he claimed that he had been 'shanghaied' to the front because he had been AWOL in the States. In his conversation with the Battalion Surgeon he admitted that the reason he did not know how to be an aid man was because he had spent most of his time in the States in the guardhouse.

"When this case was referred to the Commanding General for reference to trial the Commanding General suggested that the accused be offered an opportunity to serve as a rifleman. He was interviewed informally and stated that he could not be a rifleman because he did not know how to shoot. He was then offered an opportunity, because of his strong physique to serve as a mortar ammunition carrier which required no special skill. He inquired if he would be subject to fire as an ammunition carrier and was told that he would. He then declined that opportunity and stated that he would prefer to be court-martialed."

6. The charge sheet shows that accused is 22 years of age, was inducted into the Army 15 August 1942, and had no prior service.

7. The court was legally constituted. 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 and the sentence.

Donald K. MacBay, Judge Advocate.

Wolfgang Robinson, Judge Advocate.

Henry C. Renick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
10 August 1944.

Board of Review

NATO 2974

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 464, U. S. Army, 2 June
Private WILLIE D. OLIVER, JR.	)	1944.
(34 073 530), Company D, 92d	)	Dishonorable discharge and
Engineer Regiment.	)	confinement for 20 years.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 93d Article of War.

Specification: In that Private Willie D. Oliver Jr, Company D, 92nd Engineer Regiment, did, at Mazzafarro, Italy, on or about 3 May, 1944, with intent to commit a felony, viz rape, commit an assault upon Angelena Bosse, by willfully and feloniously striking the said Angelena Bosse on the body with his fist, and biting her on her lip with his teeth.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions, two by summary court-martial for entering an off-limits area and for wrongfully appearing on a public thoroughfare with jacket not buttoned, both in violation of Article of War 96 and the third by special court-martial for absenting himself from his organization without proper leave, in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all

pay and allowances due or to become due and confinement at hard labor 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 under Article of War 50½.

3. The evidence shows that on 3 May 1944 a detail of colored American soldiers including accused were working near "the pump house at the canal", in Mazzafarro, Italy, cleaning drainage ditches, and a group of Italians including Angelena Bosse was working in near-by fields (R. 5,6,9,11,13).

Angelena Bosse testified that about 1700 hours 3 May 1944 when she was working about half a kilometer from the pump house, accused, whom she had never seen before, threw her on the ground and bit her on the lips, causing her face to be covered with blood. Witness testified that accused, "on top of" her, placed his hand over her mouth and raised her dress, but that "he did not have time" to do anything else. (R. 9,12) She punched accused to free herself and struck him with a hoe, trying "to hit him any place". Witness testified further that accused was standing and running after her prior to the time she hit him with the hoe and that "he was never on the ground before" she hit him. Witness testified also that she chased accused, that it was then that she hit him with the hoe, and that accused escaped on a bicycle. Witness returned to the field and found accused's field jacket and cap which he had been carrying and a rubber boot he had been wearing. (R. 10-12) On recross-examination witness testified she remembered making the statement "when he grabbed me I hit him with a hoe and he fell to the ground" and that the statement was true.

An Italian man, who was working in his field, testified that at about 1630 or 1700 hours when the "soldiers stopped working",

> " I saw a colored soldier leave the other soldiers and go across the field where that woman was working. I was about 100 or 120 meters away at that time. I saw him talking to the woman, or doing something, then I saw them both on the ground. While I was watching they both fell on the ground. I talked to the five or six other men who were working with me, and they said, 'Go help that woman'. While those four or five men were running I saw the colored soldier get up from the top of the woman and grab a hoe. He grabbed the hoe and was going to hit the man that ran up there. One of the Italian fellows struggled with him, but he wasn't hit. They struggled and he fell to the ground and the Italian grabbed one boot. The colored soldier fell on the ground. He grabbed the hoe and the rubber boot and the colored soldier escaped."

Witness was 120 meters away and could not recognize the soldier. (R. 13,14)

A noncommissioned officer, who was on the detail of which accused was a member, testified that on 3 May 1944 the detail ceased work about 1600 hours and that all the soldiers except accused got on a truck for the return to camp.

Witness testified that accused, who was "wearing O.D.'s and hip boots", was on the opposite side of the canal and observed a "lot" of civilians working "in the fields there". It was necessary for accused to cross over a bridge some distance away in order to get to the truck. About 1615 hours witness observed accused was running and "saw them chasing him". (R. 5-7) At that time accused was about half way to the bridge but headed back in the direction of the place where the detail had been working (R. 7), being chased by a group of from seven to ten Italians. Witness testified that the next time he saw accused was about five minutes later and that accused was then coming toward the truck. Although someone said "Here comes Oliver", the truck drove off without accused, after it had been waiting for him about ten minutes. (R. 6,8)

Second Lieutenant Valentine V. Costanzo, 92d Engineer Regiment, testified that about 1650 hours, 3 May 1944, with "Colonel Bennett" he drove in and parked a "peep right next to the pump house" and saw accused on the back of a bicycle being pedaled by an Italian boy. Accused "had no boots or shoes, no hat and no field jacket". Witness testified that he understood Italian "pretty well" and that Angelena Bosse "came up to the peep and pointed out Oliver and started speaking incoherently". (R. 15,16) He testified, over objection by the defense, that she told him,

> "that she was in the field working and the soldier came over and asked her a few things. She became frightened and moved off to another field to continue her work" (R. 16),

and also over objection that "after she was there a short while the soldier grabbed her and threw her on the ground". The law member ruled witness might "give the substance of the conversation" witness had with the woman and witness testified,

> "The farmers that were working in the area ran up to help her and the soldier noticed them, and tried to run away. In her efforts to hold him, she said that she had pulled off one of his boots. She later presented that boot to us when she met us on the road. Then she also pulled her skirt up and showed me that her under garments were bloody. Her face was also bloody. I asked her what had happened and she said that the soldier had bit her." (R. 17)

Witness also testified that at that time the woman did not say anything with respect to the actions of the accused while she was on the ground. Witness further testified that he had not been able to get any coherent statements from the woman until after the Colonel had left taking the accused with him, and that then she had quieted down and told witness what had happened. (R. 17) Witness testified that what was then told him was the same as he was told by her later that evening when accused was present. Defense then moved that

> "the witnesses testimony be stricken, first, for the reason that it is hearsay, and second, for the reason that the accused was not present when the statements were made".

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The motion was denied. (R. 18) Witness further testified:

> "The surgeon asked me to ask the woman whether or not the soldier had reached the woman's privates, and she said no" (R. 20,21).

A noncommissioned officer of accused's company testified, as a witness for the defense, that on a date he did not know, about 1615 or 1620 hours, he looked through field glasses, in search of accused, and

> "saw some Italians running towards the bank. He was standing still when they were about 20 feet from him. Then he looked as though he was coming on down towards the ditch. When he pulled up to the building the Lieutenant went around the building and said that he couldn't find him" (R. 21).

He further testified that accused went "towards the truck" and that the Italians were running toward him (R. 22).

Accused elected to remain silent.

4. There is evidence that at the place and time alleged accused seized Angelena Bosse, the woman named in the Specification, forced her to the ground and placing himself upon her, covered her mouth with his hand and raised her dress. It is shown that he bit her lips, causing bleeding and that shortly after the incident the woman exhibited her undergarments to an officer who testified they were bloody. Regardless of the inferences deductible from these and other circumstances, there is substantial evidence that the woman resisted accused and that upon the basis of all the evidence, the court was warranted in concluding that the accused assaulted the woman and that concomitantly therewith intended to have carnal knowledge of her by force and without her consent. The circumstances support the conclusion that accused, in committing the assault, intended to overcome any resistance by force, actual or constructive, and to penetrate the woman's person. It is immaterial that her resistance and the arrival of help prevented accused from accomplishing his purpose. The allegations of the Specification find substantial support in the evidence and all elements of the offense charged are fully established (MCM, 1928, par. 149l).

5. Some of the testimony of Lieutenant Costanzo concerning his conversation with the woman was hearsay. While part of it might be deemed admissible under the res gestae or "prompt complaint" rule, it is unnecessary for the Board of Review so to hold, observing that the substance of the extra judicial statements of the woman was elicited by other evidence in the case. An exceptionable part was the woman's pretrial statement to the effect that when accused spoke to her prior to the assault she was frightened and went to another field to continue her work. But neither this nor the other statements can be said to have injuriously affected the substantial rights of the accused (AW 37).

6. The charge sheet shows that accused is 28 years of age and was

inducted into the Army 19 April 1941. He had no prior service.

7. The court was legally constituted. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to commit rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 455, Title 18, United States Code.

Donald W. MacKay, Judge Advocate.

Virgil R. Lynn, Judge Advocate.

Henry C. Kleinick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
25 August 1944.

Board of Review

NATO 2992

UNITED STATES	)	34TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 34, U. S. Army, 19 June 1944.
Second Lieutenant GEORGE W. CARTER (01 299 849), Company G, 133d Infantry Regiment.	)	Dismissal and confinement for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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.

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

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

Specification 1: In that Second Lieutenant GEORGE W. CARTER, Company G, then of Company F, 133rd Infantry Regiment, did, on or about 17 April 1944, in the vicinity of Borgo Montello, Italy, misbehave himself before the enemy by failing to lead his patrol on reconnaissance against the enemy, having been ordered to do so by Captain HUGH S. JACOBS, his commanding officer.

Specification 2: In that Second Lieutenant GEORGE W. CARTER, Company G, then of Company F, 133rd Infantry Regiment, did, on or about 18 April 1944, in the vicinity of Borgo Montello, Italy, misbehave himself before the enemy by failing to lead his patrol on reconnaissance against the enemy, having been

ordered to do so by Captain HUGH S. JACOBS, his commanding officer.

Specification 3: In that Second Lieutenant GEORGE W. CARTER, Company G, 133rd Infantry Regiment, did, on or about 24 April 1944, in the vicinity of Borgo Montello, Italy, misbehave himself before the enemy by refusing to lead his patrol on reconnaissance against the enemy, having been ordered to do so by 1st Lieutenant WALTER J. ESCO, his commanding officer.

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

Specification: In that Second Lieutenant GEORGE W. CARTER, Company G, then of Company F, 133rd Infantry Regiment, did, on or about 18 April 1944, in the vicinity of Borgo Montello, Italy, falsely, knowingly, and with intent to deceive, report to Captain HUGH S. JACOBS, his commanding officer, that he had, pursuant to order, led his patrol on reconnaissance against the enemy on 17 April 1944, when in truth and in fact the patrol mission was never performed by him.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, confirmed the sentence but reduced the period of confinement to 15 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that in the month of April 1944, the 2d Battalion, 133d Infantry Regiment, commanded by Lieutenant Colonel Bruno G. Marchi, was in a defensive position on the Anzio beachhead (Italy) (R. 22,23). On or about 17 April accused was platoon commander of the second platoon, Company F, 133d Infantry, having been assigned as platoon leader two weeks previously by Captain Hugh S. Jacobs, company commander (R. 8,11). Company F at that time was "in the lines" in the vicinity of Borgo Montello, Italy, in a defensive position about 500 to 1000 yards from the enemy. There were no friendly troops between Company F and the enemy (R. 8), who were Italians, directly in front, flanked by Germans (R. 14). The second platoon of Company F was on the front lines "straddling" a road "listed as Albany number two", about 800 yards from the enemy. The platoon "formed more or less of a bump in the company sector", inasmuch as it extended 50 to 75 yards in front of the flanking platoons. (R. 14) The platoon command post was a large building situated on two roads that joined "Albany two", and was "fairly well shattered on the side towards the enemy" (R. 14,15). This position received "the majority of the shelling and mortar fire", consisting for the most part of medium artillery and some mortar fire and a few self-

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propelled guns. Captain Jacobs testified that the "c.p. was hit fifteen or twenty times" during the period from 13 April to 6 May. (R. 12) He further testified:

> "Our company, being in defensive position, was ordered by Battalion to send one patrol out each night to determine the strength and position of the enemy. On the morning of the 17th I contacted Carter by telephone and ordered him to take F Company's patrol out that evening." (R. 8)

And further:

> "I told him that he was to lead a reconnaissance patrol and was to leave at eleven o'clock from his platoon area; to go up to the right; and his objective was house 127. He was to determine whether or not this house was occupied by the enemy and, if so, what the disposition was."

And:

> "I told him that for further information he could contact Lt. Newman and that he could give him more details as to the route and what to expect in the way of enemy disposition in that area." (R. 9)

Accused "was to leave at 2300 hours on the 17th and return at 2:00 a.m. on the 18th", and this was included in the order. Accused "accepted" Captain Jacobs' order, "said that he understood it, and that he would contact Lt. Newman and would take the patrol out." (R. 9)

When the order was received in the platoon command post, accused told Technical Sergeant (now Second Lieutenant) Dean B. Hamilton, "of the call and what the order was about", which was to "call in three more men to go on a patrol" (R. 14,15). Hamilton testified that accused

> "asked me if I wanted to go and I said yes and I picked out the three men and sent for them."

This was at about 2130 or 2200 hours. Witness further testified that,

> "After they came in, of course I gave them routine instructions to get ready for the patrol, and I and Lt. Carter went over the airial photograph and picked out the route and showed the men the route we would take and the objective of the patrol",

which was to leave at 2300 hours. (R. 15)

Shortly after 2300 hours the patrol was ready to leave the command post, "so Lt. Carter put on his side-arms and the rest of us put on our arms and helmets". Then, Hamilton testified,

"we went out the door and we got, I and the three privates, got outside and a mortar shell lobbed in approximately thirty to forty yards away and we didn't know whether to take off then or not and the Lieutenant said to wait a while and I stepped in the doorway and I noticed that Lt. Carter was shaking and a little nervous and stood there fifteen minutes or a half hour and went back in the c.p. and I called the others into cover and stepped inside myself to wait for further orders." (R. 16)

Witness thought accused was "nervous and shaky" because "I could feel him. We were standing beside each-other. It was an open door and it wasn't too dark." (R. 21) He described accused's "reaction" when they started to go out as follows:

"He got up from the desk, strapped his side arms on, and let out a big breath and said, 'Let's go', and he just headed for the door and got through the door and stopped."

It appeared to witness that accused "intended to leave the building". (R. 19)

No one went out on the patrol mission and accused remained in the orderly room of the platoon command post. Hamilton testified: "About an hour or an hour and a half later he (accused) got up and said, 'Come on Dean, let's go and report', and I said, 'Alright'". (R. 16)

Meanwhile, at the company command post, Captain Jacobs was informed by telephone at about 2315 hours that the patrol had left. He testified: "About two o'clock when the patrol was to have returned there was no report, so I phoned the c.p. again" and "sent a message to Lt. Carter to report to the c.p. and give me details of the patrol". (R. 9,10) "About fifteen minutes later" accused "came to the company c.p. with his platoon sergeant and he and I went over the aerial photograph and he turned in his report to me". Captain Jacobs further testified:

"I asked him how it went and he said it was pretty rough and I pulled a photograph out and asked him to point out the route he took and what he found and whether or not it was on the photograph. So he showed me the route I had prescribed, leaving the platoon area and moving up along Albany number two and he had followed this route until four hundred yards from his objective when they were fired on and the gun was in the vicinity of house 94 and they proceeded a little farther and drew fire from the right front near house 126, the house next to his objective. He said he didn't move the patrol very much farther because of the fire but that they remained in position and formed a listening post and in a short while he could not hear any enemy movement and did not draw fire from house 127 and it was not, so far as he could determine, in enemy hands" (R. 10).

Thereupon, Captain Jacobs telephoned "Captain Ralph" at the battalion

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command post and "told him that Lt. Carter would give the report so he took the phone and gave Ralph the report". Captain Jacobs testified that he "assisted" accused "by holding the map for him", and then "congratulated Lt. Carter on his patrol and told him to go back to his c.p. and get rest". (R. 10) Captain Jacobs observed accused's appearance at the time and testified:

> "Carter was alright, slightly excited I thought, but seemed collected and was able to give me an account of the patrol and didn't seem troubled at all to me" (R. 36).

He further testified: "About twenty minutes later his platoon sergeant (Hamilton) and platoon guide (Staff Sergeant Lockie) asked me to go outside because they wanted to speak to me" (R. 10).

Hamilton testified that after the report had been made he returned with accused to the platoon command post and

> "I went down to get water with Sergeant Lockie and I told him what the situation was and, thinking of the results that might occur due to the report, I decided that we better tell the Captain what the score was and I went down and called the Captain out and told him in case it meant anything one way or another that we had not gone out on the patrol and that he should do whatever he thought was right" (R. 17).

As a result of his conversation with Hamilton and Lockie, Captain Jacobs testified that he "telephoned Captain Ralph and told him to cancel the patrol report and that I would explain to him later in person but that I wanted it cancelled immediately and then called Lt. Carter" (R. 10) and:

> "I told Lt. Carter that I was not satisfied with the results of his patrol and ordered him to take the patrol out the following night with exactly the same mission and hours of departure and return" (R. 11).

Hamilton testified that "the next night" at about 2100 or 2130 hours he had a conversation with accused:

> "The telephone rang and he had apparently received orders to go out on a patrol and he turned to me and said, 'Here we go again', and told me we were to go on the same mission as the night before and wanted to know if I wanted to go again and I said, yes" (R. 17).

Witness further testified:

> "We sat around for another hour or hour and a half and I asked him if he wanted to call in the other men and he said, 'Not yet', and so I was waiting for the order to call the men in and we decided to pick up a couple of men from out on

> the line so we didn't call them into the c.p. When it got time to go we got as far as the doorway and Lt. Carter couldn't seem to get beyond the door. He was nervous and shaky and breathing heavy and we stood there for a few minutes and he started a couple of times and he didn't seem to be able to make it and we stepped back in and he said, 'Dean, I can't make it', and I said it was one of those things and that, if he couldn't do it, he should tell them and he called the company c.p. and talked to Lt. Higgins and told them that he couldn't make it" (R. 17,18),

and said,

> "'I can't make it. I guess you will have to make out the papers'. There was a pause and he turned to me and said, 'Sergeant Hamilton, do you want to make the patrol', and I said, 'Yes'" (R. 19).

Hamilton went out on the patrol, which was the only one that left that night, and accused did not accompany it (R. 18). Witness further testified that accused's "reactions" were

> "a repetition of the night before. He got up, put on his equipment, and headed for the door and went through a black-out room. There were no visible actions. In other words, you couldn't see his actions but just by sound."

Then accused "went in and took off his belt, sat down on a chair, and called the company c.p." He had "reactions of fear" and was "very shaky". (R. 19) His voice "wasn't normal. It wasn't shaky and yet it sounded as forced control" (R. 21).

Captain Jacobs testified that as a result of a conversation he had had with the executive officer he talked to accused "at the c.p. around midnight" of 18 April, and

> "I asked Carter what the trouble was and why he was not out on the patrol and he told me he got as far as the door of the c.p. and just couldn't go. His nerves were shot or something and just couldn't take it. I asked him if the same thing occurred the previous night and he said yes. I asked him if he knew what he had done when he turned in the report when actually he had not made it. I told him I wanted officers leading my men right and ordered him to get his equipment and report to the Battalion c.p." (R. 11).

At that time accused appeared to witness to be "very calm. I expected him to be excited but he accepted my order without any argument" (R. 36).

Lieutenant Colonel Marchi testified that on or about 17 April he received a report concerning accused from the commanding officer of F Company. He further testified:

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"At that time I did nothing. Captain Jacobs had wanted to give him another chance so I told him to remain with him and told Captain Jacobs to report further."

After witness received a second report from Captain Jacobs, he ordered accused to report to him at his command post. (R. 22) Accused came to the command post "during the night 18th-19th" and remained there two days and approximately two nights. Lieutenant Colonel Marchi testified: "He ate his meals with me. We were confined to two small rooms and in very close contact". Although there was "quite a bit of shelling near the c.p. at all times", accused did not appear to witness to be "unusually shaky" or "unusually nervous".

"to me he was perfectly normal. He ate his meals regularly and joked and talked with all of us. I think he even played cards with some of the officers and was absolutely normal." (R. 22-24)

Witness further testified that "on the night of April 20-21" he felt that accused "was absolutely normal and fit for duty so reassigned him to G Company, commanded by Lt. Esco. I told Carter to report to Lt. Esco and G Company for duty. He did that same night" (R. 23).

When accused reported to First Lieutenant Walter J. Esco, commanding Company G, "he was not assigned to a platoon" for "each platoon had a leader" and "he was an extra officer at the time". Lieutenant Esco testified that he decided, on or about 24 April, that it was accused's "turn" to lead a reconnaissance patrol, "because he had no other duties", and further testified:

"I talked to Carter on two occasions on 24 April. On the first occasion, it was in the afternoon sometime, and I told him that it was his turn to lead a reconnaissance patrol and told him the number of men he would have, the route, and time he would leave, and the time he was expected to return, and the mission of his patrol. He told me that he didn't think that he could take the patrol out and I told him that he had better think about it for a while and suggested to him that someone else take the patrol out and that he would just go along with them and perhaps after he had been out he might overcome any apprehensions or fears that he had, so he sort of left with the understanding that he would think about it. Later in the afternoon I talked to him again and told him that he was ordered to take out the patrol that night".

Further:

"He said that he couldn't do it and just refused to take it out. I asked him if he realized what that meant and he said he realized fully well what it meant and I told him that that

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> was an order that he was to take the patrol out and that it was direct disobedience of an order if he didn't and he said he couldn't take it out."

The order was given to accused around 1600 or 1700 hours; patrols went out "generally between 2000 hours and 2200 hours". (R. 26,27) Another officer was assigned "to lead the patrol that Lt. Carter was to accompany", and that patrol left between 2000 and 2200 hours that night (R. 28). Accused was ordered to return to the Battalion command post and left Company G around 2130 hours (R. 27,28).

Lieutenant Colonel Marchi testified that when accused came back to his command post he talked to him, and

> "I asked him if he knew the seriousness of his offense and he said yes and I asked him if he could go back and carry out his orders and he said not and I said there is nothing for me but to send you back for trial and he said, 'I guess that is what you will have to do'".

Witness then sent accused "to the rear of our kitchen area to take a little rest". (R. 23-25)

Accused had been in Company F about one month prior to 17 April 1944. Prior to his assignment as platoon leader of the second platoon he was a "surplus officer and worked in general with all the platoons". Captain Jacobs considered the quality of his work "very good", although he had been given no individual mission in combat prior to 17 April. (R. 11,12) Hamilton testified, in regard to accused's "action under fire", that

> "When an occasional shell came over, I noticed he would take a deep breath and say, 'Cut that shit' or some similar remark. Before the patrols came up I never noticed anything in particular."

After the company moved "into the line" and the platoon command post was occupied, witness testified:

> "whenever a barrage came in, we headed for the dugouts in the center of the room in the building and it seemed that, as the days went by and the barrages came in more, Lt. Carter headed for the hole just a little faster than the rest." (R. 18)

It was stipulated that, after his rights under Article of War 24 had been explained to him, accused "made a voluntary statement concerning his case" to the investigating officer, reading as follows:

> "On or about April 17, 1944 when Captain Jacobs told me I was to lead a reconnaissance patrol to house 127, I fully intended to lead the patrol. I had organized the patrol,

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told them our objective, and showed them the route we would follow from an aerial photo furnished by the company. The patrol was scheduled to leave at 2300 hours. As we started out of the platoon C.P. which was in a house, a German machine gun opened up firing down the road past the house. I got as far as the door of the house and something happened to me. I got as far as the door of the house and couldn't go any farther. What happened I cannot say, but all I thought of at that time was getting in the security of the house. I just couldn't help myself. I went back into the house and sat on a chair. I was shaking so bad I could hardly sit still but I didn't have any idea of what I should do. About 0215 hours, Capt. Jacobs called on the sound power phone and asked if the patrol had returned. I told him it had and he told me to come to the company C.P. and give him the report. The distance to the company C.P. is about 300 yards and I had my platoon Sergeant, Sgt. Hamilton go with me to the C.P. There I gave Captain Jacobs the erroneous report. Why I gave the report as I did, I cannot say because I don't know."

It further states that:

"The next morning just after dawn, Captain Jacobs called and said he was dissatisfied with my patrol of the night before and I was to take another patrol that evening with the same mission. At that time I didn't know that someone had called Captain Jacobs and told him the patrol hadn't gone out at all. I had the feeling that Captain Jacobs knew, however, and I figured he was trying to give me another chance. I wanted to be given another chance, so I said 'Yes Sir'. I told Sgt. Hamilton that we would have to go on another patrol that night. That night time came for the patrol to go out. I got as far as the door again, and I couldn't go any further, no matter how hard I tried. I waited for a few minutes and tried it again. Then I went back in the house and called the company C.P. Lt. Higgins answered and I told him that I just couldn't make it. He said 'O.K., I know how you feel. Tell Sgt. Hamilton to take the patrol out'. So I told Sgt. Hamilton to take out the patrol. After they had been gone for about half an hour, the Company C.P. called and informed me that Captain Jacobs was on his way down to the platoon C. P. When he arrived he and I went into another room where he asked me what was wrong. I told him I didn't know myself. Then he told me he couldn't have a platoon leader in his company who acted like that and that I should get my stuff together and go to the 2nd Battalion C.P. with the runner that same morning. At the Bn. C.P. I talked to Captain Ralf, Battalion S-3. He asked me what had happened and I told him as near as I could. He showed me a place to sleep, and I laid down, but could not sleep. I stayed at the Bn. C.P. that day, the 19th, that night and the following day."

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Furthermore:

"About midafternoon on April 20th, Lt. Col. Marchi, the Battalion Commander, told me to get my equipment ready and to go out to 'G' company with the runner that evening. I rolled my equipment and that evening the 1st Sgt. of 'G' Company and Lt. Garris took me out there. Upon arriving at 'G' Company, Lt. Esco, the company commander, told me to sleep in his hole, where I stayed that night. The next day Lt. Esco talked to me and asked me about myself. I told him what had happened. Whether he knew about what had happened at 'F' Company or not I am not sure, but from the way he talked, I don't believe he knew a thing about it, until I told him. He said he didn't think it was his job to try to straighten me out, and also that if I stayed with the company, I would have to do my share of patrolling. I was at 'G' Company about three days or till about April 24th. On that morning, Lt. Esco told me I would have to take a patrol out that night. I thought about it for awhile and decided that I wasn't capable of taking out a patrol and that even if I could overcome my own fear I did not have enough confidence in myself and that I might endanger the lives of the entire patrol. I asked Lt. Esco for permission to call Lt. Col Marchi and see if he would see me that evening. He said it was all right with him, so I called the Battalion C.P. Captain Manchester, S-1, answered and said that the Colonel was busy. I then asked Captain Manchester to ask the Colonel if he would see me that evening. Captain Manchester asked the Colonel and the Colonel said he would. Later Colonel Marchi called me and asked me what I wanted, and I told him, I didn't think I could make it. He told me to take the patrol out and then come and see him. I told him I couldn't do it. He said I would either take the patrol out or be court-martialed. I told him I still couldn't do it. He told me then to think it over, and if I still felt that way that evening to come back to the Battalion C.P. with the 'G' company runner. I rolled my equipment and got ready to go to the Battalion. Lt. Esco called me over to his hole a little later and repeated his order and my refusal to obey with Lt. Elling, of company 'H' as a witness. At dark I went to the Battalion with the runner. Colonel Marchi took me into a side room and asked me what was wrong with me. I told him truthfully that I didn't know. He then told me to go back to the kitchen area and to stay there till he got word to me.

"Prior to joining the 2nd Battalion, I had been Liaison Officer between the 100th Infantry Battalion (Separate) and the 133rd Infantry. I was with the 100th Infantry from September 18, 1943, until March 18, 1944". (R. 29; Ex. A)

Accused identified his signature on the document (R. 29).

It was stipulated that Captain Raymond Sobel, Medical Corps, Neuropsychiatrist, 34th Infantry Division, would testify, inter alia, as follows:

"On examination, May 2, 1944, I found the following: This officer was referred for disciplinary consultation. He had been liaison officer between the 100th Bn and the 133rd Regimental Headquarters since the landing in Italy. A short time ago he was given a platoon. Soon he was assigned to take out a patrol of four men into no man's land. He was quite apprehensive in as much as this was his first patrol, his first excursion forward of Bn C.P. and his first combat experience in leading men. He brought the patrol to a barb wire barrier and was closing it, when a machine pistol opened up on him. He then lay in the ditch for he says 'my knees turned to water and I became paralized.' In as much as he felt that he could not lead the patrol he sent the platoon Sgt ahead with his three men and returned to the CP alone, crawling furiously at the side of the road. On reaching the CP he hid in the dugout which they had made inside the house.

"The next night he was ordered out on another patrol and had an occurrence of the same fear reaction with a sensation of paralysis. He brought the patrol back to the C.P. called his CO and was told to send out the 2 men and remain behind. Shortly thereafter he was ordered by his Col to take still another patrol out but he declined, saying that he was unable to do so. Thereupon he was told that he would be subject to court martial if he did not fulfill his duty as an officer.

"Past history reveals fairly well adjusted home life with no great dependency upon his parents. He always engaged in competitive sports, was a fair student in high school and seldom had any personal difficulties. He has been shy and timid as far as girls were concerned. On this account he never learned to dance. Nevertheless he made an exceedingly good adjustment and said he was not uneasy because of this. His past army record is confined to replacement training centers where he was a part of the permenant cadre. He volunteered for OCS and was a fair student.

"The officer went through the two experiences above under pentothal narcosis. No anxiety was manifested and there was no terror reaction on describing his so called paralysis. I am convinced that his case involves low moral fibre.

"DIAGNOSIS: Psychoneurosis anxiety.

"Recommendation: Reclassification or court martial procedures would be advisable in my opinion. His psychoneurosis anxiety, is present in approximately 90% of our combat troops in a mild form.

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"***

"1. Was he at the time of the alleged offense suffering from a defect of reason resulting from disorder of the mind? No.

"***

"1. Was the accused suffering at the time of the offense from any emotional or physical disorder which might have effected his behavior? Yes.
If so specify: Psychoneurosis anxiety
State how this might effect his behavior: Made it difficult for him to control his behavior" (Ex. B).

Accused testified that he first came into the Army on 24 September 1940 and was assigned as a private to Company H, 10th Infantry, Fort Thomas, Kentucky. Subsequently he went to the 1610th Recruiting Center at Camp Grant, Illinois, where he was a mail orderly with the rank of private first class. Thereafter he became company clerk and was promoted to corporal and to sergeant. Later he went "to the Infantry O.C.S." at Fort Benning and from there to Fort Jackson, South Carolina, where he was assigned to the 100th Division as a platoon leader. (R. 30) He was with the division from 25 November 1942 until 22 March 1943 and his duties consisted of teaching recruits their basic training. From there he went to a replacement depot and ultimately overseas to the Canastel replacement depot, temporary duty with the G-3 section, Mediterranean Base Section, and was eventually "put in the 100th Battalion" as liaison officer on or about 17 September 1943. (R. 31) He testified that he came to Italy with the 100th Battalion and remained with that organization until about 24 March 1944 when he "was transferred to 2nd Battalion and Colonel Marchi told me I was assigned to F Company", which was then located outside of San Giorgio, Italy (R. 31,32,35). From there he came "with them" to the beachhead. He testified in regard to the events on 17 April 1944 as follows:

"I received orders to take the patrol in the afternoon. Jacobs informed me, he called me, and told me I would take a small reconnaissance patrol, five men, and go to house 127 and see if the house was occupied by the enemy. I said yes and he told me that he had an aerial photo and he would send it up but that he wanted it back. Before that I told Sergeant Hamilton about the patrol and immediately after dark my runner, Private Anderson, went to the company c.p. and picked up the aerial photo and when he got back Sergeant Hamilton sent for the other three men for the patrol. I showed the men the approximate route and marked with an x was the company c.p. and also the objective and from that I picked out the house where our platoon c.p. was and plotted the route to our objective. At approximately eleven that same evening, we started out. The three men were standing outside the house and I got as far as the door and something

happened. I still don't know what it was but I couldn't go any farther. Sergeant Hamilton was standing close to me and I couldn't make myself go out the door so I went back inside the house, sat down on a chair, and nobody said anything. I am glad they didn't. I was very nervous. I could hardly sit still and how long I sat there I can't say but the Captain called just a little after two a.m. and Private Anderson was on the phone at the time and the Captain evidently asked him if the patrol had returned. He told him it had and then the Captain told Private Anderson to tell me to come to the c.p. and give my report."

He testified that when he received the order from Captain Jacobs, he "fully intended to lead the patrol." (R. 32) Further:

"I didn't know at that time if someone had said something to him but I had a feeling from the way he talked that he knew it didn't go out and that he was trying to give me another chance which was very white of him and I told him I would."

The night of 18 April was

"Just a repetition of the night before. Sergeant Hamilton, another man, and myself were going. Hamilton was in the c.p. and the other man was in the line and we planned to pick him up as we went thru the line. Sergeant Hamilton and I got ready to go and I got as far as the door and the same thing happened as the night before."

The house in which his command post was located was under "concentrated barrages" and was hit by shellfire three times "between 13-17 April" and accused was present "during all that". He further testified:

"The house itself was kind of broken down by artillery and the room we were in had never been hit. There were no holes in the ceiling or walls. This first shell hit in the corner of the room. Sergeant Hamilton was lying in the corner about three feet from the corner. The shell hit in the ceiling and splattered shrapnel and plaster around, so immediately I headed for the hole in the small room and stayed in there for approximately one hour or an hour and a half."

And,

"I was trembling and lay there trying to calm myself and the medical aid man was nervous himself and he considered that I was more nervous than he was and tried to calm me down." (R. 33)

4. It thus appears from uncontradicted evidence, including accused's

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own testimony, that at the place and time alleged in Specification 1, Charge I, Captain Hugh S. Jacobs, accused's commanding officer, ordered accused to lead a reconnaissance patrol for the purpose of discovering the disposition of enemy forces. Accused prepared to go and assembled his men but at the appointed time of departure did not go and the patrol mission was not performed that night. The next day, as alleged in Specification 2, Charge I, accused was again ordered by Captain Jacobs to perform the identical mission, that is to lead a reconnaissance patrol against the enemy, and again accused failed to carry out the order. After a rest period accused was assigned to another company and, at the time and place alleged in Specification 3, Charge I, his commanding officer, First Lieutenant Walter J. Esco, ordered him to lead a reconnaissance patrol and accused refused to obey the order. In each instance his company was before the enemy and subjected to intermittent enemy shellfire. Accused's conduct constituted misbehavior, in violation of Article of War 75 (MCM, 1928, par. 141a; Winthrop's, reprint, p. 623).

It further appears from uncontradicted evidence that accused, at the place and time alleged in the Specification, Charge II, after having failed to carry out the order of Captain Jacobs, his commanding officer, to lead a reconnaissance patrol against the enemy, reported to him, three hours later, that he, pursuant to the order, had carried out the patrol mission. The reconnaissance patrol had not, in fact, ever left the platoon command post, and all the information accused gave Captain Jacobs was untrue. The court was fully warranted in finding that in making the report accused intended to deceive Captain Jacobs. His conduct constituted a violation of Article of War 96.

5. There was evidence offered by the defense to the effect that accused at the time of these offenses was suffering from psychoneurosis anxiety, a condition "present in approximately 90% of our combat troops in a mild form". There is no showing of insanity and the evidence supports the findings.

6. The charge sheet shows that accused is 25 years of age, was commissioned in the Army of the United States 14 November 1942 and had prior service as an enlisted man from 24 September 1940 to 13 November 1942.

7. The court was legally constituted. 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 and the sentence.

Donald W. MacKay, Judge Advocate.
Werner R. Lynn, Judge Advocate.
Henry C. Merrick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
25 August 1944.

Board of Review

NATO 2992

UNITED STATES	)	34TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 34, U. S. Army, 19 June 1944.
Second Lieutenant GEORGE W. CARTER (01 299 849), Company G, 133d Infantry Regiment.	)	Dismissal and confinement for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Robert K. Mackay, Judge Advocate.
Whitmer P. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

NATO 2992 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 25 August 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Second Lieutenant George W. Carter (01 299 849), Company G, 133d Infantry Regiment, attention is invited to the foregoing

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NATO 2992, 1st Ind.
25 August 1944 (Continued).

holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2992).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 57, NATO, 25 Aug 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
30 August 1944.

Board of Review

NATO 2993

UNITED STATES	)	ISLAND BASE SECTION
v.	)	Trial by G.C.M., convened at Palermo, Sicily, 14 June 1944. Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.
Private LAWRENCE W. MORTON (36 364 887), Battery D, 214th Antiaircraft Artillery (Gun) Battalion.	)	

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 93d Article of War.

Specification 1: (Finding disapproved by confirming authority.)

Specification 2: In that Pvt. Lawrence W. Morton, Btry D, 214th AAA (Gun) Bn., did, at Palermo, Sicily, on or about 15 December 1943, with intent to do him bodily harm, commit an assault upon Sciangula, Francesco di Girolamo, by shooting him in the left arm, with a dangerous weapon to wit, a pistol.

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

Specification: In that Pvt. Lawrence W. Morton, Btry D, 214th AAA (Gun) Bn., did, on or about 15 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Sciangula, Vincenzo di

Girolamo and di Bologna by shooting him with a pistol, at Palermo, Sicily.

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

Specification: In that Pvt. Lawrence W. Morton, Btry D, 214th AAA (Gun) Bn., did, without proper leave, absent himself from his station at Palermo, Sicily, from about 22 October 1943 to about 28 December 1943.

He pleaded not guilty to and was found guilty of the Charges and Specifications, all members of the court present concurring in the findings. No evidence of previous convictions was introduced. He was sentenced "to be hung by the neck, until dead", all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48. The confirming authority, the Commanding General, North African Theater of Operations, disapproved the finding of guilty of Specification 1, Charge I, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The defense entered a special plea of insanity (R. 5). The proceedings of a board of medical officers which convened to examine and determine accused's "mental condition and/or sanity" was received in evidence (R. 18,23; Court's Ex. 1). The investigation was conducted from 22 May to 4 June (R. 18). The findings of the board were as follows:

"Constitutional Psychopathic State; Psychopathic Personality manifested by, criminalism, inability to adjust to the social order, and inadequate emotional reaction.

"Although legally sane and responsible for his actions, his judgment is poor and often on an infantile level. He knowingly and repeatedly has done things which are socially wrong without consideration for the rights of others. He has not been able to learn from previous experiences, including punishment, as is evidenced by repetitions of anti-social acts."

"1. Pvt Lawrence W. Morton is at this date, sane.
2. There is no evidence that he was not sane on or about 15 December 1943.
3. He understands the nature and quality of his acts, and is capable of realizing right from wrong.
4. He is able to understand the charges against him, and is capable of communicating intelligently with his counsel and of doing the things necessary for the proper presentation of his case."

One member of the board, a psychiatrist (Captain Sidney Vogel, 34th Station

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Hospital), testified that he had examined accused before the date of the offenses alleged and had concluded accused was sane (R. 7-9). The defense counsel stated to the court:

> "At this time I would just like to make a statement for the record. I feel that the fact that Captain Vogel originally examined the accused to determine as to whether or not he had any psychiatric leanings and that subsequent to the original examination the accused allegedly committed some serious crimes, that in all fairness to the accused it seems that someone other than Captain Vogel should have been on the medical board when the second examination was arranged for" (R. 9).

The court "denied" the plea that "accused be considered insane" and the trial proceeded (R. 19).

4. The evidence for the prosecution shows that about 1815 hours on 15 December 1943 Salvatore Sciangula and two of his brothers, Vincenzo and Francesco, were in their home at 31 Via Perez, Palermo, Sicily. It was dark outside. Salvatore owned a bicycle which was in the courtyard adjoining the home, about three meters from the house and ten meters from the courtyard doorway leading to the street. (R. 33-35,41,42) The door to the street was usually halfway open (R. 34), but the bicycle was locked (R. 39). Salvatore heard a noise outside and, saying that "they are taking the bicycle away", went out into the courtyard, followed immediately by Vincenzo and Francesco, in that order. Salvatore went toward the bicycle "to see what it was all about" and saw accused "in the entrance" carrying the bicycle. Salvatore told accused to stop, but he started to walk away with the bicycle. Salvatore followed and grabbed the bicycle from accused, who thereupon pointed at Salvatore's stomach. The latter, thinking accused had a knife, called out "cortella" ("knife" in Italian) and made a "fast backward movement", almost falling to the ground. (R. 34-36,41,42) Vincenzo and Francesco had followed Salvatore and were about seven meters away at that time. Accused fired one shot which struck Vincenzo who dropped to the ground and "made a noise with his mouth". Salvatore also fell to the ground and accused left, Francesco following him. (R. 40-42)

Francesco testified he caught up with accused and seized him by the shoulders and that while witness held accused the latter fired one shot over each shoulder and one "from his side", "his arm going behind his back" (R. 41,43). Francesco, who was hit in an arm by one shot, returned home and went to the hospital (R. 35,41,43). Salvatore did not see the encounter between accused and Francesco but heard three or four "rapid shots" (R. 35, 40).

Both Francesco and Salvatore identified accused in court though each testified that at the time of the shooting he did not see accused's face (R. 34,37,41,42). Salvatore testified he recognized accused "from his height, stature, and from the way he ran and that he admitted it was he, before the Commissario" (R. 37). Francesco testified "In that moment of fury, I did

not see anything, all I saw was the person" (R. 41).

Francesco testified "Everything happened so suddenly that Salvatore grabbed the bicycle, the accused grabbed it back, pointed the gun at the same time and fired" (R. 43), while Salvatore testified accused did not grab the bicycle back "because he did not have the time" (R. 37). Salvatore, asked "When did he shoot your brother, when he pointed the pistol at you and you grabbed the bicycle?", replied "As soon as he saw him (Vincenzo) because he was coming forward" (R. 38). This same witness when asked "Then why didn't he shoot you?" replied "Because I *** moved immediately backward and the shot hit my brother" (R. 39).

Francesco, demonstrating the relative positions at the time of the shooting, placed Salvatore a foot and a half in front of and facing accused, Vincenzo six or seven feet directly behind Salvatore and himself by the left side of Vincenzo (R. 43). Salvatore testified that he did not carry a knife, that Vincenzo did not "pull out" a knife and that no attack was made on accused until after Vincenzo was dead (R. 36,37).

A neighbor of the Sciangulas testified that about 1815 hours on 15 December 1943 when he was going through the doorway from the courtyard to Via Perez he observed two men behind the door, one dressed "as an American and the other only had the cap". When witness said "good evening" one of the two men replied with the same words. Witness had observed a bicycle in the entrance to the courtyard. Shortly after leaving the courtyard witness heard shots behind him. Later he went to the hospital where he saw the corpse of Vincenzo and saw Francesco who was wounded. (R. 31-33)

Dr. Giuseppe Di Stefano, a "medical surgeon", testified that on 17 December 1943 he performed an autopsy upon the body of Vincenzo Sciangula, identification of the body having been made by the "King's Attorney". Witness testified that death, which had occurred from 40 to 48 hours prior to the autopsy, was due to "a severe internal hemorrhage", the result of "a firearm wound of medium caliber on the left side of his thorax between the ribs", which went from the front and left of the body to the rear and right. Witness further testified that they "were not able to find" the bullet and that it would have been impossible for a hemorrhage to be brought about by an ordinary street fight. (R. 20-22) The King's Attorney of Palermo identified his report of an autopsy performed upon Vincenzo Sciangula, parts of which report were read to the court without objection by the defense, defense stating in answer to a question by the court that the report was in substance the same as Dr. Di Stefano's testimony (R. 22-24; Ex. 1).

Giuseppa Aronica testified that she saw accused for a few minutes about 2100 hours 15 December 1943 when he came to her room and again after midnight when he returned there. On the latter occasion he had a broken pistol with him which he stated to witness had exploded and hurt one of his fingers, which was bandaged with a handkerchief. Witness testified that accused stated to her that he had wounded one Italian and had shot at another "because they wanted to steal his wallet" and that she "understood" from a conversation accused had with one Giuseppe Furitano, with whom he had returned, that accused

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"had seen an Italian with a bicycle and had tried to take it away from him". (R. 44,46,47)

Giuseppe Furitano testified, as a witness for the prosecution, that he did not see accused on 15 December 1943 and that on that date he spent the entire night at the Patria Hotel with "a Miss Bruna". (R. 28,29) Witness identified a statement as one he had signed. It was admitted in evidence over objection by the defense that it was not voluntary. (R. 29; Ex. 3) In it, after relating his conversation with accused for a considerable period, he stated, among other things, that on the evening of 15 December, while in the company of witness and others, accused took a bicycle from near a doorway on Via F. Paola Perez but was intercepted and that some shots were fired by accused at the "proprieter" (Ex. 3). Witness testified, in effect, that he did not know whether his statement was true (R. 29,30).

First Lieutenant Lester J. Zucker, Corps of Military Police, Headquarters Island Base Section, testified that about 2300 hours 28 December 1943 he arrested accused and "warned him of his rights under the 24th Article of War" in the presence of several other officers and that accused stated:

> "he was AWOL for about two months and had left the 59th Evacuation Hospital the day before he was supposed to be discharged and had not reported back to his organization, that he had been befriended by this family, the father and the two sons, and that they had engaged in several holdups for which he had supplied the guns" (R. 26).

Sergeant John G. Scott, 191st Military Police Prisoner of War Detachment, sergeant of the guard "of the Stockade" identified a statement which he testified accused signed without duress, threats or promises in so far as witness knew (R. 48). The defense stated it had no objection on the ground of lack of voluntariness but did object to the statement on the ground that accused did not have complete control of his mental faculties at the time the paper was signed (R. 49). The court overruled the objection and admitted the statement (R. 49; Ex. 6), the law member stating, in response to remark by counsel, that "We will consider only that portion which pertains to the charges" (R. 55). The statement contained a recital that accused had been warned of "my rights under the 24th Art. of War" and knew that "anything that I say may be used against me". He stated, among other things, that he absented himself without leave on about 22 October, 1943, and thereafter, in association with members of a family named Furitano, and while living at the Hotel Patria in Palermo, committed a series of frauds, larcenies and robberies. He stated:

> "About 1830 hours" *(15 December 1943)* "the four of us (Eugenio, Tomasso, Giuseppi, and I) left the house, after having had a few glasses of wine. This night, Tomasso carried a nickle plated black handled .32 Cal. Rev., and I carried a nickel plated .38 Cal. Rev. wooden handle that I wore in a makeshife shoulder holster. Just as we left the house, Mrs. Furitano (legal) requested Joseph to stop into a nearby wine shop and buy some

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wine. About a block from the house Joseph stopped into a wine shop, while we (I, Eugenio, and Tomasso) waited outside. Joseph came out with a bottle of wine and instructed us to wait for him while he took the wine home. After about five minutes, Joseph joined us, and we (all four) walked together in the direction of Via Pirez, because Tomasso suggested to Joseph, and Joseph conveyed to me, in his broken English, that the above mentioned street would be a choice spot for a holdup, as this street was always dark. As the four of us walked down this street, we walked in pairs. Eugenio and Tomasso walked ahead, and Joseph and I followed. In a dimly lit hallway, on the aforementioned street, after Eugenio and Tomasso had walked up ahead, I and Joseph noticed a bicycle that was laying alongside the right wall of this hallway."

The statement continued:

"As I was about to go in, to steal the bicycle, Joseph and I stopped close to the aforementioned hallway, because a civilian was leaving. As the civilian (male) was leaving, he said, 'Buona Siera', which Joseph replied with same. I remember and can identify this civilian because he was a man walking with a peculiar limp. The moment the coast was clear, I walked into the hallway and grabbed the bike that was laying on the right side of the wall. As I was walking out, I dropped the bike, causing a com(m)otion. Joseph running in one direction, and I, turning right from the above mentioned hallway and away from Corso Tukory, Palermo. While running off in this manner, I noticed that a (first) person (male) grabbed me, and I fought him off, striking him in the stomach with my fists. I warded him off. He (first male) thinking I had a knife, because he fell back yelling 'Cortello', which I understand means 'Knife' in Italion. As Is looked back, another person, (second male). kept coming at me. He grabbed me, and we started to tussle, and as I broke away at a range of about six feet, I took from my shoulder holster a revolver (nickle plated Cal. .38, wooden handle) and fired two shots at him (second male). Right after these two shots, and as I started to run away, I heard him (second male) say, 'Aspetta', which I also understand in Italian to mean 'Wait'. I continued, bearing right, and turning the corner, about three or four doors down from the corner, I was grabbed from the rear by a third person (male) who clung at my shoulders and turned me off balance. It was turning me off balance that I realized he was a third person. I fought him off with my elbows, striking my right elbow in his stomach, as I turned around and hitting him (third person) with my left fist in the stomach. As I turned away from him and over my left shoulder I fired another shot (third shot fired) at this person, from a range of about 18 to 30 feet. When I fired at this person, it seemed as though I fired at a shadow, because of the distance. I continued running to the next corner, crossing the street and turning left, slowing down to a walk and at the

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same moment putting my gun back in my holster."

After the incident described accused:

> "went to the Furitano home, which at this point was a block or two away. I found the old man (Tomasso), Giuseppi, and Eugenio already home. Also present was Tomasso's wife (legal). At this time I reached into my holster to take the gun out and I also noticed that the middle finger of my right hand that was partially amputated two years ago, was bleeding. Upon examination of the revolver (Wooden handle Cal. .38, nickel plated), I found that the barrel on the right side was blown out, this causing the bleeding of my right middle finger Partially amputated. I also noticed at this time that there were two unexploded shells in the chambers of the revolver, (foreign make, wooden handle, nickel plated Cal., .38) and there also appeared blood on my suntan shirt. *** I left the Furitano home iwth Eugenio to go back to the hotel Patria, leaving Joseph and Tomasso at home. I arrived at the hotel at about 2100 hours and found Diana at her room with several civilians, (male and female) and an American soldier, all of whom I do not know. Eugenio told the group including Diana that an attempt was made to holdup us, earlier in the evening. He (Eugenio) telling them that a holdup man was scared off by Lorenzo firing several shots. *** I returned to my own room with Eugenio and found Aronica (nicknamed Adella) in my room. *** Aronica (Adella) then bandaged my finger (right middle partially amputated), that was bruised in the shooting, upon discharge from on(e) of the chambers of the said gun (wooden handle, nickel plated, Cal..38). She also remarked about the blood on my shirt. I, at this time placed the gun (foreign make, wooden handle, nickel plated, Cal..38) on the bed. Eugenio left my room at about 2330 hours and I slept with Aronica (Adella) all night." (Ex. 6)

The prosecution offered in evidence the deposition of First Lieutenant Cyril F. Kiernan, Medical Administrative Corps, Registrar of the 59th Evacuation Hospital, which was received in evidence without objection (R. 24,25; Ex. 2). Lieutenant Kiernan testified that accused was a patient in that hospital and that accused "went AWOL" early on the morning of 22 October 1943 (Ex. 2).

Accused testified that as a child he had suffered fits or convulsions and that when about 19 years old had suffered a head injury. Thereafter he was in a hospital for about three months for nervousness and headaches. While in the Army he had suffered from fits and nervous twitches of his facial muscles. He added:

> "I was in the hot sun one day and I passed out. My commanding officer asked me what the trouble was and I told him that I didn't know. I never told him about it before then later I told him I'd had that trouble several times before. One time

in the mess line, just at the end I passed out and my commanding officer sent me down to the dispensary. When I was down there two days the commanding officer came down and told the Captain to send me to the hospital for a psychiatric test. Upon going to the 59th Evacuation Hospital I stayed there several days and Captain Vogel came in and talked to me. I gave him my history about being nervous and having headaches. On the 21st of October he came in and told me there was no use for me to buck for a Section VIII. I told him I didn't want a Section VIII and wanted to stay in the Army and just wanted to get in another outfit, because the fellows in the Battery were always making fun of me and passing remarks about my condition, they said I was a misfit and all sorts of things about me, that is why I wanted to get in another outfit. On the 22nd of October I was to be discharged. I didn't want to go back to the Battery for the simple reason they all thought I was putting on an act. That is the reason I didn't go back to the company." (R. 50)

On 15 December 1943 he had five or six glasses of wine to drink and became "kind of sleepy", but was not "real drunk". He testified that on that evening

"I was walking down Via Perez with Furitano. We stepped in front of this doorway and suggested we go inside. We went inside, we had no intention of taking a bicycle. There were some people in the house eating supper. Then one fellow told me to get out and I walked out. As I was going out with Furitano there was a bicycle standing by the door. An Italian came out and came running up to us. Later I found out he asked, in Italian, what we wanted and I told him to mind his own business, which he didn't understand. I was a few feet from the bicycle, I picked it up and put it against the building. I then walked down the street about twenty (20) feet and forgot all about the matter. First thing I knew there was two of them came up behind and grabbed me about the shoulders, and in the scuffle I hit one in the stomach. I ran after getting loose from them, Furitano was with me. When I got a little further way down there was another one came up behind me. I had a gun in my pocket, I took it out and pointed it at him and then he yelled 'cortella', which I know means knife in Italian. He kept on coming and I fired one shot. I ran down the street and around the corner then I stopped running. I turned around and fired another shot, I didn't think I hit him because I didn't aim at him, just more to scare him." (R. 51)

He testified he fired the weapon in self-defense. He did not run away from Palermo, but he did "figure" he "had done wrong" (R. 53). Accused also testified that his statement (Ex. 6) was true (R. 54).

5. It thus appears from the evidence with respect to Specification 2,

Charge I, that at the place and time alleged accused shot Francesco Sciangula in the arm with a pistol. There is evidence that accused fired three shots at his victim who had just apprehended accused and that this occurred immediately after accused, interrupted in the commission of larceny, had fired the pistol, mortally wounding another victim. Accused's wrongful conduct immediately preceding the shooting, together with the testimony of the Italian witnesses, clearly refutes any suggestion that he was acting in self-defense and the circumstances negative the possibility of the existence of excuse or justification based upon accused's sudden seizure by his victim. The conclusion is justified that accused intended to do bodily harm to his victim. The pistol was used in a manner which established it as a dangerous weapon. The evidence clearly supports the finding of guilty of a violation of Article of War 93 (MCM, 1928, par. 149m).

It likewise appears from the evidence that at the place and time alleged in the Specification, Charge II, accused discharged a pistol in the direction of Vincenzo Sciangula, inflicting a wound from which Vincenzo died. The shooting occurred when accused was intercepted while taking the bicycle and was incidental to the attempt by the owner to recover his property. The shot was apparently fired at Salvatore but the willful conduct of accused in discharging the pistol under the circumstances bespoke an intent to cause the death of or serious bodily harm to Salvatore. It is immaterial whether accused intended such harm to the actual victim or to another person (MCM, 1928, par. 148a). Malice aforethought was inferable from the circumstances in evidence. The suggestion that the deceased or one of his brothers may have drawn a knife was for the court to consider. Any theory of self-defense was, under the proof of the aggressive and unlawful acts of accused, properly rejected by the court. The autopsy disclosed that a gunshot wound caused the death and the identity of the corpse upon which the autopsy was performed was sufficiently shown by competent evidence to have been that of the person named in the Specification. The court properly found accused guilty of murder in violation of Article of War 92 (MCM, 1928, par. 148a).

The victim of the assault alleged in Specification 2, Charge I, was described in the Specification as Sciangula, Francesco di Girolamo, and the victim of the homicide was described in the Specification, Charge II, as Sciangula, Vincenzo di Girolamo and di Bologna. The evidence shows the name of the victim of the assault only as Francesco Sciangula or Sciangula, Francesco and the victim of the homicide as Vincenzo Sciangula or Sciangula, Vincenzo. The names as proved were identical with the corresponding parts of the names alleged. The failure to prove the remainder of the names alleged was not fatal (NATO 2238, Payne). The record leaves no doubt that the persons struck by the bullets fired by accused were the persons intended to be described in the Specifications.

The uncontroverted evidence including accused's pretrial statement shows accused to have been absent without proper leave from his station as alleged in the Specification, Charge III, in violation of Article of War 61.

6. The introduction in evidence of the pretrial statement of the witness Giuseppe Furitano was proper for the limited purpose of impeaching his prior

contradictory testimony but was not of course competent to prove the truth of the recitals of the pretrial statement. The defense did not object to the admission of the statement except on the ground that it was not voluntary. It is assumed that the court considered the statement only as impeachment. But whatever was the court's action in this regard, it is clear that the substance of all portions of the statement which bore on the offenses charged is found in other competent evidence. No possible irregularity in the premises could have injuriously affected any of the substantial rights of accused (AW 37).

7. The deposition of Lieutenant Kiernan, introduced by the prosecution, related only to the non-capital offense of absence without leave. There was no error in its consideration by the court (Bull. JAG, October 1942, sec. 382).

8. There was no legal impropriety in the disposition of the plea of insanity. Although medical officers expressed the view that accused was suffering from a constitutional psychopathic state with impaired ability to adjust to social requirements and with inadequate control of his emotions, the board found him sane and responsible for his actions and capable of "realizing right from wrong". In view of the conclusions of the board, and considering the testimony of accused as to his history of nervous and mental difficulties, the court was justified in finding that accused was in fact able, concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right. Findings to this effect were implicit in the findings of guilty (Bull. JAG, December 1942, sec. 395 (44a)).

9. The charge sheet shows that accused is 32 years of age and was inducted into the Army 18 August 1942. No prior service is shown.

10. The court was legally constituted. 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 and the sentence. A sentence of death or imprisonment for life is mandatory upon a court-martial upon conviction of murder under Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Robert N. MacBay, Judge Advocate.

(absent), Judge Advocate.

Henry C. Renick, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
30 August 1944.

Board of Review

NATO 2993

UNITED STATES	)	ISLAND BASE SECTION
v.	)	Trial by G.C.M., convened at Palermo, Sicily, 14 June 1944.
Private LAWRENCE W. MORTON (36 364 887), Battery D, 214th Antiaircraft Artillery (Gun) Battalion.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

Donald W. MacKay, Judge Advocate.

(absent), Judge Advocate.

Henry C. Remick, Judge Advocate.

NATO 2993 1st Ind.
Branch Office of The Judge Advocate General, NATOUSA, APO 534, U. S. Army, 30 August 1944.

TO: Commanding General, NATOUSA, APO 534, U. S. Army.

1. In the case of Private Lawrence W. Morton (36 364 887), Battery D, 214th Antiaircraft Artillery (Gun) Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have

CONFIDENTIAL

NATO 2993, 1st Ind.
30 August 1944 (Continued).

authority to order execution of the sentence.

2. After publication of the general court-martial order in the case, nine copies thereof should be forwarded to this office with the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in parenthesis at the end of the published order, as follows:

(NATO 2993).

HUBERT D. HOOVER
Colonel, J.A.G.D.
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 60, NATO, 30 Aug 1944)

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
5 August 1944.

Board of Review

NATO 3003

UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, U. S. Army, 13 July 1944.
Private WALTER H. PLEBAN (33 277 474), Company I, 179th Infantry.	)	Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Walter H Pleban, Company I, 179th Infantry did, at or near Benevento, Italy, on or about 6 October 1943 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he was apprehended at or near Naples, Italy, on or about 29 January 1944.

Specification 2: In that Private Walter H Pleban, Company I, 179th Infantry, did, at or near Nettuno, Italy on or about 29 February 1944, desert the service of the United States

by absenting himself from his organization without proper leave with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces, and did remain absent in desertion until he was apprehended at or near Nettuno, Italy on or about 1 May 1944.

He pleaded guilty to the Specifications except, as to each, the words "desert the service of the United States by absenting" and "with intent to avoid hazardous duty, to wit: combat operations against elements of the German armed forces" and "in desertion", substituting for the first exception the word "absent", not guilty to the excepted words, guilty to the substituted word, not guilty to the Charge but guilty to violation of Article of War 61. He was found guilty of the Charge and Specifications except, as to Specification 1, the words "he was apprehended at or near Naples, Italy" and, as to Specification 2, the words "he was apprehended at or near Nettuno, Italy", and not guilty of the excepted words. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the "rest" of his natural life, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that on 6 October 1943 accused, who was an ammunition bearer of a machine gun squad, was with his company which was then engaged in combat near Benevento, Italy. His battalion was on the offensive and committed to action, receiving artillery and small arms fire. (R. 9,13) His acting section sergeant testified that accused was in the area before it was shelled but that "after the fire stopped" he made a "check of the section" and found that accused was "gone" (R. 9,10). This witness testified that accused was not with his company and section between 6 October 1943 and 29 February 1944 (R. 15). An extract copy of the morning report of accused's company admitted in evidence (R. 6) contained the entry "33277474 Pleban, Walter A. Pvt duty to AWOL 6:45 AM Oct 6/43" (Ex. A).

The mess sergeant of accused's company testified that on 29 February 1944 accused "reported back to the kitchen" with five or six soldiers "who returned back to duty from the hospital", but witness did not recall whether or not accused was "under escort" and had no way of telling where accused came from (R. 6,14,15). The kitchen was located "in the rear in a grape vine patch" on the Anzio beachhead in Italy, the company being forward (R. 6, 7). Witness testified,

"I taken these returned back to duty men and piled them on a truck and trailor with rations and water and coffee *** I got up there and got the coffee set up and artillery shells started coming. There were a few shells and we got in holes. It let up after a while and *** I got these men lined up ready to go forward to the company. We got ready to go and I checked the group and found Pleban was not there. We hollered and a few others hollered with me and there was

no signs of the man returning to us. I took the coffee and rations up there and on the way back I happened to run across Pleban at the same place we had the coffee. I told him where the 3rd Battalion Headquarters were, and the company. I returned to the kitchen." (R. 7)

The spot where witness left accused was five or six hundred yards from the company area (R. 7). Witness further testified that on 1 May 1944 the company was on the Anzio beachhead (R. 8,9). Accused's acting section sergeant testified accused was not with the section on 29 February 1944, or at any time thereafter (R. 11). The extract copy of the morning report contained the following entries:

"3 March 1944 - 33277474 Pleban, Walter A. Pvt duty to AWOL 1800 Feb 29/44.
21 March 1944 - 33277474 Pleban, Walter A. Pvt AWOL to evac & drp fr rolls this date.
1 May 1944 - 33277474 Pleban, Walter A. Pvt AWOL drp fr rolls to Conf Regtl Stockade 1 May 44" (Ex. A).

Accused elected to remain silent.

4. It thus appears from the evidence and accused's pleas that at the place and time alleged in each Specification accused absented himself without proper leave from his organization and remained so absent until the dates alleged. On each occasion accused's organization was in combat and subjected to enemy fire. From these and other circumstances the court was warranted in concluding that when accused absented himself he did so with the intention of avoiding the hazardous duties of combat as alleged (MCM, 1928, par. 130).

The court by its findings excepted from the Specifications the manner and place of the termination of the absences, despite accused's pleas, presumably because of an absence of testimony with respect thereto. As the offense of desertion was complete when the absence in each instance commenced, matters pertaining to manner and place of termination of such absence are here immaterial.

5. The charge sheet shows that accused is 25 years of age. He was inducted into the Army in July 1942. No prior service is shown.

6. The court was legally constituted. 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 and the sentence.

Donald K. MacKay, Judge Advocate.
Mortimer R. Fox, Judge Advocate.
Henry C. Lenick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
11 September 1944.

Board of Review

NATO 3015

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 23 May 1944.
	)	
General Prisoner HAROLD R. BAUGH (35 669 597), formerly Private, Company I, 504th Parachute Infantry.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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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 Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that General Prisoner Harold R. Baugh, did, at or near Naples, Italy, on or about 18 October 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Lieutenant Colonel Paul H. Dolman, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced except the conviction involved in accused's plea of former jeopardy. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the morning of 18 October 1943 accused, a general prisoner, but at that time a private of Company I, 504th Parachute Infantry, was a member of a guard detail of which Corporal Adnirum J. Etheredge, 504th Parachute Infantry, was in charge, and was stationed at outpost number 4 located a short distance inside the Capodichino airfield near Naples, Italy. About 0800 hours Staff Sergeant John Ross, 909th Air Base Security Battalion, patrol sergeant of the airfield, approached Etheredge and told him an Italian shoeshine boy who was shining paratroopers' shoes just inside the gate would have to leave the field (R. 17,18,28,34,38;Ex. 2). Etheredge replied that the boy was doing no harm. A short discussion followed, after which Ross left and returned shortly with "a written order about all Italians" which he exhibited to Etheredge. The order was shown to an officer who, after reading it, told Etheredge the boy would have to leave. Etheredge then said to Ross, who was leaving, "You keep your black ass out of this area". Ross replied that he was "not black", he was a "colored man", and asked accused to "speak to the corporal because he did not know what he was doing". (R. 18) Ross testified accused replied: "You heard what the corporal said and if you don't do it then I'll tell you" (R. 22). As to what then occurred Ross testified:

> "Then by that time my driver had turned around the jeep and set it back towards the Provost Marshal's office and was waiting for me."

and:

> "The corporal *** and some of the other paratroopers were standing around and beginning to bunch up a little. As I got in the jeep I knelt backwards to look at them, and then took a .45 and shoved the bolt home and then held it at raised arms and then drove away" (R. 18).

Ross testified that accused did not have a gun and he did not see any paratrooper so armed (R. 23).

Ross drove to his command post, about three-quarters of a mile away, and reported the incident to Lieutenant Colonel Paul H. Dolman, his battalion commander (R. 18-20). Colonel Dolman and Captain Frederik L. Ludemann, Jr., 1056th Military Police Company (Aviation), got in the rear of the "jeep", Colonel Dolman sitting on the right immediately behind Ross and Captain Ludemann on the left behind the driver. The "jeep" had a "regular GI jeep top" of canvas, which was up at the time, but no side curtains. They started back to outpost number 4 and were "halfway over the field" when a report was heard and a bullet passed through the left side of the "jeep" and struck Captain Ludemann's shoe. The "jeep" proceeded for another 50 yards and stopped when a second bullet went through the spare tire on the rear of the vehicle and struck Colonel Dolman, who exclaimed "I have been hit", slumped forward in the "jeep" and then crawled out on to the ground. (R. 18-23,28-31) Colonel Dolman was immediately taken to a hospital and given medical attention and blood transfusions but died 23 November 1943 (R. 10,11; Ex. 1).

It was stipulated that if Corporal Ward M. Watson, Battery E, 80th

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Airborne Antiaircraft Battalion, were present he would testify that on the morning of 18 October 1944 he was eating breakfast in a shack near the corner of the airfield (R. 31,33) and

> "heard a rifle go off. I stuck my head out and went out around the side of the place. Rifles were pointed past our door and Baugh hollered, get back inside. I went inside again and got my tommy gun and came out to see what the noise was about. I then asked Baugh what they were shooting at and he said they were shooting at some colored men. I went to the shack and then to the jeep and found the Colonel lying on the ground. I started back to the shack and Baugh started to go towards the gate" (R. 31,32).

Accused was armed with an "M-1" rifle and looked "excited" and "fighting mad, just like when you want to beat hell out of somebody". Witness was positive accused was shooting the gun, "it was pointed in that direction" and there were two empty shells on the ground. (R. 32) The "jeep" had passed the shack and was going away from it, 75 or 80 yards away (R. 33).

o Lieutenant Colonel George A. Shaffer, Investigating Officer, Peninsular Base Section, testified he interviewed accused and obtained a written statement from him. He also testified that before the statement was made Article of War 24 was read to accused and explained, that accused was told that any statement he made might be used for or against him, and that accused stated he wished to make a statement. The defense objected to the admission of the statement on the ground that "the corpus delicti has not been proven" and also questioned the voluntary character of the document (R. 16) but stated "I do not care to cross examine the witness nor to argue in support" of his statement. The court admitted the statement in evidence subject to the corpus delicti being proven (R. 17) and subsequently admitted it "unconditionally" (R. 33). That statement reads in material part as follows:

> "The shooting happened on the morning of 18 October 1943 at about 0800 hours, while I was on duty as an outpost guard of the 504th Parachute Infantry. Our outpost was using a building located a short distance inside the airport Capodichino, Naples, Italy. On this morning a(n) Italian shoeshine boy had been permitted to enter the gate to where we were to shine our shoes. While the boy was shining my shoes, a jeep drove up in which were a colored sergeant and his driver. The sergeant got out, came over to Corporal Etheredge, who was in charge of our guard, and told him that he would have to put the shoeshine boy outside. The Corporal told him that he had him in there to shine our shoes, and when he finished he would put him out. The sergeant and the corporal had some words. This sergeant turned to me and said, 'Tell the corporal where he is wrong in telling me to get off the post.' I then said, 'The corporal is not wrong as he is in charge of this post.' Then the colored sergeant said something else, I dont remember the words, but I told him then that if he didnt get off I would put him off. The sergeant then backed up to

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his jeep, got in, and pulled out his pistol and cocked it, and kept it pointed at us, facing to the rear in his jeep as the jeep drove away. As the colored sergeant drew his pistol and the jeep pulled away, Corporal Etheredge grabbed his rifle and ran after the jeep and gave the order to fire and also said, 'get your guns and shoot the bastard' and gave other orders that I dont remember. Some of us ran to the guardhouse to get our rifles. I grabbed my rifle. When I came out of the guardhouse with my rifle, I saw the jeep disappearing around the corner of the building about 50 yards away. I ran around an old cellar to a point about 150 yards from the guardhouse where I could see which way the jeep was going. I was standing by a wrecked hangar, and I notice the jeep passing on my right between 50 and 100 yards away heading back for the guardhouse with the same two colored men in it; I did not notice any other occupants of the jeep, I was about to fire when I saw a number of men working on an airplane which would have been in the line of fire. So I waited until the jeep had passed them and then I fired my rifle. The jeep was slowing down and after I fired a second shot the jeep stopped. I then returned to the guardhouse, and Corporal Etheredge asked me, 'Did you shoot?' I replied, 'Yes, I think I got him.' The corporal then told me, 'Remain here.' I remained in the guardhouse with the other guards, and about five minutes later two lieutenants came up in a jeep and called for the corporal of the guard, and Corporal Etheredge went out and talked to them. In a few minutes he came back in the guardhouse and told us all to remain in the guardhouse and not go out. In about fifteen minutes after that Major Adams and Lt. Keep came to the guardhouse. They questioned us guards and asked who had fired the shots. I immediately said that I had. Then I found out that a white officer had been shot. I did not learn who had gotten shot until that afternoon" (Ex. 2).

It was stipulated that a certified copy of a "Clinical Record Brief" signed by Captain A. E. Nielsen as medical officer of the day at the 17th General Hospital and containing information taken from the official records of that hospital, with the exception of the phrase "when shot by a person from a nearby building" be admitted in evidence. The contents of the certificate were apparently read by the prosecution, but it was not identified as an exhibit, attached to the record, or specifically admitted in evidence. It reads:

"Dolman, H. Paul, Lt Col, disposition Died, final diagnosis: Wound, penetrating, severe, right lumbar, with perforation of caecum, accidentally incurred on 18 Oct 1943, at 'A751' about 0730 hrs, when shot by a person from a nearby building; Additional diagnoses: 18 Oct 1943: Exploratory incision revealing large multiple perforations of caecum and lower ascending colon; right colon resected with use of modification of Mikulicz technique (Lahey); Died, 0635 hrs, 23 Nov 1943" (R. 10).

Captain Carlyle Payne, Chief of Laboratory Service, 17th General Hospital,

testified that Lieutenant Colonel Paul H. Dolman died 23 November 1943 and identified a protocol of an autopsy he performed on the body (wherein the name appears as "Dalman") which was admitted in evidence (R. 11) and reads in part:

> "The cause of death in this case is not very clear and may easily be the result of two or three conditions. The abdominal abscess is hardly enough to account for death, but when considered together with the parenchymatous change of the kidneys and liver and the lesions in the liver as a result of insufficient circulation there may be adequate cause for death" (Ex. 1).

As to the cause of death, witness testified:

> "The outstanding finds are an abscess in his abdominal cavity, apparently as the result of a bullet wound, the bullet entered the lumbar region. We also had other findings, chief of which was considerable degeneration in the kidneys. Those were the two outstanding findings" (R. 11).

Asked whether there was some cause of death other than the "bullet entering the body", witness replied:

> "I cannot say that there was some intervening cause. I know that my findings show an abscess in the abdominal cavity and also degeneration in the kidneys" (R. 11).

Witness testified further that the abscess, which in his opinion was the "direct result of the wound", would not ordinarily "be considered enough evidence to cause death" but that the "effects of the wound plus possible transfusion reaction would certainly explain the death adequately" and the cause of death was "the abscess plus the degenerative changes in the kidneys" (R. 11,12). Witness testified further that the "degenerative changes in the kidneys" might be "the result of the transfusion or might be the result of some other unknown factor" but that it was "extremely unlikely" that the "degree of pathology" of the kidneys found in the autopsy existed prior to the gunshot wound (R. 12,14) and that:

> "Even though the cross matching, as ordinarily done, is correct, there may be still other factors which could not be demonstrated. Ordinarily, a transfusion if properly cross matched, if the blood is properly cross matched, there is no reaction. Occasionally, unknown factors might be present which would lead to reaction" (R. 12).

As to whether the "degenerative change" in the kidneys could have been "a complication or result of the abscess" witness testified:

> "Well, it might or might not. I do not think I could

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answer that yes or no. Many times it does occur, perhaps not to as marked a degree as it was in this case, but it may be started with infections" (R. 12).

Witness testified further that the "most likely reason" for giving the transfusion, which might have caused the degeneration, was "in connection with his surgery following the injury" so in effect the transfusion was "caused" by the bullet wound and the possible result of the transfusion together with the bullet wound caused Dolman's death (R. 14,15).

Accused testified in connection with the events preceding the shooting that Ross turned to him and said:

> "'Tell the corporal where he is wrong telling me to get off the post'. I said, 'If the corporal told you to get off the post he is not wrong, he is in charge of the post. If you don't get, will put you off myself.' He said something else but I was getting my shoes shined and didn't pay much attention to it. He started to the jeep. At the time he was getting into the jeep he took his pistol and loaded it, cocked it and around the building he went. The corporal then said, 'Get your rifles and shoot the bastard'" (R. 44);

and further:

> "The corporal gave the order to go get your rifles and get the colored people. I grabbed my rifle. I seen one person go around the building one way and I went another way around an old cellar, around an old hangar, where I could see both ways. The road was at a junction and I could see both ends of the road. I saw nothing until I saw the jeep coming back a moment or so later with these colored persons and back towards the same spot, going back towards the outpost where we were. I was going to fire but I waited until the jeep went past a plane where these fellows were working. I then fired on the jeep these colored people were in. I fired one shot and a moment or so I fired another one. I see these boys from the other end come down towards the jeep and I went back to the guardhouse" (R. 45).

Accused testified that "not over five minutes, three to five minutes time" elapsed between Ross' departure and the time accused saw him returning (R. 45). He testified further that he thought the order given by Corporal Etheredge was "legal", that he acted in compliance therewith, that he did not at any time see Colonel Dolman or Captain Ludemann in the jeep, had he seen them he would not have fired and that he intended to shoot Ross (R. 45-47).

Three defense witnesses testified that after cocking his pistol Ross held it pointed directly at Etheredge, accused and the other paratroopers, as he drove away (R. 36,40-42). Etheredge testified he "ducked", told the men to "scatter", and ordered them to "get their rifles and shoot the

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bastard" (R. 42,44). A defense witness testified Etheredge was in charge of the post and "told us to get that nigger" (R. 36).

Captain George F. Block, prison officer of the Peninsular Base Section stockade, testified that since 7 February 1944 he had been in daily contact with and observed accused as a general prisoner in the stockade, that accused had been a model prisoner and had been made a platoon sergeant and that for a period of time had been placed in charge of the prison laundry. Witness testified further that accused executed orders with promptness and dispatch and that in his opinion if accused were given an order to shoot someone he would "unhesitatingly carry it out" (R. 33,34).

4. It thus appears from the uncontroverted evidence that at the place and time alleged accused shot Lieutenant Colonel Paul H. Dolman, the person named in the Specification, with a rifle, inflicting injuries which, with complications resulting directly therefrom, caused his death 36 days later.

Defense contended that accused shot at Sergeant Ross pursuant to what he believed was a lawful order of his superior and that while he intended to shoot Ross he had no intention of shooting nor did he see Colonel Dolman.

The general rule is that a homicide committed in the proper performance of a legal duty is justifiable. Thus the acts of a soldier done in good faith and without malice in compliance with the orders of a superior are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know them to be illegal. Where, however, the order is so manifestly beyond the power or discretion of the commander as to admit of no rational doubt of its unlawfulness it cannot be used as a cloak of immunity to render justifiable an act which, but for such order, would be unlawful (40 C.J.S., Homicide, sec. 107, p. 967; Winthrop's, reprint, pp. 296,297; MCM, 1928, par. 148a).

The circumscription of the general rule has been expressed in the following language:

> " *** the order, to constitute a defense, must be a legal one *** and it must command a thing not in itself unlawful or prohibited by law *** the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness. Such would be a command to violate a specific law of the land or an established custom or written law of the military service, or an arbitrary command imposing an obligation not justified by law or usage *** " (Winthrop's, reprint, pp. 296,297).

The foregoing rule is particularly applicable to the circumstances of the instant case. Furthermore, the testimony of accused clearly discloses that the tense situation which precipitated the order no longer existed at the time he fired at Ross and shot Dolman. That he did not believe himself in

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imminent danger at the time is shown by the fact that, according to his own testimony, he held his fire until Ross' "jeep" reached a point where men working on a near-by airplane were out of the line of fire. Accused then fired twice, first from a position to the left of the "jeep" and later from a position to the rear of the vehicle. There is no suggestion in the evidence that at the time he fired accused was observed by any of the occupants of the vehicle. No issue of self-defense was raised by the evidence.

The court in rejecting accused's defense must have concluded that under all the circumstances in evidence the order, commanding as it did the doing of an unlawful act, was itself unlawful and such that a man of ordinary sense and understanding would know it to be illegal and beyond the scope of the authority of its author. There is substantial evidence to support this conclusion. The precise contention was raised by accused in a previous trial and determined adversely to accused and the action approved by the Board of Review (NATO 898, Etheredge and Baugh).

5. Accused testified that he did not see or intend to shoot Dolman but intended to shoot Ross. His intention under the circumstances is immaterial. Such intention does not operate to change the grade of the crime (MCM, 1928, par. 148a; Wharton's Crim. Law, 12th Ed., Vol. I, sec. 442, pp. 677,678; NATO 1556, Boudreaux).

The rule is:

> "Since legal malice does not require ill will toward the victim, the crime may be murder although the person killed was not the one whom accused intended to kill, as where the victim is mistaken for another, or where one shooting at another kills a bystander or third person coming within range, or where one partakes of poison which accused intended for another, or receives a blow intended for another. Actual malice toward the unintended victim is not necessary. The grade of the crime in such cases will be the same as though accused had killed the person whom he had intended to kill" (40 C.J.S., Homicide, sec. 18, pp. 864,865).

6. The record presents a question as to whether the evidence shows a sufficient causal connection between the gunshot wound and Dolman's death. The autopsy disclosed an abscess in the abdominal cavity apparently caused by the gunshot wound, and a degeneration of the kidneys which could have resulted from "transfusion reaction". The abscess alone was not sufficient to have caused death but together with the degeneration of the kidneys was an "adequate explanation" thereof. The evidence further shows that the transfusions were administered as a direct consequence of the gunshot wounds and that it was highly unlikely that, prior to the shooting, the kidney condition existed to the degree found. There is no suggestion in the evidence that Dolman received other than prompt, normal and approved medical attention.

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In such cases the rule is:

> "Liability for homicide does not depend upon the fact that death is the immediate consequence of the injury inflicted by the accused. One who inflicts an injury on another is deemed by the law to be guilty of homicide if the injury contributes mediately or immediately to the death of such other. The fact that other causes contribute to the death does not relieve the actor of responsibility, provided such other causes are not the proximate cause of the death. Criminal responsibility for inflicting an injury which is the efficient cause of death is not lessened merely because of the predisposed physical condition of the decedent, without which the blow or wound would not have been fatal" (26 Am. Jur. sec. 48, p. 191).

Also:

> "To warrant a conviction for homicide it is necessary, but sufficient, to establish that the act of accused was a proximate cause of death. In this connection proximate cause does not necessarily mean the last act of cause or the act nearest in point of time to the death; it means rather nearness in point of causal relation. Accused's act or omission need not be the immediate cause of the death and he is responsible if the direct cause resulted naturally from his conduct. An injury is the efficient, proximate cause of the death where it directly and materially contributed to the happening of a subsequent accruing immediate cause of the death; or, as the rule is sometimes stated, if the act of accused was the cause of the cause of death, no more is required" (40 C.J.S., Homicide, sec. 11b, p. 854).

There was substantial evidence to warrant the conclusion that, under the above rule, Dolman's death resulted from the gunshot wound inflicted by accused (NATO 2295, Lavender).

7. Upon arraignment and before pleading to the Specification and Charge, accused interposed a plea of former jeopardy. The plea was supported by a stipulation between the prosecution and defense to the effect that on 26 October 1943 accused had been tried by a general court-martial and convicted of assault with intent to murder Lieutenant Colonel Paul H. Dolman by shooting him in the back with a rifle on 18 October 1943, and had been sentenced to dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for ten years, which sentence was approved by the reviewing authority; that Colonel Dolman was living at the time of the previous trial but died thereafter on 23 November 1943, after which the present charges were preferred against accused; and that the same acts of accused were the basis for both sets of charges. The plea was overruled (R. 9).

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The action of the court in overruling the plea was proper. Colonel Dolman's death resulted from the acts of accused and occurred subsequent to the first trial thus changing the character and effect of his acts and bringing into existence a new offense.

The rule in such cases is:

> "According to a general precept of criminal law, if, after the first prosecution, a new fact supervenes for which the defendant is responsible, and which changes the character of the offense and, together with the facts existing at the time, constitutes a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. This principle is the foundation for the well-established rule that at common law a conviction for assault while the person assaulted is still living is no bar to a prosecution for murder or manslaughter instituted after the person assaulted dies on account of the injuries received; and the trial for murder does not place the defendant twice in jeopardy" (26 Am. Jur., sec. 182, pp. 278,279).

And stated in other words:

> "A conviction or an acquittal of assault and battery, or of assault with intent to commit murder, or to do grievous bodily harm, etc., is not a bar to a subsequent prosecution for murder or manslaughter, where the person assaulted died of the blows inflicted. This is a well-recognized exception to the same evidence rule previously stated for determining the identity of the offenses" (22 C.J.S., sec. 287, p. 431).

Also:

> "And a conviction of assault and battery has been declared no bar to an indictment for manslaughter for the killing of the same person, who had meanwhile died of the assault" (Winthrop's, reprint, p. 264).

The rule thus set forth involves an established exception to that generally applied with respect to lesser included offenses. As stated in the Manual for Courts-Martial:

> "In general, once a person is tried in the sense of A. W. 40 for an offense, he can not without his consent be tried for another offense if either offense is necessarily included in the other" (MCM, 1928, par. 68).

The rule of the Manual is expressly made general in its scope and admits the exception.

8. The charge sheet shows that accused is 30 years of age. He was

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inducted into the Army 2 November 1942. No prior service is shown.

9. The court was legally constituted. 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 and the sentence. A sentence of death or imprisonment for life is mandatory upon a court-martial upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 454, Title 18, United States Code.

Kenneth D. MacBan, Judge Advocate.
Mortimer Kahn, Judge Advocate.
Henry C. Reinich, Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
23 August 1944.

Board of Review

NATO 3041

UNITED STATES	)	FIRST ARMORED DIVISION
v.	)	Trial by G.C.M., convened at APO 251, U. S. Army, 8 July 1944.
Private ROLAND B. DORSEY (18 090 013), Company A, Supply Battalion, 1st Armored Division.	)	Dishonorable discharge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private Roland B. Dorsey, Company A, Supply Battalion, 1st Armored Division, APO 251, U. S. Army, did, at Camigliano, Italy, on or about, January 28, 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: Proceeding by water transportation to combat area at Anzio, Italy, and service thereat, and did remain absent in desertion until he was returned to military control on or about February 8, 1944.

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

Specification 1: In that Private Roland B. Dorsey, Company A,

Supply Battalion, 1st Armored Division, APO 251, U. S. Army, did, near Camigliano, Italy, absent himself without proper authority from his organization, from about January 19, 1944 to about January 28, 1944.

Specification 2: In that Private Roland B. Dorsey, Company A, Supply Battalion, 1st Armored Division, APO 251, did, without proper leave, absent himself from his station at Stockade, Peninsular Base Section, near Melito, Italy, from about February 20, 1944 to about April 10, 1944.

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

Specification: In that Private Roland B. Dorsey, Company A, Supply Battalion, 1st Armored Division, APO 251, U. S. Army, having been duly placed in confinement in Stockade, Peninsular Base Section, near Melito, Italy, on or about February 13, 1944, did, at Engineer Depot E-250 near Aversa Italy, on or about February 20, 1944 escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Roland B. Dorsey, Company A, Supply Battalion, 1st Armored Division, APO 251, U. S. Army did, at Camigliano, Italy, on or about February 22, 1944, knowingly and willfully apply to his own use and benefit one 1/4 Ton truck of the value of about $850.00, property of the United States furnished and intended for the military service thereof.

ADDITIONAL CHARGES

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

Specification: In that Private Roland B. Dorsey, Company A, Supply Battalion, 1st Armored Division, APO 251, U. S. Army, did, at Peninsular Base Section Stockade, near Melito, Italy, on or about May 8, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Amentea, Italy, on or about May 21, 1944.

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

Specification: In that private Roland B. Dorsey, Company A, Supply Battalion, 1st Armored Division, APO 251, U. S. Army, having been duly placed in confinement in Stockade, Peninsular Base Section, Near Melito, Italy, on or about April 10, 1944, did, at Stockade, Peninsular Base Section near Melito, Italy, on or about 8 May 1944, escape from said confinement before he was set at liberty by proper authority

He pleaded guilty to Charge IV and its Specification and not guilty to all other Charges and Specifications and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "US" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused was a member of Company A, Supply Battalion, having joined the organization 1 January 1944 "some time around Camigliano" (R. 7,11). On 19 January he was part of a detachment located at Camigliano (Italy) in charge of the Personnel Officer, First Lieutenant James C. Robertson, and Staff Sergeant Robert M. Parr (R. 7,11,12). A certified extract copy of the morning report of "Headquarters Company", Supply Battalion, was introduced in evidence showing that accused was attached to that organization for rations only from Company A and that he absented himself without proper leave 19 January 1944 and remained so absent until 28 January 1944 (R. 13; Ex. A). Sergeant Parr testified that he made a search for accused on the morning of 18 January; "The company had pulled out and I was left in charge, and headquarters called for a detail to go out on trucks the next day and I looked for him at three o'clock that morning". Accused was not there. (R. 7) Neither Sergeant Parr nor Lieutenant Robertson gave accused permission to be absent from 19 to 28 January (R. 7,12).

Lieutenant Robertson testified that on 28 January 1944, he saw accused who "had just been brought back by the MPs and I asked him where he had been and I told him that he was going up to the beachhead" at Anzio (Italy), "and I told Sergeant Parr to take him to the assembly area". Witness also told accused that Company A was at the beachhead, and testified "I don't see how he could help from knowing there was no other place where he could go but to his company". (R. 12) Sergeant Parr testified that about 1200 hours on 28 January he was "called down" to Lieutenant Robertson's office in Camigliano "to take charge of" accused. Witness testified "He was supposed to go with me to Santa Maria and pick up his barracks bags that were stored there" and "when we came back I was to take him to the staging area" at "the palace grounds". Accused went with Sergeant Parr to Santa Maria to get his barracks bags. Sergeant Parr testified that he gave accused "orders to wait there" for him and "I went down to gas up the vehicle and I left him with Private Coleman and when I came back he was gone". (R. 7,8) Private William T. Coleman, Company A, Supply Battalion, testified that on 28 January, when he and accused were taken to the staging area at the palace grounds, accused "was supposed to wait" but did not do so. Witness testified "He said something about going to the Red Cross and I told him he better stay around" and then accused "took off". Witness also testified that they waited about 30 minutes for accused and "looked about for him", and that a search was made at the Red Cross and accused could not be found there. (R. 9-11) Sergeant Parr testified that accused was cognizant of the fact that he was going to the palace grounds to be subsequently transported to the Anzio beachhead because "Lieutenant Robertson told him" that on "the first date" witness

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testified to, accused's company was preparing to go to the Anzio beachhead, and that on the latter date the company was "there". The next time witness saw accused was "when the MPs brought him in before we put him in the PBS Stockade", at which time accused expressed to witness his willingness to rejoin his "outfit". (R. 8,9) The morning report of Headquarters Company, Supply Battalion (supra), shows that accused absented himself without proper leave therefrom on 28 January 1944 and remained so absent until 12 February 1944 (R. 13; Ex. A).

Accused was "brought back" to Lieutenant Robertson's office on 12 February (R. 12) and placed in confinement by that officer in the stockade of Peninsular Base Section, near Melito, Italy, on 13 February 1944 (R. 13; Ex. C). Captain William G. Wood, adjutant of the stockade, testified by deposition, which was admitted in evidence, both the defense and accused stating "no objection", that on 20 February 1944 accused was working under guard at Engineer Depot E252, near Aversa (Italy). Witness further testified that accused was not returned to the stockade on that date because "he had escaped and was not returned to military control. That is the guard reported him as escaped and he had no authority by anyone in authority to be absent". The next time witness saw accused was when "it was reported to me by phone that he was apprehended on Apr 10 '44 at the gate to the 2nd Replacement Depot then located near Bagnoli, Italy. He was returned to the Stockade and re-confined 10 April 1944". (R. 15; Ex. C)

After the prosecution had offered in evidence a "confession" of accused and the defense and accused both stated there was no objection thereto, Major Homer E. Long, the trial judge advocate, testified:

> "For the benefit of the record, this confession was made to me at the PBS Stockade on the 12th of April 1944, after the accused had been fully informed of his rights, and he was made to understand he could remain silent or anything he might say would be used for or against him. After making his confession orally, it was set down on paper and he was again warned of his rights by Captain Wood, and the accused admitted it was the truth and signed this confession in my presence" (R. 15).

The "confession", admitted in evidence, reads as follows:

> "My name is Private Roland B. Dorsey, ASN, 18090013, Company 'A' Supply Battalion, 1st Armored Division. On or about the 20th February 1944, I escaped from the Peninsular Base Section Stockade at Aversa, Italy and later went to the town of Camigliano, Italy where the Rear Echelon Headquarters of the Division is located. I stole a jeep there. It was a 1/4 ton 4 x 4 truck number 20100785. Sometime after midnight on the night of 22nd - 23rd February 1944 I took a key I had and tried to start the vehicle but it wouldn't start. I knew then that it needed a rotar or coil wire. The peep was parked in front of a radio halftrack; between the radio halftrack and a

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tent and along side a wall so I pushed the peep out into the Street, put a coil wire into the coil and got it started that way.

"There were two soldiers on duty in the radio scout car, one was on duty at the time, but he did not know I was taking the peep. I left Camigliano and drove the peep around for about two weeks. Then I had a flat tire, so I abandoned the peep on a street in Caserta and near the theatre where enlisted men go.

"I acknowledge theft of the peep and accept full responsibility and liability and will sign statement of charges, report of survey or anything necessary to reinburse the United States Government for any pecuniary damages due it as a result of the theft" (R. 14,15; Ex. B).

Technician Fourth Grade Ralph Rundell, Service Company, testified that about 22 February 1944 he was assigned to the "JAG section, Camigliano, Italy" and that at that time a 1/4 ton vehicle, commonly known as a "peep" was assigned to that section, the last four numbers of the vehicle being 0785. Witness testified that between 2100 and 2200 hours the vehicle was parked in front "of our pyramidal tent which was in town", and when witness got up the next morning it was not there. To witness' knowledge neither he nor anyone else in authority gave anyone permission to take the vehicle. Witness testified that he inquired the next morning whether anyone had used the peep "and no one had". (R. 13,14)

Captain Wood further testified by deposition that on or about 8 May 1944 accused escaped from the Peninsular Base Section stockade by cutting a hole in the wire fence. Accused was "arrested on May 21st 1944 near Amentea and then returned to the Stockade on the 28th May 1944". (R. 15; Ex. C)

Technician Fifth Grade Louis C. Marino testified by deposition, admitted in evidence, both defense and accused stating "no objection", that on or about 21 May 1944 he was "on duty coming to Amentea to Salerno with prisoners from Reggio, Calabria". Witness testified further:

"In the afternoon of the 21st of May at approximately 2:30, Sergeant Castor and I were on the way to Salerno from Reggio when we met this weapons carrier driven by a civilian at the time. There were three of them in the front seat; this was in the town of Amentea. I made a motion to the vehicle to stop and they did not answer in Italian or American so Sergeant Castor turned his vehicle around and we proceeded after them. We chased them for about a half mile into the mountains where we found the vehicle abandoned. We made a search immediately for the occupants but we found only a civilian. This civilian told us that they were American soldiers that were in the weapons carrier and they carried pistols and that they also threatened to shoot him if he did not

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leave the vehicle and run. Later on that night at approximately 8:30 with the assistance of the carabinieri I found the accused, Dorsey, in an Italian pill box. He gave his name to me as Henderson. This was a fictitious name of course because he was later identified as the accused, Dorsey, and he had only given me his correct serial number, 18090013. I brought him to the carabinieri jail and frisked him for identification and so forth. I found that he was wearing a civilian uniform under his O.D. uniform."

Witness placed accused in confinement. Accused did not "put up any resistance or fight with us in any way" but at no time did he admit to witness that his name was Dorsey. "He more or less stuck to the name of Henderson, I believe that is the name." (R. 15; Ex. D)

Defense introduced in evidence, by stipulation between the defense and the prosecution, a psychiatric report. After the report had been read to the court, at the request of the prosecution, the law member stated "the court is not to consider any entries therein other than what constitutes his mental condition", and the report was admitted in evidence. (R. 15; Ex. 1) It reads, in pertinent part, as follows:

"3***Psychiatric examination, chiefly dependent upon history, gives sufficient evidence to the examiner to warrant a diagnosis of: Constitutional Psychopathic State, Inadequate Personality.

"4***c. <u>At the time of the alleged offense</u>, was this soldier suffering from a mental defect, disease or derangement? Constitutional Psychopathic State, Inadequate Personality.
***d. Did such mental defect, disease or derangement prevent him from distinguishing right from wrong, concerning the particular acts charged? No.
e. If he could distinguish right from wrong concerning the particular acts charged, did such mental defect, disease or derangement prevent him from adhering to the right? No, though his ability to adhere to the right is not as strongly developed as is that of a normal individual.
f. If the answer to <u>d</u> or <u>e</u> above is 'Yes', what is the nature of the soldier's insanity? The soldier is sane.
g. ***It is felt that this soldier is responsible for his actions but it is also felt that he will not be improved by punishment and that he will never develope into a satisfactory soldier. It is recommended that disciplinary measures be taken and that he be discharged under the provisions of Section VIII, AR 615-360" (Ex. 1)

Accused elected to remain silent.

4. It thus appears from uncontradicted evidence that at the place and

time alleged in the Specification, Charge I, accused absented himself without proper leave from his organization and remained so absent until about 12 February 1944. At the time of the commencement of his absence accused had just been returned to a detachment of his battalion by military policemen and the officer to whom he was delivered informed accused that he was being sent to his company on the beachhead at Anzio, Italy. After securing his barracks bags and being ordered by a noncommissioned officer to wait with another soldier for transportation to the staging area, accused "said something about going to the Red Cross" and "took off". Subsequent search for him was unsuccessful. When accused absented himself, his organization was on the Anzio beachhead, which was manifestly hazardous duty. From these and the other circumstances of the case the court was warranted in concluding that when accused absented himself he did so with the intention of avoiding the hazardous duty of proceeding to the combat area at Anzio and service thereat, as alleged (MCM, 1928, par. 130a). There was no direct proof that accused was to proceed to the beachhead by water transportation as alleged, although the evidence does show that accused was to have been taken to a staging area. This omission was of no consequence. The proof shows that accused was returned to his organization on 12 February 1944, substantially as alleged. As the offense of desertion was complete when the absence commenced, matters pertaining to manner and time of termination of such absence are here immaterial.

It further appears with respect to each Specification, Charge II, that at the place and time alleged accused absented himself without proper leave from his organization and remained so absent until the date alleged, in violation of Article of War 61. The absence set out in Specification 1, described as an absence without proper "authority", sufficiently describes absence without leave, absence from command being the gravamen of the offense charged (NATO 2046, Jamruska).

As to the Specification, Charge III, the evidence, including accused's own statement, shows that after having been duly confined in the stockade, Peninsular Base Section, accused escaped from the control thereof while working near by under guard, without having been released or set at liberty by proper authority. The confinement is presumed to be legal. Violation of Article of War 69 is established by the evidence (MCM, 1928, par. 139b).

With respect to the Specification, Charge IV, to which accused pleaded guilty, the evidence, including accused's statement, shows that a "peep", the last four numbers of which were 0785, after being parked in front of a tent in Camigliano, Italy, was missing the following morning, and that no one had permission to take it. Accused admitted that he "stole a jeep", which he further described as "a 1/4 ton 4 x 4 truck number 20100785". That the vehicle was property of the United States and was furnished and intended for the military service was shown by the testimony that it had been assigned to a Judge Advocate Section in Camigliano. There was no testimony aside from the plea of guilty as to its value, but the court was thereupon warranted in finding that it had the value alleged. All elements of the offense alleged in the Specification, Charge IV, were established (MCM, 1928, par. 150i).

It further appears from the evidence, with regard to the Specification, Additional Charge II, that at the place and time alleged accused was duly placed in confinement in the stockade, Peninsular Base Section, and that on the date alleged he escaped therefrom without having been released or set at liberty by proper authority, in violation of Article of War 69.

As to the Specification, Additional Charge I, the evidence shows that at the time alleged accused escaped from confinement in the stockade of the Peninsular Base Section and remained away from the stockade until 21 May 1944, a period of 13 days. His unauthorized absence was terminated by apprehension and arrest. When apprehended, accused gave a fictitious name and was wearing a civilian uniform under his military uniform. His confinement as a result of his previous offenses (including the admitted stealing of a military vehicle), his indisputably established escape from the stockade, his unauthorized absence while in the neighborhood of numerous military organizations, his giving of a fictitious name and possession of civilian clothing when apprehended - these and the general circumstances in evidence justify the conclusion that accused was guilty of desertion as charged (MCM, 1928, par. 130a; Winthrop's, reprint, pp. 637-639; NATO 603, Suci).

5. As evidence bearing on the additional charge of desertion, a capital offense in time of war, the prosecution offered in evidence the depositions of Captain Wood, and Technician Fifth Grade Marino. Defense stated that it had no objection thereto and accused stated "no objection". The depositions were thereupon admitted in evidence. "Under express consent of the defense made or presented in court, but not otherwise, a court may admit deposition testimony not for the defense in a capital case" (MCM, 1928, par. 119a). It sufficiently appears from the record that the defense and accused expressly consented to the introduction of the depositions in evidence, and that the requirements of Article of War 25 and of the Manual for Courts-Martial were complied with.

6. The charge sheet shows that accused is 19 years of age, that he enlisted in the Army 12 September 1942, and had no prior service.

7. The court was legally constituted. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of desertion in time of war and also for the offense of applying to one's own use property furnished or to be used for the military service, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 87, Title 18, United States Code.

Donald W. Mackay, Judge Advocate.

Walter R. Grimm, Judge Advocate.

(sick), Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
12 August 1944.

Board of Review

NATO 3047

UNITED STATES	)	3D INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Pozzuoli, Italy, 31 March 1944.
Private JESSE J. COFFEY (7 082 257), Company L, 7th Infantry.	)	Dishonorable discharge and confinement for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private JESSE J. COFFEY, Company "L", 7th Infantry, did, near Montesarchio, Italy, on or about 0600 hours, 4 October 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit, combat activity against the enemy, and did remain absent in desertion until he surrendered himself at the Office of the Provost Marshal, 5th Army Headquarters, Caserta, Italy, on or about 1200 hours, 23 November 1943.

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

Specification 1: In that Private JESSE J. COFFEY, Company "L", 7th Infantry, did without proper leave absent himself from his organization near Baja e Latina, Italy, from about 0600 hours, 27 December 1943 to about 1200 hours, 5 January 1944.

Specification 2: In that Private JESSE J. COFFEY, Company "L", 7th Infantry, did without proper leave absent himself from his organization near Pozzuoli, Italy, from 14 January 1944, time unknown, to 31 January 1944.

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", and except the words "with intent to avoid hazardous duty, to wit, combat activity against the enemy", of the excepted words not guilty, of the substituted words guilty, not guilty to Charge I but "guilty of the 61st Article of War", and not guilty to Charge II and the Specifications thereunder. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 40 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to 25 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. A certified extract copy of the morning report of Company L, 7th Infantry, was introduced in evidence, showing that accused absented himself without proper leave therefrom at 0600 hours 4 October 1943 and remained so absent until 1700 hours 24 November 1943; that he again absented himself without proper leave from that organization at 0600 hours 27 December 1943 and remained so absent until 1200 hours 5 January 1944; and that he again absented himself without proper leave from that organization on 14 January 1944 (time unknown) (R. 8,9; Ex. A).

A platoon leader of Company L, 7th Infantry, of which accused was a member in the latter part of September and the first part of October 1943, described the "conditions" that Company L "was facing" on 2, 3 and 4 October 1943, as follows:

> "Well, on October 2d we were just about a couple miles near Avellino. We were alerted to move out, that was on the second. On the 3d we were alerted to repel a counter attack toward Avellino. We started out and continued on until the following morning which was the 4th when we reached Montesarchio. After Montesarchio we took a truck ride to a little town near Caserta. During the next week we made a reconnais(s)ance preparatory to crossing the Volturno River".

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This officer further testified that the company came in contact with the enemy before it reached Montesarchio, and that "the attack order was on the way". (R. 13,14)

Corporal Charles V. Lubniewski, 6743d Stockade Company Provisional, testified that he worked "in the admittance and discharge office at the Stockade", located between Aversa and Melito (Italy) and that his "job is to handle the records there to admit and discharge prisoners". He described "the procedure followed in the Stockade in admitting prisoners" as follows: "The prisoner is brought to the window and we get his confinement papers and make up three copies of the papers". Witness identified a "confinement form" dated 31 January 1944, on which accused appears as the second name. Witness also identified a "roster of all prisoners received and released during the day" of 31 January on which "the name, Coffey, Jesse J., No. 7082257, Company 'L', 7th Infantry, 3d Division", appears on line 10, and a morning report of the same date which "shows that we received forty-eight AWOL prisoners". Certified extract copies of the confinement form, the roster of prisoners and the morning report were introduced in evidence as Prosecution's Exhibits "B", "C", and "D" after the defense expressly stated it had no objection thereto. (R. 11-13)

Accused made an unsworn statement through counsel as follows:

> "The accused admits dropping out from his company while on the move from Avellino to the vicinity of Montesarchio for the purpose of getting something to drink as he had been drinking along the way. It was his idea that he could drop out and get a few drinks and rejoin his outfit as they hadn't contacted the enemy at that time. He believed that he could get back. As in most cases, he had a few drinks and then had trouble in finding his organization or getting back to it immediately. While gone he was in the uniform of the service at all times. He finally turned himself in to the 5th Army Provost Marshal and, as stated by the accused to the defense, once he left his organization he found it was pretty hard to keep up with them because of their movement from one part of the country to another. As other AWOL's in all cases, he turned himself in. Reading from his service record, this man joined the 7th Infantry on the 28th of February, 1943, at Fort Lyautey and his service record shows that he participated in the Tunisian campaign, the Sicilian campaign from July 10, 1943 to August 17, 1943, and the Italian campaign from the 20th of September until October 4th at which time he left. His character and efficiency ratings are unknown or excellent. On page 22 the 7th indorsement shows that while at Fort George G. Meade, Maryland, his character was excellent and his efficiency rating as a soldier was excellent.

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Indorsement one on page 16 shows that while at Headquarters, Atlanta Recruiting District, Atlanta, Georgia, his character was excellent and his efficiency is not rated. The second indorsement by Company 'D', 26th Infantry, shows his character as excellent and a satisfactory rating as a soldier" (R. 15,16).

4. It thus appears from the evidence and from accused's plea that at the place and time alleged in the Specification, Charge I, accused absented himself without proper leave from his organization and remained so absent until he surrendered himself approximately 50 days later. When accused absented himself his organization was before the enemy and was advancing to meet an enemy counterattack. Reconnaissances were made shortly thereafter preparatory to crossing the Volturno River. Accused in his unsworn statement admitted "dropping out from his company while on the move from Avellino to the vicinity of Montesarchio", but stated that it was only for the purpose of getting a few drinks and that he later had trouble in finding his organization because of its movement from one part of the country to another. From the facts and circumstances the court was justified in concluding that when accused absented himself he did so with the intention of avoiding the hazardous duty of combat as alleged, in violation of Article of War 58 (MCM, 1928, par. 130a).

It further appears that on the dates alleged in the Specifications, Charge II, accused absented himself without proper leave from his organization and remained so absent for the periods found by the court. There is no evidence as to the exact places at which the absences commenced, but as absence from command is the gravamen of the offense of absence without leave, it is immaterial that there was no proof as to the exact place where the offense occurred (NATO 2844, Mangerpan). Conviction of absence without leave in violation of Article of War 61 was justified.

5. For the apparent purpose of showing that accused's third absence without leave was terminated on 31 January 1944, the prosecution introduced a purported "confinement form" (being a letter from "Headquarters Stockade, Peninsular Base Section" to the "Commanding Officer, 504th MP Bn"), an extract of an unsigned stockade roster, and an extract of a morning report, on which accused's name does not appear (Exs. B,C,D). These documents were inadmissible (MCM, 1928, par. 117a). However, defense expressly waived objection to their introduction in evidence and the error, if any, is inconsequential, as the offense involved was committed when accused absented himself and a finding as to the duration of the absence was unnecessary (AW 61; NATO 1087, Lapiska).

6. The review by the staff judge advocate, accompanying the record of trial, contains the following:

"Accused had been in the Army nearly four years at the time of his initial offense, he had participated in the Sicilian Campaign and for 24 days of the Italian

Campaign. He admits that, while advancing to make contact with the enemy, he had been drinking and left his company in order to get more to drink. He stopped for a drink and stayed away for fifty (50) days. After his surrender he remained with his unit about one month before he went AWOL for nine (9) days; after his return from the second unauthorized absence he stayed with the company nine (9) days and then went AWOL for another seventeen (17) days. There appears to be no facts which weigh in favor of accused. I believe that the sentence, if served in full, is too severe under all circumstances - and if it isn't to be served in full the question is immaterial - and therefore I recommend that the period of confinement be reduced to twenty-five (25) years. In my opinion the dishonorable discharge should be executed and the disciplinary barracks designated as the place of confinement. Under Article of War 42 a peniten(t)iary may be designated, but the offense here is strictly a military offense and the record contains no indications that accused possesses any criminal tendencies involving moral turpitude".

7. The charge sheet shows that accused is 23 years of age, that he enlisted in the Army 15 March 1940, and had no prior service.

8. The court was legally constituted. 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 and the sentence.

Derek MacKay, Judge Advocate.
Werner Rohm, Judge Advocate.
Henry C. Kenick, Judge Advocate.

266039

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
26 August 1944.

Board of Review

NATO 3069

UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, U. S. Army, 14 July 1944. Dishonorable discharge and confinement for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private PHILIP M. DE MARCO (33 263 446), Detachment of Patients, 300th General Hospital.	)	

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private Philip M. DeMarco, Detachment of Patients, 300th General Hospital, did, at or near Naples, Italy, absent himself without proper leave from his company from on or about 13 February 1944 to on or about 21 March 1944.

CHARGE III: Violation of the 65th Article of War.

Specification: In that Private Philip M. DeMarco, Detachment of Patients, 300th General Hospital, having a lawful order from

Sgt. Van T: Barfoot (now 2nd Lieutenant) who was then in the execution of his office, to return to his outpost position, did, near Pozzili, Italy, on or about December 6, 1943, wilfully disobey the same.

CHARGE IV: Violation of the 69th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

He pleaded not guilty to the Charges and Specifications and was found not guilty of Charge I and its Specification, guilty of the Specification of Charge II except the words "at or near Naples, Italy", and "21 March 1944", substituting for the second exception the date "20 March 1944", of the excepted words not guilty, of the substituted words guilty; guilty of Charge II, guilty of Charge III and its Specification and not guilty of Charge IV and its Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of 30 years, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. With respect to the Specification, Charge II, an extract copy of the morning report of Company L, 157th Infantry, for 25 March 1944, was admitted in evidence, the defense, after examining the document, stating "No objections". It showed the following entry:

"25 March 1944: '33263446, De Marco, Philip M., Pvt., Sk Ab LD to AWOL 13 Feb 1944; AWOL to Duty 1200, 20 March 1944'" (R. 4; Ex. A).

A witness testified he saw accused in a hospital in February 1944, at some time prior to the 17th or 18th of that month (R. 7). In the course of an investigation of his conduct accused stated to an officer that he returned to duty with his company on the "Beachhead" on 21 March (R. 12-14).

With respect to the Specification, Charge III, the evidence shows that on 6 December 1943 Company L, 157th Infantry, was confronting the enemy a few miles north of Pozzili, Italy, and was receiving artillery and mortar fire. Accused, a member of that organization, was assigned to a platoon of which Sergeant (now Second Lieutenant) Van T. Barfoot was platoon sergeant. Lieutenant Barfoot testified that on that date he had posted accused and two other men on an "OP". Witness also testified that he left but subsequently returned and that (R. 5-7)

"on my way back to the OP I saw Private DeMarco, with his rifle, coming towards me. I asked him where he was going and he said he was going back down the hill. I said, 'You get back in your hole'. That's the last I saw of DeMarco",

and that accused did not start back toward his hole but went "Down the hill to the left". Witness did not authorize accused to go down the hill. (R. 6)

Accused testified that on 6 December 1943 he had obtained permission from his squad leader to leave the "OP" to go "to the medics" because of a cold and a sore throat (R. 15) and that he went to the rear aid station from which he was taken to a medical battalion where he stayed seven days, returning to duty with his company on the 13th or 14th of December (R. 16,24). Accused further testified that as he started down the hill he met Lieutenant Barfoot and talked with him, telling him that he (accused) "was going off the hill" and that Lieutenant Barfoot told him to take his equipment with him (R. 18,20, 21). He denied receiving an order to return to the outpost or to get back in the hole (R. 19). Accused further testified that on 21 March he "went back to the company", "reported back to duty" and was placed in arrest (R. 16). He also testified that when his first sergeant later told him to report back to his platoon he "thought it was all forgiven" (R. 23).

4. With respect to the Specification, Charge II, it thus sufficiently appears from the evidence that at the time alleged, 13 February 1944, accused absented himself without proper leave from his company and remained so absent until 20 March 1944, as found by the court. The proof of absence without leave consists of an entry in the morning report of the company of accused, Company L, 157th Infantry, made on 25 March 1944, showing accused as absent without leave on 13 February and from absent without leave to duty on 20 March 1944, together with the admission and testimony of accused that he returned to duty with his company on 21 March.

There is testimony that accused was in hospital in February 1944 and the morning report entry indicates that at the time he absented himself without leave he was sick in hospital and physically absent from the company. The evidence does not show the exact locations in Italy of the company and the hospital at the time of the initial absence. The company was within the Anzio beachhead at the time of accused's return to duty and at the time the entry was made in the morning report. The circumstance that accused was in hospital and not present with his company at the time of his initial absence without leave suggests a possibility that the entry may not have been based on the personal knowledge of the officer making it. On the other hand, there is nothing in the morning report entry or elsewhere in the evidence to show that the respective locations of the hospital and the company were such that it would have been impossible for the officer making the entry to ascertain the recorded facts personally and upon his own investigation. The contrary not appearing, it must be presumed that the officer who made the entry performed his duties properly (MCM, 1928, par. 112a).

The court found accused not guilty of so much of the Specification, Charge II, as alleged that the absence occurred at or near Naples, Italy, and did not, by substitution, reach a finding as to the place of the commission of the offense. The omission to find the place of the commencement of the absence was immaterial (NATO 440, Gilbert; NATO 1279, Alex; NATO 1715, Hinlow).

With respect to the Specification, Charge III, the evidence sufficiently

shows that at the place and time alleged accused received an order from Sergeant Van T. Barfoot (now Second Lieutenant) the noncommissioned officer named in the Specification, substantially as alleged, and that he failed to obey it. Such order was given while the organization was confronting the enemy and under artillery and mortar fire.

5. The record of trial together with the original charge sheet accompanying it shows that the Specifications upon which accused was arraigned described accused as a member of Company L, 157th Infantry. There is evidence that at the time of the commission of his offenses accused was a member of that company (R. 4,12). After the court had reached its findings the trial judge advocate stated that he had been advised that accused was at the time of trial a member of the Detachment of Patients of the 300th General Hospital and stated further that in the absence of objection the charge sheet would be amended accordingly (R. 32). The original charge sheet shows that the Specifications were thereupon changed to allege that accused was a member of the Detachment of Patients, 300th General Hospital. As copied into the record of trial the Specifications contain the changes indicated. This error in the preparation of the record could not have injuriously affected the substantial rights of accused.

6. The charge sheet shows that accused is 26 years of age, was inducted into the Army 24 April 1942 and had no prior service.

7. The court was legally constituted. 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 and the sentence.

Donald W. MacKay, Judge Advocate.
Werner Rahm, Judge Advocate.
Henry C. Quick, Judge Advocate.

263361

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
16 August 1944.

Board of Review

NATO 3117

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at
	)	Naples, Italy, 27 June 1944.
Private WALLACE THOMAS	)	Dishonorable discharge and
(34 030 261), Headquarters	)	confinement for ten years.
and Service Company, 384th	)	U. S. Penitentiary, Lewisburg,
Engineer Battalion (Separate).	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Wallace (NMI) Thomas, Headquarters and Service Company, 384th Engineer Battalion (Separate), did, without proper leave, absent himself from his station at Bellizzi, Italy, from about 25 May 1944, to about 26 May 1944.

CHARGE II: Violation of the 93d Article of War.
(Motion for finding of not guilty sustained.)

Specification: (Motion for finding of not guilty sustained.)

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

Specification: In that Private Wallace (NMI) Thomas, Headquarters and Service Company, 384th Engineer Battalion (Separate), under the wrongful and false pretense of being a provost sergeant and

> with intent to extort money and a watch from Private First Class Daniel Pena, 6505th Headquarters and Headquarters Squadron, Fighter Control Area Provisional, did, as Casermetta, Italy, on or about 25 May 1944, wrongfully, unlawfully, and feloniously threaten with arrest and imprisonment said Private First Class Pena under a charge of being in an "off limits" area unless given money or a watch, and by means thereof obtained from said Private First Class Pena a watch of some value.

He pleaded not guilty to the Charges and Specifications and was found guilty of Charges I and III and their Specifications. On motion by the defense, in which the prosecution joined, he was found not guilty of Charge II and its Specification. Evidence of three previous convictions, one by special court-martial for absence without leave in violation of Article of War 61, and two by summary court-martial, one for being drunk in uniform in violation of Article of War 96 and one for being drunk on ward in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. A certified extract copy of the morning report of Headquarters and Service Company, 384th Engineer Battalion (Separate), was introduced in evidence showing that accused absented himself without proper leave therefrom on 25 May 1944 and remained so absent until 26 May 1944 (R. 7; Ex. 1). The company commander testified that he heard of accused's absence

> "when the man was brought in and informed of the trouble he had been in and outside of that the morning that we took reveille he wasn't present or reported and to see whether he showed up that evening I caused the area to be searched by my Sergeant."

Witness further testified that he knew accused was absent from reveille; "the Sergeant took the roll call and he found out from another Sergeant that he was absent the night before". (R. 6,7)

It was stipulated that if Private First Class Daniel Pena, 6505th Headquarters and Headquarters Squadron, Fighter Control Area Provisional, were present in court as a witness, he would testify as follows:

> "That on the night of May 25th, 1944 in Casermetta, Italy, a colored soldier whose name I am not certain but whom I can identify - (stipulated to be accused) - came to me and said he was a Provost Sergeant and that he was going to take me to the Major. He kept intimidating me with threats of up to twenty years in prison for being off-limits. I

didn't think the town was off-limits but he scared me. Finally he said he would overlook everything if I would give him some money. I told him I had none. He then said he would take the Doxa wrist watch which I was wearing. I can identify the watch because of a cracked crystal. All this time he was talking to me he kept his right hand in his shirt, as if on a pistol. Rather than create a disturbance I gave him the watch and he went away" (R. 10).

Captain Frank H. Fristoe, 384th Engineer Battalion (Separate), testified that he was the officer who investigated the charges and that he warned accused of his rights under Article of War 24 by advising "him that any statement that he might give in the form of an affidavit, sworn statement, might be used against him in that it would put him in the same category as any other witness in the case". Witness testified that accused then made a statement as follows:

"On or about 1900 hours 25 May 1944 I left my station at Bellizzi, Italy without permission, and did not return until I was picked up by Sgt. Briss Goodson on or about 1530 hours 26 May.

"On 25 May, at about 2100 hours I entered a dwelling house in Cassermetta, Italy and took a watch from a white soldier who was in the house. I took this watch to Pontecagnano and sold it to a British Corporal for $12.00. It was a Doxa wrist watch, with silver case and wrist-band. It had a black face, gold numerals and hands, and a crack in the crystal. On the 9th of June I went with Sgt. Henry Wiggins and Tec 5 Mose Montgomery, and Pvt 1cl Horace Smith to this British Soldier's Headquarters. The British soldier did not want to return the watch but did give it back to Captain Fristoe after Tec 5 Mose Montgomery and Pvt 1cl Horace Smith had given him $12.00 of their money." (R. 8,9; Ex. 2)

Accused elected to remain silent.

4. It thus appears from uncontradicted evidence, including accused's statement, that at the place and time alleged in the Specification, Charge I, accused absented himself without proper leave from his organization and remained so absent until 26 May 1944, in violation of Article of War 61.

It further appears from the evidence that at the place and time alleged in the Specification, Charge III, accused pretended to be a provost sergeant and threatened Private First Class Daniel Pena with imprisonment up to 20 years, for being "off-limits", if he did not give accused some money. When Pena told him he had no money, accused indicated that he would take a "Doxa" wrist watch Pena was wearing. During the entire conversation accused had his hand inside his shirt "as if on a pistol". When so confronted Pena gave accused the watch. Accused admitted that he "took a watch from a white soldier", which he later sold. It is sufficient to state that the facts and circumstances here disclosed constitute an offense recognized as that of blackmail by Section

22-2305, District of Columbia Code, which provides as follows:

> "Whoever verbally or in writing accuses or threatens to accuse any person of a crime or of any conduct which, if true, would tend to disgrace such other person, or in any way subject him to the ridicule or contempt of society, or threatens to expose or publish any of his infirmities or failings, with intent to extort from such other person anything of value or any pecuniary advantage whatever, or to compel the person accused or threatened to do or to refrain from doing any act, and whoever with such intent publishes any such accusation against any other person shall be imprisoned for not more than five years or be fined not more than one thousand dollars, or both. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, sec. 819.)"

Accused was properly found guilty of the offense of blackmail, in violation of Article of War 96.

5. The charge sheet shows that accused is 31 years of age, was inducted into the Army 28 March 1941, and had no prior service.

6. The court was legally constituted. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of blackmail, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-2305, District of Columbia Code.

Donald W. MacBay, Judge Advocate.
Mathiner R. Robinson, Judge Advocate.
Henry C. Renick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
28 August 1944.

Board of Review

NATO 3138

UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 45, U. S. Army, 18 July 1944.
Private MAGDANIEL S. BECERRA (38 006 222), Company F, 157th Infantry.	)	Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Magdaniel S. Becerra, Company F, 157th Infantry, did, near Palermo, Sicily, on or about 13 September 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Amphibious operations against the enemy, and did remain absent in desertion until he surrendered himself near Palermo, Sicily, on or about 14 September 1943.

Specification 2: In that Private Magdaniel S. Becerra, Company F, 157th Infantry, did, near Palermo, Sicily, on or about 24 September 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself near Naples, Italy, on or about 7 January 1944.

Specification 3: In that Private Magdaniel S. Becerra, Company F, 157th Infantry, did, near Naples, Italy, on or about 5 February 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself near Naples, Italy, on or about 1 July 1944.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the "rest" of his natural life, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that accused was a member of Company F, 157th Infantry, which in September 1943 was located in a staging area "just out on the edge of" Palermo (Sicily). The company was an element of the 2d Battalion which was in reserve at the time, "the last to move out", the other battalions of the regiment having landed at Salerno, which fact First Sergeant John W. Boley, Company F, 157th Infantry, testified "we all knew" (R. 4,7). When they "hit the staging area" they knew they were going to move, though they did not know when it would happen (R. 9). They had been given their "training" before going to the staging area (R. 10). Witness testified that at that time he was company clerk of that organization and that no passes were given out from the Palermo staging area (R. 7,10). Witness testified further that the company had formations and that accused was present "for part of them but not the last formation" which was held just before they "moved out". About 13 September the company left Palermo and landed at Salerno (Italy) where it engaged in combat. (R. 8) Witness, asked whether or not accused was present in the company from 13 September 1943 until 26 May 1944 (on which date witness was wounded), replied "Prior to our going to the Anzio Beachhead, the MPs brought him into the Company Area" in January 1944 and that accused remained with the organization "just a day or so". Witness further testified accused was not with the company from January 1944 to May 1944 when witness went to a hospital, and that during that time he typed the rosters for the company and "checked the rolls entirely". (R. 8,9)

An extract copy of the morning report of Company F, containing an entry dated 9 July 1944 was introduced in evidence, the defense stating "no objections" (R. 3), and reads as follows:

"9 July 1944: '38006222, BECERRA, Magdaniel S., Pvt. Erroneously reported on 23 Nov 1943 as, "Duty to Sk Ab 18 Sept 1943". SHOULD BE: "Duty to AWOL 13 Sept 1943".
AWOL to Duty 14 Sept 1943. Duty to Sk Ab, 56th Evac Hosp, 14 Sept 1943. Sk Ab, 56th Evac Hosp, to DS, Repl Depot, Palermo, Sicily, 24 Sept 1943. DS, Repl Depot, Palermo, Sicily, to AWOL 24 Sept 1943. AWOL to Ab Conf, PBS Stockade, Aversa,

Italy, 7 Jan 1944. Ab Conf, PBS Stockade, to duty 8 Jan 1944. Duty to Ab Conf, PBS Stockade, Aversa, Italy, 8 Jan 1944. Ab Conf, PBS Stockade, to duty 20 Jan 1944. Duty to Ab Conf, PBS Stockade, 23 Jan 1944. Ab Conf, PBS, Stockade, to DS 2nd Repl Depot, Bagnoli, Italy, 4 Feb 1944. DS, 2nd Repl Depot, to AWOL 5 Feb 1944. AWOL to Ab Conf, Naples, Italy, 1 July 1944. Ab Conf, Naples, Italy, to Ab Conf, PBS Stockade, 2 July 1944. Ab Conf, PBS Stockade, to Present Conf, Regt'l Stockade, 3 July 1944'" (Ex. A).

Captain Ray B. Vaughters, 157th Infantry, testified that in the course of investigating charges he warned accused he wished to ask some questions and told him he did not have to answer them if he did not want to, that witness could not command accused to answer them, and that if accused did answer them they would be made "a matter of record" and later used against him (R. 4). Witness testified that accused

"said that his outfit was in a staging area near Palermo and he took off and went into Palermo and got drunk. While he was there the 2nd Battalion of which he was a member, pulled out for Italy. All the ships had left and he turned into the MPs. The MPs then took him down where the kitchens were as they hadn't pulled out yet. The same day that he was turned over to his kitchen, he went to the 56th Evac. Hospital in Termini. After getting out of the hospital he was sent to the replacement depot in Palermo. He was only there for two or three hours when, for some reason or the other, he didn't say why, he took off again and left the Depot. I asked him how long he was gone and he said he stayed around Sicily there until sometime in November. He wasn't sure. Then he went to Italy. I asked him how he got over there and he said on some kind of a small boat. A cargo boat. He lived around the vicinity of Naples until about January when he turned in to the MPs in Naples and they immediately put him in the PBS Stockade and from there he was brought up to his unit just before we came back to Gioia but his Unit wouldn't accept him so they took him back to the PBS Stockade again where he stayed until about January 20th when the MPs brought him back again for trial. But at that time, his outfit was alerted and before they got a chance to try him, they pulled out and they had to put him back in the PBS Stockade awaiting a chance for a trial. He said he stayed there awhile until about February 4th or 5th when without any guard, they took him over to the replacement depot in Naples and turned him loose for shipment back to his unit. He stayed there a day or two and then took off again and just lived around Naples until he turned in again to the MPs on July 1st. He wouldn't give any account of what he was doing. He said he was just messing around was his explanation until he turned in to the MPs on July 1st. He went to the PBS Stockade about the 2nd and on the third, he was turned over to the Regiment. I think that was the day he came back" (R. 5).

Witness further testified that the refusal by accused's unit to accept him was for the purpose of keeping him under guard "until we could get the charges drawn up and get him tried for desertion" (R. 6).

Captain Vaughters, asked by the defense as to his source of information for the entries on the morning report (Exhibit A), and "which entries you got from the man himself and which you gained otherwise" testified that the entry pertaining to 13 September 1943 "was taken from accused's own statement and from the statements of two witnesses from the company", that his knowledge concerning the entry pertaining to 7 January 1944 was "from the MPs that brought Becerra back", and that all the other entries were from the statement of accused except those of 8,20 and 23 January and 2 and 3 July 1944 which were based on witness' personal knowledge (R. 10-12).

Sergeant Harold A. Yarnell, Company F, 157th Infantry, a witness for the defense, testified he typed Exhibit A and that he got the information therein contained from Captain Vaughters who read it to him (R. 13).

Sergeant Edmund J. Bednez, Company D, 157th Infantry, a witness for the defense, testified he worked in the "Morning Report section", "in the Personnel Section". Witness identified "a morning report with remarks that were given to me by Sgt. Dornell" and testified that he typed it and that he "got the information for this particular report from Sergeant Yarnell. He had me copy an extract for it for a charge sheet". Shown Exhibit A, witness testified it was from a copy thereof that he copied "that entry". (R. 12,13)

Accused made the following unsworn statement:

> "I never was inconsiderate of anybody and that's probably what made me feel so bad. I was insulted very many times and I felt I wasn't being treated right. Everyone always considered me more or less like a colored man. That's what made me feel that way. That's all sir" (R. 13).

4. With respect to Specification 1, it thus appears from the evidence including accused's pretrial statement that at the place and time alleged accused absented himself without proper leave from his organization which was then in a staging area in Sicily awaiting imminent shipment to Salerno, Italy, where most of his regiment were generally known to have landed. Accused surrendered himself the following day after his organization had left. His company landed at Salerno and engaged the enemy, an operation which was manifestly hazardous duty. The intent to avoid such duty as alleged can be inferred from the facts and circumstances attendant upon his unauthorized departure.

With respect to Specifications 2 and 3 it appears from the evidence, including accused's pretrial statement, that at the place and time alleged in each accused absented himself without proper leave from his organization and remained so absent until he surrendered himself substantially as alleged.

An intent not to return to his place of service may be inferred from the extended duration of the absences, the first being 104 days and the latter 146, while in the vicinity of numerous military establishments. (MCM, 1928, par. 130a).

5. At the conclusion of the presentation of evidence at the trial the defense moved for a finding of not guilty, assigning as reason therefor that an accused may not be convicted upon his unsupported confession and stating

> "It has only been shown to this court that the only basis for all this including the termination of his first alleged AWOL, the beginning and termination of the 2nd alleged AWOL under the 2nd Specification and the beginning of the 3rd AWOL, alleged, has been this man's own confession. There is no other supporting evidence to show he came or went on the various alleged AWOLs. The only evidence we have is his leaving on the first specification and the ending of the third AWOL. The defense moves for a finding of not guilty" (R. 14).

There was introduced sufficient independent evidence of the corpus delicti to permit the introduction of the statements of accused and therewith to justify the findings (MCM, 1928, par. 114). Whether or not all items of the entry in the morning report were competent to prove the facts recited, it was established by the testimony of Sergeant Boley that accused absented himself without leave at Palermo on 13 September 1943, that he did not return to his company until January 1944, and that a day or so later he again absented himself and remained absent at least until 26 May 1944.

6. A psychiatric report which is attached to the record of trial states there was "no evidence of mental illness present" and contains the following:

> "Why did you go AWOL? 'I don't know, it just comes to me I suppose. I was AWOL in Sicily from August to January and they let me go and this time I went AWOL from the 7th Depot in March. I stayed away until picked up last Saturday'. How did you spend your time? 'Just roaming around'. How did you get by without money? 'Just meeting people'. Drink much? 'Not much'.
>
> "Insight is not impaired. Orientation is correct. Recent and remote memory is good. Is not tnese or apprehensive. No hallucinations are present. No somatic complaints offered."

7. The charge sheet shows that accused is 22 years of age. He was inducted into the Army 29 January 1941 with no prior service.

8. The court was legally constituted. 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 and the sentence.

Ronald W. Mackay, Judge Advocate.

(absent), Judge Advocate.

Henry C. Kenick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
19 August 1944.

Board of Review

NATO 3151

UNITED STATES v. Private GUSTAF F. JOHNSON (31 025 472), Company L, 179th Infantry.	)	45TH INFANTRY DIVISION Trial by G.C.M., convened at APO 45, U. S. Army, 28 July 1944. Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 Gustaf F Johnson, Company L, 179th Infantry, did, at or near Nettuno, Italy, on or about 22 May 1944, desert the service of the United States by absenting himself from his organization without proper authority with intent to avoid hazardous duty, to wit: combat operations against elements of the German Armed Forces, and did remain absent in desertion until he surrendered himself at or near Pozzuoli, Italy, on or about 31 May 1944.

Accused pleaded guilty to the Specification except the words "desert" and "by absenting himself from his organization without proper authority with intent to avoid hazardous duty, to wit: combat operations against elements

of the German Armed Forces" and "in desertion", substituting for the first and third exceptions respectively the words "absent himself without leave from" and "without leave", to the excepted words not guilty but to the substituted words guilty, and not guilty to the Charge but guilty to a violation of Article of War 61. He was found guilty of the Charge and Specification. Evidence of two previous convictions, one by special court-martial and one by summary court-martial, both for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the "rest" of his natural life, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that about 20 May 1944 when accused's organization was in battalion reserve on the Anzio beachhead, accused left his company and went to the supply tent near the kitchens in the rear where he was found the following morning by the supply sergeant (R. 5-8). The supply sergeant testified that when he asked accused "what he was doing back in that area" accused replied he was "going to a dental appointment" (R. 7). This witness further testified that accused left but returned around 1600 hours, remaining overnight. The next morning

> "he had breakfast with us, went for his dental appointment and came back again around 4:00 PM. He told me then that he was going to stay over at the clearing company because he had to stay there until his work was finished" (R. 8).

Witness also testified he did not see accused thereafter until the time of the trial (R. 8).

An extract copy of the morning report of accused's company was introduced in evidence without objection by the defense (R. 4), which contained the following:

> "31 May 1944 - 31025472 Johnson Gustaf F Pvt abs sk 15th EH to duty May 20/44 and duty to AWOL 0645 May 22/44 and AWOL to abs in conf 45th Div Rear Ech stockade May 31/44 0900" (Ex. A).

Accused's platoon officer testified that on 22 May 1944 the organization was subjected to enemy artillery fire which was "fairly heavy". He also testified that there were "all those 40 mm ack ack guns right behind us firing over our heads. They fired continuously all day and night. They were close enough that we could see the tracers going directly over our heads." (R. 6)

The officer who investigated the charges testified that about 9 June 1944 he had a conversation with accused and after witness informed accused that he need not make any statement "if he didn't wish to" and that if he did make a statement it could be used against him, accused signed and swore to a

statement which was admitted in evidence as Exhibit B, the defense stating "no objections" (R. 4,5), which statement reads as follows:

> "I was sick and went to the 15th Evacuation Hospital on 11 May 1944. I stayed there about a week and upon being dismissed from there I went back to the Company L kitchen where I stayed all night. I left from the kitchen the next day, I believe it was the 22nd of May. I left the beachhead and boarded an LST and went to Pozzuoli, Italy. I surrendered myself to the Military Police on 31 May 1944. I left my organization because I did not think I could stand it to go back to the front lines" (Ex. B).

Accused elected to remain silent.

4. It thus appears from the evidence, including accused's sworn written statement and plea, that at the place and time alleged accused absented himself without leave from his organization and remained so absent until he surrendered himself as alleged. At the time of the commencement of the absence accused's organization was subjected to enemy artillery fire and was in battalion reserve. Under all the circumstances the court was warranted in concluding that when the accused absented himself he did so with the intention of avoiding hazardous duty as alleged.

5. The charge sheet shows that accused is 29 years of age and was inducted into the Army 18 March 1941. No prior service is shown.

6. The court was legally constituted. 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 and the sentence.

Ronald W. MacKay, Judge Advocate.

Wolcott P. Lynn, Judge Advocate.

(sick), Judge Advocate.

CONFIDENTIAL

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
13 October 1944.

Board of Review

NATO 3185

UNITED STATES	)	PENINSULAR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Naples, Italy, 24 June 1944.
Privates CLARENCE SYDNOR (33 786 357), HENRY JOHNSON (34 094 912), both of 96th Quartermaster Railhead Company, and Private ROBERT L. DUPREE (32 353 279), 432d Replacement Company, 30th Replacement Battalion.	)	Dupree and Sydnor: Dishonorable discharge and confinement for eight years. Johnson: Dishonorable discharge and confinement for 13 years. Dupree and Sydnor: Federal Reformatory, Chillicothe, Ohio. Johnson: U. S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined by the Board of Review and held legally sufficient to support the sentences.

Donald W. Mackay, Judge Advocate.

Dissent, Judge Advocate.

Hearn C. Remick, Judge Advocate.

13 October 1944

NATO 3185

MEMORANDUM:

SUBJECT: Record of trial in the case of Private CLARENCE SYDNOR (33 786 357), Private HENRY JOHNSON (34 094 912), both of 96th Quartermaster Railhead Company, and Private ROBERT L. DUPREE (32 353 279), 432d Replacement Company, 30th Replacement Battalion.

1. The Specifications of the Charge allege larceny, at Bagnoli, Italy, of property of the United States, furnished and intended for the military service thereof, on 17 March (Specification 3) by accused Johnson alone, and on 29 and 31 March (Specifications 1 and 2, respectively) by all three accused acting jointly and in pursuance of a common intent. The property involved in Specification 1 was sugar, flour and rice, of a value of $34.00 and in Specifications 2 and 3 was dehydrated eggs, in both instances the value being in excess of $50.00.

2. No question exists as to the larceny on 17 March (Specification 3) by Johnson of 32 cases of dehydrated eggs, which was clearly shown by the evidence (R. 9,33,34,39,42).

3. The evidence with respect to Specification 1 shows that on the evening of 29 March, the three accused were in the house of Maria Cascino when Corporal Gerard W. Racine, 51st Military Police Company, arrived (R. 10). Racine was investigating "black market" conditions in and about Bagnoli (R. 8). Racine heard Dupree say "we better get going because it is getting late" whereupon Johnson and Sydnor left the house. He heard Johnson and Sydnor say "let's go; we will go to the dump" (R. 11) and Dupree had made the remark "we are going to work" (R. 12). He also testified that two of the accused left the house "to go to the dump to bribe off some guards" (R. 18). "Dupree spoke of doing business if they got the money and if they could contact the right guard", and the two who left were carrying money with them (R. 19). Racine testified "I knew that they received the money and that they were going to the dump because Alberto Mele told me they were going and Dupree made the statement that they were going to the dump" (R. 20).

Racine further testified "On the 29th of March 1944 I saw ten bags of sugar, 4 bags of flour and 5 bags of rice over the wall, thrown over by Henry Johnson and Sydnor". Racine was on the outside of the wall and saw them throw it over. He testified that "Johnson took the bag, passed it over the wall and I took the bag from Johnson". (R. 17)

Vitaliano DeMaria testified that the events on the night of 29 March took place "at the same place where the incident of the 32 cases of eggs took place" (March 17; Specification 3) and testified that when "Tobey"

(Dupree) and he "were sure that the work was going on that night, 'Tobey' suggested that we go sit in the house***which is close by" (R. 26,32,35). Witness was with Dupree "All throughout the period when that operation took place". Dupree did not physically take part in the operations "but he watched the whole thing. Then afterwards they split the money up among themselves". With regard to the division of the money witness testified he heard it though he did not actually see the money split up as he was interested "in the civilian angle" and not "in the colored angle".

Antonio Parascandola testified that on 29 March he saw ten sacks of sugar, five sacks of rice and four of flour thrown over the wall and that witness received them from Racine but he did not see who was "throwing them over". He testified that he saw Johnson and Dupree that evening, but testified that Johnson "didn't do any business that night". (R. 43) Witness did not identify Sydnor. He testified he was present at the "paying off", which took place after the "throwing over the wall" had taken place. "Spitfire" (Johnson) and "Toobey" (Dupree) were present (R. 26,42,43). Mele gave Dupree 3000 lire per sack which Dupree split with two of his friends whom witness did not know. Witness also testified that neither of the two with whom the split was made was Johnson (R. 44).

With respect to Specification 2 of the Charge, Racine testified he went to Maria Cascino's house on 31 March, where he saw the three accused (R. 13,14). He asked if there was going to be any work that night and Sydnor and Dupree told him that there was going to be work and that "they were only waiting for someone to get the money together so that they could go and contact the guards" and

> "The next time that I had anything to do with it was when Johnson and Sydnor left the house and then Dupree, De Maria, Mancini and myself left the house to go to the rear of the dump in the court. There was also some civilians with us, five or six of them. We went to the courtyard and Dupree told Mancini to take the civilians by the corner of the wall as there would be about fifteen or twenty minutes before rations would come over the wall if Johnson and Sydnor were successful in paying the guard, the right guard. Mancini did that; he went to the corner of the wall with the civilians" (R. 13).

Witness did not see any articles come out of the ration dump but saw some articles from there--two cases of rations--being brought out and placed in witness' "jeep". He did not know the contents. Dupree was dressed in blue dungarees and a sailor's hat. The arrival of the "CID" agents broke up the proceedings. Later that evening both Johnson and Sydnor returned to the Cascino house. (R. 14,15) Witness testified that Johnson and Sydnor left earlier that evening "to see if they could contact the right guards" (R. 15) and to pay the guards (R. 20) but witness stated that it was his own conclusion that they left the house to pay the guards (R. 21).

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Private Fred Mancini, 51st Military Police Company, testified that on 30 March Mele had him ask the colored soldiers if they wanted to do any "business" (R. 31). Witness testified that on the 31st of March he saw Mele give Johnson some money while Dupree was in the same room and Sydnor was in another (R. 27) and that about five minutes before that had heard Johnson say "he needed some money to give to the guard" (R. 30,31). At the time the money was handed over witness testified "Johnson was on the right hand side of the table and I would say that Dupree was just a little off to the other side"; they were "in the same group" and he thought they were all engaged in a common conversation (R. 31). Witness testified that Johnson and Sydnor went to the dump and he saw them headed toward the main gate "of 557" (R. 27). Witness took the civilians near the wall and saw two cases coming over the wall which were picked up by one Rosario and later witness discovered that each of these cases contained six number 10 cans of eggs (R. 28).

De Maria testified that Mele gave "Spitfire" (Johnson) 20,000 lire and that

> "'Spitfire' left saying that he was to go and pay off the guards but leaving orders that he would send back word whether it would be all right to go and wait near the wall for stuff" (R. 38),

but subsequently testified that he did not understand English and this information had been given to him by Mele (R. 39).

Parascandola saw Johnson and Dupree the night of 31 March at Cascino's house, and Mele was there and gave them 20,000 lire. "They were saying that they wanted money to go speak to the guard so Mele gave them the money". (R. 42,44,45)

There was competent evidence from a quartermaster officer that the rations mentioned were property of the United States and that their values were substantially as alleged (R. 23,24).

4. It thus appears from substantial evidence that on the dates alleged in Specifications 1 and 2 of the Charge the three accused, acting jointly and in pursuance of a common intent, were present aiding and abetting Alberto Mele and his associates in the larcenies alleged. With respect to the events of the 29th there is testimony that all three accused stated in substance that they would go to a quartermaster dump at or near Bagnoli if they "got the money" and if they could contact the right guard. Johnson and Sydnor physically assisted in passing the bags over the wall according to Racine. Dupree appears to have supervised the operations outside of the dump and received 3000 lire per bag from Mele at the time of the "pay off". All three apparently had an assigned part in the transaction and each participated actively therein.

Substantially the same actions were taken on the 31st. Johnson was heard to say he needed money to give to the guard and about five minutes

later was seen receiving money from Mele in the presence of Dupree. Johnson and Sydnor again left and were seen going in the direction of the main gate of the dump. Dupree was heard giving directions as to the Italians outside the wall and stated that it would be 15 or 20 minutes before rations would come over the wall if Johnson and Sydnor were successful. Two cases were seen coming over the wall and their contents were later noticed by Racine to be dehydrated eggs.

As each accused was present aiding and abetting the thefts each became a principal and was properly charged as such.

It thus appears that the evidence relative to the events of the 29th clearly justify the finding as to the offense alleged to have occurred on that date. The conduct of the accused on the 29th may properly be considered in connection with their conduct on the 31st and the facts and circumstances in evidence warrant the conclusion they were likewise guilty of the offense alleged on the latter date.

5. The additional Charge alleged a violation of Article of War 96 in that all three accused

> "acting jointly, and in pursuance of a common intent, did, at Bagnoli, Italy, on or about 31 March 1944, conspire to commit an offense against the United States, to wit, bribery, in violation of Section 39 of the Criminal Code, and in that they did, at said time and place, accept money from Alberto Mele, an Italian civilian, with intent to bribe certain persons in or near Depot Q-557, at Bagnoli, Italy."

It is sufficient to state that the facts alleged and shown were clearly violative of Article of War 96 (Dig. Op. JAG, 1912-40, sec. 454 (23, 73)).

6. 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 and the sentences.

Donald W. MacKay, Judge Advocate.

Dissent, Judge Advocate.

Henry C. Kenick, Judge Advocate.

269740

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
14 September 1944.

Board of Review

NATO 3212

UNITED STATES	)	1ST ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 251, U. S. Army, 24 July
Private PAUL A. HACKENBERG	)	1944.
(6 946 285), Company A, 6th	)	Dishonorable discharge and
Armored Infantry.	)	confinement for life.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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: (Finding of not guilty.)

Specification 2: In that Paul A. Hackenberg, Private, Company "A" 6th Armored Infantry, did, near Cisterna, Italy on or about 24 May 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by Captain JAMES W. WILSON to engage with the enemy, which forces, the said command was then opposing.

Specification 3: In that Paul A. Hackenberg, Private, Company "A" 6th Armored Infantry, did, in the vicinity of Anzio Beachhead, on or about 3 June 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by Captain ALAN V. BODENE to engage

with the enemy, which forces, the said command was then opposing.

Specification 4: In that Paul A. Hackenberg, Private, Company "A" 6th Armored Infantry, did, near Tatti, Italy on or about 22 June 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by Captain FRANK B. CLAY to engage with the enemy, which forces, the said command was then opposing.

Specification 5: In that Paul A. Hackenberg, Private, Company "A" 6th Armored Infantry did, near Maziolla, Italy on or about 2 July 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by Captain ALAN V. BODENE to engage with the enemy, which forces, the said command was then opposing.

Specification 6: In that Paul A. Hackenberg, Private, Company "A" 6th Armored Infantry, did, near Torre, Italy on or about 5 July 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by Captain ALAN V. BODENE to engage with the enemy, which forces, the said command was then opposing.

He pleaded not guilty to the Charge and Specifications. He was found not guilty of Specification 1, guilty of Specifications 2, 3, 4, 5, and 6, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the "rest" of his natural life, all members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that on the dates alleged accused was a member of Company A, 6th Armored Infantry, 1st Armored Division (R. 6,9). Staff Sergeant Lewis H. Evans, Company A, 6th Armored Infantry, testified that on the 3d and 22d of June and the 2d and 5th of July 1944, accused was a member of his squad and that "we were moving up forward at that time" against the enemy. On each of the dates mentioned except the last, on which witness was in the hospital, witness checked and found accused absent. Witness further testified that on 3 June 1944 his unit had moved forward to contact the enemy near Anzio, Italy, that accused was with them when they "pulled out" but "dropped out" when they left the assembly area. Witness also testified that on 22 June the organization made contact with the enemy and captured Tatti and that accused was not with them. Witness testified that on 2 July 1944 "we just left the tracks and got out about a half of a mile and he dropped out". Witness also testified accused had never been with him on an attack. (R. 5-8)

Corporal Henry H. Belcher, Company A, 6th Armored Infantry, testified

that at Cisterna, Italy, on 24 May 1944, accused was assigned to his squad and that "Captain Wilson", the company commander, gave an order to advance, at which time they were "getting a few shells - pretty heavy shelling" and were "fixing to go forward". Witness further testified that on that date accused was with the squad when it started out but was missing thereafter, and that he did not know of any authority for the absence and reported it. (R. 8-10)

Sergeant Robert H. Anketell, Company A, 6th Armored Infantry, testified that accused was a member of his "unit" on 24 May 1944 at which time it was located near Cisterna, Italy, and "Captain Wilson", company commander, gave orders "to advance" and that the company was tactically employed under "heavy fire" by the enemy (R. 10-12). "When they went to the assembly area and into the attack", witness discovered accused was absent. Witness also testified he had not given accused permission to be absent. (R. 12)

Staff Sergeant Elton Mitchell, Company A, 6th Armored Infantry, testified accused was a member of his platoon on 2 July 1944, when they were "below Maziolla" and also on 5 July 1944, when they were near Torre (Italy). Witness testified further that "Captain Bodene" was company commander on the dates mentioned and from 2 July to 5 July the platoon was in contact with the enemy. Witness also testified that on 2 July 1944 they received orders to "move out" and that when they did so accused was missing and though witness looked for accused he did not see him until "the 4th near the half-tracks", "in the rear". Witness testified that on 5 July accused was present when they went to a new assembly area but that when they engaged the enemy that day accused was reported absent and was not seen again by witness "until the time we came back to our tracks again". Accused did not have his permission to leave. (R. 12,13)

Second Lieutenant Thomas G. Scully, Company B, 6th Armored Infantry, testified accused was a member of his platoon in June 1944, and that on the 3d of June 1944 they were in the "pine woods" and had "just pulled out of the line". Witness testified that on that date he saw accused when he "came back" and "warned him we were going to take off again", that that evening after "Captain Bodene", the company commander, ordered them to "move out" they went to the "outpost in tanks across the railroad tracks" and there came "in contact with the enemy, small arms fire". Witness further testified that it was reported that night that accused was missing, that witness "went back to the tracks" in the morning and made a "physical check-up" and that accused "was not with us". Witness did not know of anyone who had given accused authority to be absent. Witness testified further that after accused absented himself on 3 June 1944 he returned to the platoon while it was at Lake Bracciano, approximately 15 June 1944 and was with the company when it moved north again. Witness testified further that on 22 June 1944 the company moved up to and captured Tatti, Italy, where the organization was under small arms, artillery and mortar fire and that "somewhere on the way up" accused "disappeared" without authority. Witness further testified accused was again with his company on 25 June 1944 and that on 2 July 1944 the company moved north to attack Maziolla, Italy, receiving some artillery fire "on the way up" and that when they reached a point about two miles

south of Maziolla accused was not with the company and "later showed up back at the tracks". (R. 13-15)

Witness further testified that accused was absent until 4 July and

> "on or about the 5th we were pulled out of the left side of the line to the right in column of tanks, we were right on the tanks and he was with us until it was stopped and we attacked a hill south known as Torre and Private Hackenberg left us sometime before that attack was made and was not seen again until we withdrew on the 8th or 9th of July" (R. 15).

Witness testified further he did not give accused permission to be absent on the dates mentioned (R. 15).

The defense recalled Corporal Belcher who testified that accused joined the organization "in March in Africa" and took part in the African campaign and also in the "Mt. Porchia" engagement in Italy and that up to that time he had "done a good job". Witness also testified that accused went to the Anzio beachhead in October, where his conduct had been very satisfactory. (R. 16)

The defense introduced in evidence a psychiatric report on accused dated 16 July 1944 which showed that neither at the times of the alleged offenses nor at the "present" time was accused suffering from any mental defect, disease or derangement, that his combat reaction was satisfactory and that "In combat he denies any overt anxiety" but "During last six months has shown signs of extreme nervousness even in rear areas" (R. 17; Ex. 1).

Accused elected to remain silent (R. 17).

4. With respect to Specification 2, the evidence shows that on the date alleged accused was with his squad which was near Cisterna, Italy, in close proximity to the enemy, and "getting a few shells - pretty heavy shelling", "heavy fire", and was "fixing to go forward", getting ready to make an attack. When Captain Wilson, the company commander, gave an order to advance accused started out with his squad but was missing shortly thereafter without authority.

With respect to Specification 3, the evidence shows that on the date alleged accused's company was "moving up forward" near Anzio, Italy, "against the enemy" and his platoon commander warned him the platoon was "going to take off again". That evening Captain Bodene, company commander, ordered the company to "move out" and accused was with his squad when they "pulled out" but "dropped out" when they left the assembly area. Thereafter when accused's unit made contact with the enemy accused was absent without authority.

With respect to Specification 4, the evidence shows that on the date alleged accused's platoon was moving forward "against the enemy" and was

"under small arms, artillery and mortar fire" and occupied a position south of the town of Tatti, Italy, which they later "took", and that "somewhere on the way up" accused "disappeared". He had no authority to be absent and returned on 25 June 1944.

With respect to Specification 5, the evidence shows that on the date alleged Captain Bodene, accused's company commander, gave orders to "move out" and the company moved north "against the enemy" to attack the town of Maziolla, Italy, receiving some artillery fire "on the way up". Accused started out with his squad and when they reached a point about two miles south of Maziolla accused had "dropped out" and was no longer with his company, which then made contact with the enemy. His platoon sergeant looked for accused but did not see him until "the 4th near the half tracks", "in the rear", and, as testified by his platoon commander, accused "later showed up back at the tracks".

With respect to Specification 6, the evidence shows that on the date alleged accused was with his platoon immediately before it launched an attack on Torre, Italy, but then left and was not seen again until the platoon withdrew on the 8th or 9th of July. He had no authority to be absent.

Thus it appears from uncontradicted evidence that at the places and on the dates alleged in Specifications 2 to 6 inclusive, accused failed to advance with his command and absented himself therefrom without authority. On each of those occasions accused's command was in contact with the enemy and had been ordered forward. The court was warranted in concluding that on the several dates alleged accused was serving in the presence of the enemy and that his conduct in each instance constituted misbehavior within the purview of Article of War 75 (MCM, 1928, par. 141).

The psychiatric report introduced by defense indicates that accused on the dates alleged could distinguish right from wrong and adhere to the right.

5. The charge sheet shows that accused is about 25 years of age. He enlisted in the Army 22 March 1939. No prior service is shown.

6. The court was legally constituted. 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 and the sentence.

Daniel W. MacKay, Judge Advocate.

Lyman R. Johnson, Judge Advocate.

Henry C. Resnick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
31 August 1944.

Board of Review

NATO 3213

UNITED STATES	)	FIRST ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 251, U. S. Army, 25 July 1944.
Private First Class JOSEPH J. BOROS (32 760 003), Company D, 6th Armored Infantry.	)	Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification 1: In that Private First Class Joseph J. Boros, Company "D" Sixth Armored Infantry, did at bivouac near Camigliano, Italy, on or about 13 March 1944, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: Transportation by water to the beachhead at Anzio, Italy, and service thereat; and did remain absent in desertion until he surrendered himself at Camigliano, Italy, on or about 14 March 1944.

Specification 2: In that Private First Class Joseph J. Boros, Company "D" Sixth Armored Infantry, did, at bivouac area near Camigliano, Italy, on or about 22 March 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at Salerno, Italy, on or about 14 May 1944.

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

Specification: In that Private First Class Joseph J. Boros, Company "D", Sixth Armored Infantry, did at bivouac near Anzio, Italy, on or about 28 February 1944, absent himself without proper authority from his organization and duties until on or about 7 March 1944.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Specification 1, Charge I, guilty of Specification 2, Charge I, except the words "Salerno, Italy", of the excepted words not guilty, guilty of Charge I, guilty of the Specification, Charge II, except the words "28 February 1944", substituting therefor the words "29 February 1944", and inserting after the word "until", the words "he returned to military control", of the excepted words not guilty, of the substituted words guilty, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of "your" natural life, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that from 29 February 1944 to 15 May 1944 accused was a rifleman and a member of Company D, 6th Armored Infantry Regiment, First Armored Division (R. 5,12,13). First Sergeant James F. Villandre, then first sergeant of accused's company, testified that on 29 February Company D was on the Anzio beachhead (Italy), and remained there until the "outbreak of the offensive" in which it advanced to Rome. Witness testified accused was present with his organization on the beachhead prior to 29 February and that when at 1000 hours on 29 February it was reported that accused was absent witness made a search for accused in the company area, but he could not be found. Witness further testified that accused was not present on the beachhead any time after 29 February and that no one in authority gave accused permission to absent himself (R. 13,14). An extract copy of the morning report of accused's company admitted in evidence (R. 5) contained the entries:

"Mar 1/44:
32760003 Boros, Joseph J. Pfc...Dy to AWOL 1000 hrs the 29th Feb.

Mar 9/44: 32760003 Boros, Joseph J. Pfc...AWOL to ab conf PBS Stockade 1820 hrs the 7th" (Ex. A)

Warrant Officer Junior Grade Maynard B. Troxell, 14th Armored Infantry Battalion, testified that on 9 March 1944 he was assistant personnel officer of the 6th Armored Infantry Regiment, that he had made an investigation "of the record" to determine accused's status, and that accused "was AWOL since February 29". He further testified that on 9 March accused

"came over to me at the personnel office and I warned him to be ready to go to the beachhead on the next shipment and told him to report to the replacement depot and to be

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ready to leave on the next shipment. I didn't know the exact date at that time".

Witness did not see accused "any more" (R. 5,6).

Staff Sergeant Ralph R. De Pari, a member of Company D, 6th Armored Infantry Regiment during the period from 29 February 1944 to 14 May 1944, testified that he saw accused about 1300 hours on 9 March 1944 "in the company of Mr. Troxell and three other prisoners". Witness further testified that he was present at that time, and that accused

> "was asked to report to the personnel officer, Warrant Officer Troxell and he arrived about 1300 hours. Mr. Troxell was present and he warned him of his consequences of running away from the Anzio Beachhead and was told to report to the Service Company, 1st Armored Division to await the next shipment and if he ran away again he would have to suffer the consequences of the 58th Article of War".

Witness "was told by Sergeant Nantz that the next shipment would be on the 13th" (R. 12).

Technical Sergeant Calvin M. Nantz, Headquarters and Headquarters Battery, Division Artillery, First Armored Division, testified that on 9 March 1944 he was "in charge of the RTU (return to unit) men of the Replacement Company for the First Armored Division" (R. 6). Accused was "brought" in by military policemen of the Fifth Army and "reported" to witness, who further testified: "Upon receiving the accused I notified his personnel officer, Lt. Haines, and asked him what to do. And he told me to have the man report to him". After reporting to the officer, accused was sent back to witness, who testified that accused "remained in my section and he was notified he would be shipped to his unit". Witness further testified that he informed accused personally that he was to be moved to his organization at the Anzio beachhead. Accused was not placed in custody. Witness testified further:

> "On the morning of March 13th, on or about 0640 hours men whose organization were on the Anzio Beachhead were informed to be ready to leave. Private Boros was present at that time - and I told them to be ready to return to their organizations which were at that time located on the Anzio Beachhead".

Accused was "notified by my assistant Private Tobias". Witness continued:

> "At 7:30 the roll was called and check made for the men who were present and were to be shipped. Private Boros did not answer to the name. Private Tobias searched the area and didn't find him".

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Witness testified that he called the roll, personally called out the name of accused and that accused failed to report. Witness also testified that on

the following morning accused reported back and was placed under guard (R. 6-8).

Private First Class Joseph G. Tobias, Headquarters and Headquarters Battery, Division Artillery, First Armored Division, testified that on 13 March 1944 he was assigned to the Service Company, First Armored Division, and that on 9 March accused "was brought to us from PBS Stockade". Witness further testified that accused

> "was told to report to Lt. Haines and Lt. Haines called back and told us to hold him, not under guard, to be available for the next shipment going up to the Anzio Beachhead".

At that time witness did not know when the next shipment would be, and it was impossible to tell accused at exactly what time he would leave. Witness testified:

> "On the 13th of March we had a shipment. Private Boros was on the passenger list and I notified him that morning to be ready, to get his bed roll packed and be ready to leave with the rest of the men. When the shipment left, he was not there. We searched the area and couldn't find him and then on the 14th, when I checked the roll, he was there and I told Sergeant Nantz and he placed him under confinement" (R. 8,9).

The extract copy of the morning report contained the following entries:

> "Mar 14/44:
> 32760003 Boros, Joseph J. Pfc...SD (1st Armd Div) to AWOL 0730 hrs the 13th
>
> Mar 15/44:
> 32760003 Boros, Joseph J. Pfc...AWOL to Conf 1st Armd Div 0630 hrs the 14th" (Ex. A).

Sergeant Joseph J. Yankura, Headquarters and Headquarters Battery, Division Artillery, First Armored Division, testified that on 22 March 1944 when he took over the duties of sergeant of the guard for Service Company, First Armored Division, accused's status was that of a prisoner, but that accused was absent. Witness testified accused and another prisoner were supposed to be "KPs", working without guard, and that witness "made a through search of the kitchen area, where they were supposed to be, and the general camp area", and did not locate the accused. No one in authority gave the prisoners permission to leave (R. 9-11). The extract copy of the morning report contained the following entry:

> "Mar 22/44:
> 32760003 Boros, Joseph J. Pfc...Conf (1st Armd Div) to AWOL 0930 hrs" (Ex. A).

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It was stipulated that accused returned to military control on 14 May 1944 (R. 15).

The court took judicial notice of the fact that water transportation from the Naples area to Anzio, Italy, on the 13th of March 1944, was a hazardous undertaking and that service on the Anzio beachhead from that period until late in May was also hazardous (R. 8).

A psychiatric report, dated 17 July 1944, submitted by Captain Joseph F. Zigarelli, Medical Corps, First Armored Division, Neuropsychiatrist, was introduced in evidence at the request of the defense (R. 15; Def. Ex. 1). The report shows accused to be suffering from "psychoneurosis, anxiety state, mild" and states that that condition does not prevent accused from distinguishing right from wrong concerning his alleged desertion or from adhering to the right. The report contains the following comment:

> "A person suffering from a Psychoneurosis Anxiety State, is able to differentiate right from wrong and is able to adhere to the right unless he develops a panic reaction in combat which this patient did not develop. This mental defect is mainly an impairment of the emotional portion of the Psyche and not primarily an impairment of intellect and reason" (Def. Ex. 1).

Accused elected to remain silent (R. 14).

4. It thus appears from uncontradicted evidence that at the place alleged in the Specification, Charge II, and on the date found by the court accused absented himself without proper leave from his organization and remained so absent until 7 March 1944, in violation of Article of War 61.

It further appears from uncontradicted evidence that at the time alleged in Specification 1, Charge I, accused absented himself without proper leave from a replacement unit operated by the Service Company of the First Armored Division at a time when, as he knew, he was about to embark for shipment to the Anzio beachhead. Accused's place of duty was with the group going to the beachhead, where his organization was then stationed. The facts and circumstances warrant the inference that when accused absented himself he had the concurrent intention of avoiding the duty alleged, which was manifestly hazardous.

It likewise appears that at the time alleged in Specification 2, Charge I, accused breached the restraint previously imposed on him and absented himself without proper leave from his place of duty and remained so absent until he returned to military control approximately eight weeks later. His confinement as a result of his previous offenses, and the length of his absence in a theater of active hostilities and in the vicinity of numerous military installations, together with the other facts and circumstances disclosed by the evidence, including accused's previous recent derelictions, justify the inference that when accused so absented himself he had the intention to remain permanently absent from his place of duty.

That accused absented himself from his place of duty three times in three weeks is significant. His conduct demonstrated a continuing and determined intention of avoiding all forms of military service. Accused was properly found guilty of desertion on the two occasions as charged (MCM, 1928, par. 130a).

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Though it does not appear from the evidence that the offenses alleged under Charge I occurred at Camigliano, Italy, the precise place where the acts occurred is not of the essence of the offenses charged (Dig. Op. JAG, 1912-40, sec. 416 (10)) and the omission was here of no consequence (NATO 1715, Kinlow). Similarly, there was no evidence that the desertion alleged in Specification 1 of Charge I terminated as alleged and the court excepted in its findings the place of termination of the desertion alleged in Specification 2 of Charge I. As each offense of desertion was complete when the absence commenced, matters pertaining to manner, place and time of termination of such absences are here immaterial (NATO 3041, Dorsey).

5. The prosecution requested the court to take "judicial knowledge of the fact that water transportation from the Naples area to Anzio, Italy, on the 13th of March 1944, was a hazardous undertaking and that service on the Anzio Beachhead from that period until late in May was also hazardous", to which the law member of the court replied, "Court takes judicial notice of the facts as requested by the trial judge advocate". Although the request as made could have involved an element of a conclusion, as distinguished from a fact, the court could properly take judicial notice of conditions existing on the Anzio beachhead at the time in question and from such facts conclude that the duty alleged was hazardous (NATO 3215, Lynch).

6. The charge sheet shows that accused is 23 years of age. He was inducted into the Army 26 January 1943 and had no prior service.

7. The court was legally constituted. 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 and the sentence.

Wendell W. MacKay, Judge Advocate.

Gilmer R. Fox, Judge Advocate.

(absent), Judge Advocate.

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Branch Office of The Judge Advocate General
with the
North African Theater of Operations

APO 534, U. S. Army,
12 September 1944.

Board of Review

NATO 3214

UNITED STATES	)	1ST ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 251, U. S. Army, 26 July
Private GEORGE J. MARTIN	)	1944.
(6 903 340), Company B,	)	Dishonorable discharge and
6th Armored Infantry.	)	confinement for 60 years.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, 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 George J. Martin, Company "B", 6th Armored Infantry, being present with (h)is squad while it was engaged with the enemy, did near Mte. Porchia, Italy, on or about 3 January 1944, shamefully abandon the said squad and seek safety in the rear, and did fail to rejoin it until the engagement was concluded.

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

Specification: In that Private George J. Martin, Company "B", 6th Armored Infantry, did, at or near Qualiano, Italy, on or about 29 January 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: actual combat with the enemy, and did remain absent in desertion until he returned to military control in Italy on or about 6 July 1944.

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

Specification: In that Private George J. Martin, Company "B", 6th Armored Infantry, did without proper leave, absent himself from his camp at or near Bellona, Italy, from about 18 December 1943 to about 27 December 1943.

He pleaded not guilty to Charges I and II and the Specifications thereunder, and guilty to Charge III and the Specification thereunder. He was found guilty of the Charges and Specifications. Evidence of two previous convictions, one by summary court-martial for being in an off-limits area, violation of curfew, and being without a pass, in violation of Article of War 96, and one by special court-martial for absence without leave in violation of Article of War 61, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 60 years, three-fourths of the members of the court present concurring. 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 under Article of War 50½.

3. The evidence shows that on the dates alleged accused was a rifleman in a rifle platoon of Company B, 6th Armored Infantry Regiment, which, during December 1943, was stationed near Bellona, Italy. An extract copy of that company's morning report introduced in evidence without objection contained the following entries:

"18 Dec 1943:
6903340 Martin, George J., pvt dy to AWOL 0700 hrs

27 Dec 1943:
6903340 Martin, George J., pvt AWOL to duty 0700 hrs.

3 Jan 1944:
6903340 Martin, George J., pvt dy to AWOL 2030 hrs.

16 Jan 1944:
6903340 Martin, George J., pvt AWOL to dy as of 0700 hrs 13 Jan.

23 Jan 1944:
6903340 Martin, George J., pvt dy to AWOL 0700 hrs

18 July 1944:
6903340 Martin, George J., pvt AWOL to dr fr rolls to abs conf PBS stockade 6 July

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19 July 1944:
6903340 Martin, George J., pvt abs conf PBS stockade to pres conf 1st AD stockade." (R. 5,6,9; Ex. A)

First Sergeant Ralph R. Jenkins, Company B, 6th Armored Infantry Regiment, testified that while the company was in the Bellona area during December there were regular reveille formations and that accused was absent on 18 December and was not seen again by witness until 27 December. He further testified that a "check" of the area was made by one of the company officers: "Whenever anybody was absent a search was always made". (R. 7)

On 4 January 1944 while accused's company was engaged in an attack upon Mount Porchia the company motor sergeant, who was in charge of a group of men with half-tracks bivouacked in a rear area near Bellona, recognized accused among the group although accused's name was not on the group roster. In reply to an inquiry by the sergeant as to why he was there accused stated he had returned to get some clothing. The sergeant told accused to "see the supply sergeant and be ready to leave it noon, in case the vehicle went up". Accused did not report to the supply room, was not present at noon when the truck "went up", and did not reappear in the area. (R. 5,6) Sergeant Jenkins testified that on 4 January 1944, Company B was at "an assembly area on Mt. Sargo", occupying a front line defensive position and sending out patrols, and that accused was not present with his company on that date. Witness made a check of the area and could not find him. The next time witness saw accused was after the unit was relieved "around the 13th of January". (R. 6,7)

About 20 January 1944 accused's company moved to a staging area at Qualiano, Italy, "to get ready to go to an embarkation point". "Everyone was restricted to the area". The military police would not allow anyone in or out of the area without a "special pass". Although the men did not know their destination, all knew they "were going somewhere to fight" and the fact the vehicles were waterproofed was "common knowledge". The company then moved to the "palace grounds" near Naples. On 23 January 1944 accused was reported absent without leave. After about a week, the company was loaded on "LSTs and went to Anzio". Accused was not with the company on the Anzio beachhead. (R. 6-9)

It was stipulated that accused was returned to military control on or about 6 July 1944 (R. 15).

Accused testified that on the night of 3 January 1944 his company attacked Mount Porchia and that he was first scout for the attack during which a Private Morris was wounded. He carried Morris back and turned him over to a Lieutenant Carter after which he "lay right there" until "the hill was taken", then went back "quite a ways", about "fifteen or twenty miles", "with the half-tracks" near Bellona to get some clean clothes, as his were torn and dirty. He testified further he did not have permission to go back to the rear, or to stay back and not "go up", and that he rejoined his company the date it "came back from the line".

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He further testified that he was not on the "beachhead" but that "everybody got to drinking" and he spent the time from 23 January 1944 to 6 July 1944 in and around Naples, and was "picked up" about the 6th of July. The reason he gave for his absence was "Only this - when I left the area I was drinking heavily. The next morning I knew I was AWOL and I was afraid to come back". (R. 9-14)

Asked if he knew why he was in the "palace grounds" near Naples, accused replied "No, sir. I don't recall anybody telling me anything but that we were just going there". He knew of no instructions that he ever received at that place. (R. 14)

4. It thus appears from the prosecution's evidence, as well as from accused's testimony, that at the place and time alleged in the Specification, Charge I, accused abandoned his organization while it was engaged with the enemy, and, without authority, sought safety in the rear. Accused himself testified that without permission and without informing anyone of his actions, he left his company and went back to a point some 15 or 20 miles in the rear where he remained until his company came out of the line. Such conduct is obviously not conformable to the standard of behavior before the enemy set by the history of our arms and constituted a violation of Article of War 75, as alleged.

It further appears from the evidence that at the place and time alleged in the Specification, Charge II, accused absented himself from his organization without authority at a time when it was obviously preparing for an amphibious operation and embarkation was imminent. Accused himself testified he was absent without authority during the period alleged and spent the time in and around Naples, Italy, and further that he was not with his company on the Anzio beachhead. The fact that accused was a rifleman in a rifle platoon, that the company vehicles were waterproofed, that company personnel was restricted to a staging area near Naples and other circumstances established by uncontroverted evidence as well as accused's admissions and the fact he remained unauthorizedly absent for more than five months in close proximity to numerous military installations without surrendering to military control warranted the inference that at the time he absented himself accused knew hazardous duty in the form of combat with the enemy was imminent, and that accused's actions were motivated by an intent to avoid such duty. His organization did in fact proceed to the Anzio beachhead, where duty was manifestly hazardous. The court properly found accused guilty as charged.

It likewise appears from the uncontroverted evidence as well as from accused's plea of guilty that at the place alleged in the Specification, Charge III, he absented himself from his organization without authority and remained unauthorizedly absent for the period alleged.

5. The charge sheet shows that accused is 26 years of age. He enlisted in the Army 21 August 1939, with prior service from 20 May 1937 to 14 August 1939.

6. The court was legally constituted. No errors injuriously affecting

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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 and the sentence.

Donald W. MacKay, Judge Advocate.
Mortimer R. Frum, Judge Advocate.
Henry C. Kenick, Judge Advocate.