

BRANCH OFFICE
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
OPINIONS

NORTH AFRICAN
THEATRE
MEDITERRANEAN
THEATRE

VOL. 5
1944-1945

JAG BR
MIL

LAW DIV
JAG BR
MIL

HOLDINGS OPINIONS AND REVIEWS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

NORTH AFRICAN THEATER OF OPERATIONS
MEDITERRANEAN THEATER OF OPERATIONS



VOLUME 5 B.R. (NATO-MTO)
CM NATO 3215-CM NATO 3940
CM MTO 4061-CM MTO 4689

CONFIDENTIAL

CLASSIFICATION CANCELLED
AUTH: TJAG 4/15/46 BY: A.B.K.

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

12
16
B63n
v.5

Downgraded
Authority of TTAG
May 20, 1954

Judge Advocate General's Department

Holdings Opinions and Reviews

BOARD OF REVIEW

Branch Office of The Judge Advocate General

NORTH AFRICAN THEATER OF OPERATIONS

MEDITERRANEAN THEATER OF OPERATIONS

Volume 5 B.R. (NATO-MTO)

including

CM NATO 3215 - CM NATO 3940

CM MTO 4061 - CM MTO 4689

(1944-1945)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1946

04275

CONTENTS OF VOLUME 5 (NATO-MTO)

<u>NATO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
3215	265998	Lynch	30 Aug 1944	1
3224	268372	Miller, Scafa	22 Sep 1944	5
3236	268496	Saunders	16 Sep 1944	15
3270	268399	Kissel	13 Sep 1944	21
3349	271452	Gonzales, McKinney, Findley, Lawrence	20 Nov 1944	27
3411	267994	Peterson	23 Sep 1944	43
3444	269744	Aud	17 Oct 1944	51
3569	269841	Harrah, Dordal	9 Oct 1944	57
3574	269337	Gilbert	13 Oct 1944	61
3611	268370	Marcial	13 Oct 1944	67
3644	269809	Brockington	28 Oct 1944	73
3661	268946	Manriques	17 Oct 1944	81
3662	268714	Funaro	6 Oct 1944	87
3806	269507	Lemaster	18 Oct 1944	93
3850	271950	Davis	15 Nov 1944	99
3906	276898	Ray	30 Nov 1944	103
3940	269746	Maxe, Hollingsworth	31 Oct 1944	111

MTO No.

4061	273674	Jones	7 Dec 1944	121
4164	289391	Morandi	26 Dec 1944	133
4270	277503	Springs	19 Dec 1944	141
4331	290712	Thomas	13 Dec 1944	149
4372	276902	Robinson	30 Dec 1944	157
4373	277823	Ashby	15 Dec 1944	165
4419	276869	Lee, Montgomery	9 Jan 1945	169
4431	278929	Barnes, Garcia, McCall, Peterson, Taylor, Whitney, Clark	7 Feb 1945	177
4434	277974	Elizondo	28 Jan 1945	185
4444	278677	Ammerman	21 Dec 1944	191
4446	278829	Bowers	26 Dec 1944	195
4449	277765	Howell	13 Jan 1945	199
4450	277402	Kozak	21 Dec 1944	203
4452	291881	Williamson	23 Dec 1944	207
4463	284931	Anderson, Matthews, Charles, Miles, Parrott, Hall	16 Feb 1945	211

<u>MTO No.</u>	<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
4511	286304	Crismond	30 Dec 1944	223
4512	276841	Campione	30 Dec 1944	229
4513	278277	Paul	29 Dec 1944	233
4544	278323	Gill	30 Dec 1944	237
4545	276892	Lyons	27 Jan 1945	241
4571	278734	Camberdella	3 Feb 1945	245
4595	278227	Bellville	1 Feb 1945	249
4623	287892	Henderson	15 Mar 1945	253
4638	278834	Bratton	20 Feb 1945	263
4687	278787	Ruggiero	28 Jan 1945	271
4689	291257	Tucker	30 Jan 1945	275

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 3215

UNITED STATES)

v.)

Private BOYD M. LYNCH)
(35 201 944), Company A,)
6th Armored Infantry.)

FIRST ARMORED DIVISION)

Trial by G.C.M., convened at)
APO 251, U. S. Army, 22 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.

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 Boyd M. Lynch, Private, Company "A" 6th Armored Infantry, did at bivouac near Camigliano, Italy on or about 6 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 beachhead at Anzio, Italy and service thereat; and did remain absent in desertion until he surrendered himself at Camigliano, Italy on or about 7 March 1944.

Specification 2: In that Boyd M. Lynch, Private, Company "A" 6th Armored Infantry, did at bivouac near Camigliano, Italy on or about 13 March 1944, desert the service of the United

(2)

States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: Transportation by water to beachhead at Anzio, Italy and service thereat; and did remain absent in desertion until he surrendered himself at Camigliano, Italy on or about 13 March 1944.

Specification 3: In that Boyd M. Lynch, Private, Company "A" 6th Armored Infantry, did at bivouac near Camigliano, Italy on or about 19 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.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and Specifications 1 and 2 thereunder, and guilty of Specification 3 except the words "at Salerno, Italy", of the excepted words not 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 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 under Article of War 50½.

3. The undisputed evidence shows that on 29 February 1944 accused, who had been in a hospital, reported to the replacement depot of the 1st Armored Division at Camigliano (Italy) for return to his unit. The depot was operated by personnel of the division Service Company. (R. 5,7,9) Accused was informed that he would be taken to his unit, which was then at the Anzio beachhead, about 6 March 1944, by which time a shipment would have been "built up" and that until that time he would remain at the depot. Before breakfast, about 0800 hours, on 6 March 1944 a member of the Service Company told accused to pack his belongings and get ready, that his barracks bag was to be left behind for storage, and that they would go down to the docks by truck and be shipped to Anzio. When the roll was "checked" accused was missing. A thorough search of the area was made but he was not present. Accused was present the following morning at reveille and reported later that day to First Lieutenant William E. Haines, the personnel officer of the 6th Armored Infantry. (R. 7-10) That officer warned accused "he was to make the next shipment to Anzio and that if he failed to make the shipment, I would prefer charges under the 58th Article of War, to avoid hazardous duty" (R. 5).

The next shipment to the Anzio beachhead left on 13 March. The same procedure took place that day as on the 6th, that is, a roll was called and the men were told they were leaving. Accused was present at the first roll call and was personally notified he was to go to the Anzio beachhead but "when the time came for the shipment to go out, he was not there". A thorough search was made but accused could not be found. He returned about 1700 hours and was placed under guard at the Service Company. (R. 7-12)

The personnel officer testified that if anyone in authority had given

accused permission to fail to report to the boat for shipment on the occasions described it would have been brought to his attention. He did not know of such permission being given (R. 5).

The undisputed evidence also shows that on 19 March 1944 a Private Boyd M. Lynch, Company A, 6th Armored Infantry, was a prisoner, in the custody of the Service Company, 1st Armored Division, and that when the sergeant of the guard reported accused was missing the company commander searched the area in company with the sergeant and later personally searched the tents in which they "had" the prisoners but did not find this soldier. He testified that the soldier did not have authority to be absent from the prisoners' tents and that he was not thereafter found in the area. (R. 10-12)

Morning reports of Company A, 6th Armored Infantry, containing the following entries, were introduced in evidence (R. 6):

09 Mar/44 MOS
35201944 Lynch, Boyd M. 521 Pvt
SD Div Serv Co 1st AD to AWOL 0800 hrs 6 Mar/44 - AWOL
to SD Div Serv Co 1st AD 1100 hrs 7 Mar/44

s/ M. B. TROXELL WO jg AUS 6th Armd Inf Asst P.O.

13 Mar/44 MOS
35201944 Lynch, Boyd M. 521 Pvt
SD Div Serv Co 1st AD to AWOL 0800 hrs - AWOL to
confinement 1730 hrs

s/ M. B. TROXELL WO jg AUS 6th Armd Inf Asst P.O.

22 May 1944
35201944 Lynch, Boyd M. 521 Pvt
Conf Div Serv Co 1st AD to AWOL as of 19 Mar/44 to
conf Regt'l Stockade 20 May/44 to conf 1st Armd Div
Stockade

s/ M. B. TROXELL WO jg AUS 6th Armd Inf Asst P.O." (Ex. A)

A stipulation "between prosecution and defense to the effect the accused returned to military control on or about the 14th of May 1944" was received in evidence (R. 13).

The accused elected to remain silent (R. 12).

4. It thus appears from the evidence that at the place and time alleged in each of the first two Specifications accused absented himself without proper leave from a replacement depot operated by the Service Company of the 1st Armored Division when he was about to embark for shipment to his company in the Anzio beachhead, Italy. Accused's place of duty was with the group going to the beachhead and the facts and circumstances warrant the inference that on each occasion when accused absented himself he had the concurrent intention of avoiding the duty alleged. The duty was manifestly hazardous.

265998

(4)

It likewise appears that at the place and time alleged in Specification 3, a soldier having accused's name escaped from restraint 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. The identity of names justified an inference that the person who absented himself was accused. The length of the 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 derelictions from duty during the preceding two weeks, justify the inference that when accused so absented himself he had the intention not to return to his place of duty.

That accused absented himself from his place of duty thrice in two weeks is significant. His conduct demonstrated a continuing and determined intention of avoiding combat service, each incident reciprocally substantiating the existence of the intent allegedly involved in the other two.

5. The trial judge advocate requested the court to take judicial notice that on 6 and 13 March 1944 water transportation from the Naples area to the Anzio beachhead and service thereat might "be considered hazardous duty", to which the president of the court replied the court would take judicial notice of the matter in question. Although the request as made may have involved an element of a conclusion as distinguished from a fact, the court could properly take judicial notice of conditions existing near Naples and the Anzio beachhead at the time in question and from such facts conclude the duty alleged was hazardous.

6. The charge sheet shows that accused is 25 years of age and was inducted into the Army 26 February 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 of guilty and the sentence.

Donald V. Mackay, Judge Advocate.
(absent), Judge Advocate.
Henry C. Lemick, Judge Advocate.

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

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

Board of Review

NATO 3224

UNITED STATES)

45TH INFANTRY DIVISION)

v.)

Trial by G.C.M., convened at
APO 45, U. S. Army, 5 August
1944.)

Privates ARTHUR M. MILLER)
(32 305 286) and PETER SCAFA)
(32 228 848), both of Company)
A, 120th Engineer Combat)
Battalion.)

Miller: Dishonorable discharge)
and confinement for ten years.)
Scafa: Dishonorable discharge)
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.

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 Charges and Specifications:

MILLER

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

Specification 1: In that Private Arthur M. Miller, Company A, 120th Engineer C Battalion, did, without proper leave, absent himself from his company at a location about fifteen (15) miles West of Rome, Italy, from about 1200 9 June 1944 to about 2130 14 June 1944.

Specification 2: In that Private Arthur M Miller, Company A,

(6)

120th Engineer C Battalion, did, without proper leave, absent himself from his company at its bivouac area about five eight(h)s (5/8) of a mile east of Pontecagnano, Italy, from about 0800 on 3 July 1944 to about 1600 on 13 July 1944.

CHARGE II: Violation of the 63d Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

CHARGE III: Violation of the 64th Article of War:

Specification 1: In that Private Arthur M. Miller, Company A, 120th Engineer C Battalion, having received a lawful command from 2nd Lieutenant Buck N. King, 15th Infantry, to come with him and get in a truck, did at or near Rome, Italy, on or about 9 June 1944, willfully disobey the same.

Specification 2: (Finding of not guilty.)

CHARGE IV: Violation of the 69th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private Arthur M. Miller, Company A, 120th Engineer C Battalion, was at or near Rome, Italy on or about 9 June 1944, drunk and disorderly in uniform in a public place, to wit: on a street of said city approximately one (1) mile west of the ancient Roman Colosseum thereof.

SCAFA

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

Specification 1: In that Private Peter Scafa, Company A, 120th Engineer C Battalion, did, without proper leave, absent himself from his company at a location about fifteen (15) miles West of Rome, Italy, from about 1200 9 June 1944 to about 2130 on 14 June 1944.

Specification 2: In that Private Peter Scafa, Company A, 120th Engr C Bn, did without proper leave, absent himself from his company at its bivouac area about five eight(h)s (5/8) of a mile east of Pontecagnano, Italy, from about 0800 on 3 July 1944 to about 1600 on 13 July 1944.

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

260372

Specification 1: In that Private Peter Scafa, Company A, 120th Engineer C Battalion having received a lawful command from 2nd Lieutenant Buck N King, 15th Infantry, to come with him and get in a truck, did at or near Rome, Italy, on or about 9 June 1944, willfully disobey the same.

Specification 2: In that Private Peter Scafa, Company A, 120th Engineer C Battalion, did, at or near Rome, Italy, on or about 9 June 1944, offer violence against 2nd Lieutenant Buck N King, 15th Infantry, his superior officer, who was then in the execution of his office, in that he, the said Private Peter Scafa, did grab said officer's leg and left hand and attempted to pull him from a quarter ton vehicle.

CHARGE III: Violation of the 69th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private Peter Scafa, Company A, 120th Engineer C Battalion was, at or near Rome, Italy, on or about 9 June 1944, drunk and disorderly in uniform in a public place, to wit: on a street of said city approximately one (1) mile west of the ancient Roman Colosseum, thereof.

Each assented to a common trial. Accused Miller pleaded guilty to Charges I and V and their Specifications and not guilty to the other Charges and Specifications relating to him. Accused Scafa pleaded guilty to Charges I and IV and their Specifications and not guilty to the other Charges and Specifications relating to him. Accused Miller was found not guilty of Charge II and its Specification, not guilty of Specification 2, Charge III, not guilty of Charge IV and its Specification and guilty of the other Charges and Specifications relating to him. Accused Scafa was found not guilty of Charge III and its Specification and guilty of the other Charges and Specifications relating to him. Evidence of one previous conviction by summary court-martial for stealing two cases of fruit cocktail rations in violation of Article of War 96, was introduced as to accused Miller. Accused were sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, accused Miller for ten years and accused Scafa 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. Accused are members of Company A, 120th Engineer Combat Battalion, which, on 4 June 1944, was located about 15 miles west of Rome, Italy, and

(8)

on 19 July 1944 was located about one mile east of Pontecagnano, Italy (R. 7). Extract copies of the morning report of that organization, admitted in evidence without objection (R. 6), contained the following entries:

*11 June 1944 - 32305286 Miller, Arthur M, Pvt duty to AWOL about 1200 on 9 June 1944

14 June 1944 - Pvt Arthur M Miller, 32305286, AWOL to duty at 2130 on 14 June 1944

*30 July 1944 - To correct entry of M/R 11 June 1944: Pvt Scafa, Peter 32228848 duty to AWOL on 1200 on 9 June 1944

14 June 1944 - Pvt Scafa, Peter, 32228848 AWOL to duty at 2130.

* 3 July 1944 - Pvt Arthur M Miller, 32305286 fr under arr pending CM to AWOL 0800 on 3 July 1944

15 July 1944 - Pvt Arthur M Miller, 32305286 fr AWOL to conf PBS Stockade as of 13 July 1944

* 3 July 1944 - 32228848 Scafa, Peter ONO Pvt Under AR pending CM: Duty to AWOL 0800 3 July 1944

15 July 1944 - 32228848 Scafa, Peter, ONO Pvt Fr AWOL to conf. PBS Stockade as of 13 July 1944" (Exs. A,B,C,D).

Second Lieutenant Buck N. King, 15th Infantry Regiment, testified that on 9 June 1944, in connection with his duties as part of the division garrisoning Rome at the time, his company "had a location to patrol an area" and he had a command post set up about a mile west of the Colosseum (R. 7). Witness testified that at about 2300 hours, 9 June there was "a commotion from an apartment house near the C.P." and that he took two guards and went over to the apartment house, where he saw accused, and

"There was a bunch of jabbering. When I got there I saw two men come out. When they saw me they recognized the fact that we were going to approach and they turned around and Scafa started for the door and Miller started for the other door. They did not stop when I called to them. They started back through the doors and I got

Scafa myself and told the guards to get Miller. One guard got Miller and brought him back out" (R. 8,12).

Witness further testified that he saw that accused "were drunk or drinking rather, and that from the commotion being raised there, they were causing trouble". Accused were staggering, but were able to walk and talk. "I would say they were drinking heavily, but would not say they were drunk. When a man can't walk he is drunk". Witness asked accused to come with him. "We had a truck for them to get on and they said no and they called me a Rear Echelon Son-of-a-Bitch". Then, witness testified, "I ordered them to go with me to the truck**I had a 2½ ton truck which they allow us to take men of the 45th back to their outfits". When he gave that order he "maybe had hold of Scafa and was about three feet from Miller". (R. 9) Accused "tried to pull away" and did not obey the order. "Subsequently to get them on the truck I carried Scafa over and a guard carried Miller", and accused were put in a "jeep". Witness further testified:

"The driver was in the front and Scafa on the other front seat. I got in the left rear seat and put Miller on the right and told the driver to start and was going to take them over to the M.P. C.P. and write up just whatever I was going to do. After we settled down the driver switched on the jeep. He had not cranked it. During this time Miller was cursing low and Scafa was cursing me. Just before the jeep was cranked Scafa got out of the front and in the meantime they both asked me to come out and fight them. They were using that term of beating me up. Scafa got out of the front and came to the rear left up where I was sitting. I turned around. I knew he was trying to get me. He already had said he was going to beat me or something to that effect, and he reached up and got my left trousers leg and my left hand. I had a pistol at my side and a flashlight, and I had to either hit him with it or go on my head on the pavement". (R. 10)

Scafa pulled hard on witness, "hard enough so that if I did not hit him I would go on my head" (R. 10). Then "Miller got off from the jeep and went around to Scafa, and I think that calmed Scafa off pretty much". Miller "did most of the cursing", saying the "regular things drinking men say" and calling witness a son-of-a-bitch. Then, witness testified,

"We got back in the jeep just like we started off and I took them around to the University Building where the Division M.P.'s were. On the way over there they were continually cursing, both of them. Nothing much happened on the way over. Scafa attempted to spit on me on the way and missed me and hit Miller".

Witness had his bars on all the time and testified that "they both recognized me as an officer". Scafa said "You are nothing but a Rear Echelon 2nd Lt., Son-of-a-Bitch, our company commander is a 1st Lt., and when we are turned

(10)

over to him he will eat your ass', or something like that". Witness had his pistol out after he struck Scafa:

"I dropped the flashlight when I hit Scafa over the head. The driver was driving and they were pretty mad and on the way over from the 1st C.P. to the Division I had a pistol in my hand and told them if they attempted to strike again I would hit them with it". (R. 11)

Witness testified that when Scafa came around the back end of the "jeep", trying to pull him out, "my body was well up over the back end of the jeep. When he came around the jeep he reached up and got my leg and left arm and I hit him" (R. 12). "I turned around, clear around and my knees went to the rear of the vehicle" and "my center of gravity had passed the edge of the jeep. If he turned loose I probably would not have fallen, but if he pulled me I would have fell off". Later, he pulled the pistol "for my own protection" and "just held it in my hand". (R. 13)

Witness further testified that he asked accused

"for their passes when I first went over, and asked the men their organization. I do not remember whether they told me their names or not. They told me they were from the 45th Division, and the 1st time I knew exactly who they were and what their organization was was when they told the Division M.P.'s they were from the 120th Engineers and told their correct names. They had no dog-tags and no pass" (R. 14).

Staff Sergeant Reese Felstein, 15th Infantry Regiment, testified that at about 2200 or 2300 hours 9 June 1944, he was sergeant of the guard "and we were in the C.P. and heard a commotion. It is our business to keep it quieted down and I went across the street with two guards and Lt. King" (R. 15). After the guards and Lieutenant King came out with accused and "had brought them across the street into the courtyard", witness heard Scafa say "You Rear Echelon Son-of-a-Bitch", or words to that effect. Witness also testified that Lieutenant King did not strike either accused at that time (R. 16) but "tried to quiet them down and said to both of them either to get in the jeep and he would take them back to their organization, or go to jail, to make up their minds" and that Lieutenant King told accused twice, in "exactly the same words", to get in the "jeep", and accused "were put in the jeep". "Scafa did not seem to want to. The Lt. put him in there forcibly. Miller quieted down and got in back." Scafa "was cursing continuously and got out of the jeep" and "went around to the rear of the jeep and reached up and grabbed hold of the Lt. At that time he was going to take him out of the jeep". Witness further testified, "I saw him lay his hands on the Lt. and attempt to pull him out of the jeep. At that time the Lt. grabbed his flashlight and struck him". Witness did not know by what part of the body Scafa grabbed Lieutenant King but "he actually had his hands on him". (R. 17) Scafa had been "continually cursing", and inviting the lieutenant to fight with him, saying that he "could kick the shit out of any Lt., and mentioned the fact that his officer wouldn't do anything to him or words to that effect". Both accused "knew" that Lieutenant King "was a Lt." and used

that word in addressing him. Scafa called him "a Rear Echelon Officer". After Lieutenant King had struck Scafa with the flashlight, it "knocked the fight out" of him, and Miller "went around to Scafa and put his arm around Scafa. Scafa was a bit dazed. They walked around to the front of the jeep" and got in. Miller told Lieutenant King that "he would get even with him". (R. 19)

Corporal John J. Flynn, 3d Division Military Police, testified that on the night of 9 June 1944 he was on duty in the provost marshal's office, at the University of Rome, "taking care of stragglers", when Lieutenant King brought in the two accused. "Miller said very little. The other man interrupted repeatedly while the Lt. was giving the information, and also interrupted him while finding out Miller's name and organization". Accused "did some cursing". (R. 22)

It was stipulated that First Lieutenant Bernard Gordon would testify that about 23 June 1944, when he was investigating officer, "he advised each of the accused that they did not have to say anything, that if they did say anything it might be used against them", and that thereafter each accused signed a statement. The sworn statements, admitted in evidence without objection (R. 6), read in pertinent part as follows:

"My name is ARTHUR M MILLER, ASN 32305286, I am a Pvt in Co A 120th Engr C Bn.

"I wish to make a stat(e)ment in reference to the Court-Martial Charges against me.***

"I went to Roma to visit an Italian freind who at one time was with our company as a cook. We met him and went out together. We drank a lot and I was drunk, but not so much so that I didn't know what I was doing. The Italian with us made a lot of noise, and was very boisterous. We took him home, and were walking up the stairs of his house when a Military Police grabbed SCAFA. SCAFA did not realize it was an officer who grabbed him, and SCAFA twisted towards the officer, the officer hit him across the head with a pistol-butt. We got mad at what seemed like a unprovoked attack, and started to argue with him. In the heat of the argument I called him a 'son-of-a-bitch'. We went along with him because we re(a)lized finally that he was an officer. The only way I could know that he was an officer was when one of the Military Police spoke to him, and called him 'Sir'." (Ex. E);

and

"My name is Peter Scafa, 32228848, Company A, 120th Engineer Combat Battalion. I am a Private in Co A 120th Engr C Bn. When we were near Rome, we decided to go to town to see the city itself and friends of ours, an Italian, who used to

263372

(12)

work in the company. We left the bivouac without permission. Meller and I met the Italian we were looking for, and we all three went out together and got drunk. We were taking the Italian fellow home and when we were walking in the courtyard I heard someone right behind me. I turned around quickly to see who it was, and someone hit me over the head. I couldn't see what it was I was hit with, but I think it was a pistol because when we got into the peep that was all he had with him. When we got to the station house, the officer told the corporal at the desk to 'throw the book at him'. The corporal asked me my name and outfit, and I told him. He did not give me any sort of orders, so I did not disobey him in any fashion. I deny that I am guilty of Charge III, Specification I. I also deny that I am guilty of Charge II, specification 2. Although I was drunk, I was not disorderly. I was in a wool uniform at all times, and was dressed in that wool uniform when I went to the MP station" (Ex. F).

Accused Miller testified that at 2300 hours 9 June (1944), he was in Rome, and

"Pete, Scafa***and I were taking an Italian fellow home who used to be in our outfit at Anzio***We went out and got pretty drunk. We were on the way home. His wife told us she did not want him to be drunk, but he was already drunk and it was too late. Going up the stairs somebody came behind us and grabbed Pete by the shoulder. Pete turned around and got hit".

Miller found out later that it was an officer who hit Scafa and that he hit him with a pistol. (R. 23) "I did not know he was an officer then and called him a Son-of-a-bitch. I was pretty mad and really wanted to hit him". Then accused were put in a "jeep", Scafa in the front, and Miller in the rear with the lieutenant. "Pete was hollering that he had a bleeding head, and I called the Lt. then and I did not know he was a Lt. until one of the men said 'Sir', or something and then I found out he was a Lt". After they were in the "jeep", Miller testified Scafa got out and "went around the jeep, something like that. I got out and got hold of him and put him back". He "couldn't say for sure" if Scafa grabbed the lieutenant and tried to pull him out of the back of the car. (R. 24) Miller told Scafa "to sit down or I would knock him down" and put him back in the "jeep". Miller testified that he was positive it was Lieutenant King, whom he recognized and identified, who struck Scafa with a pistol, but he did not see his face, nor his bars, did not know what kind of pistol he had--"I know he had something in his hand and figured it was a pistol". "It could have been anything"--and stated that he could not swear from his own personal knowledge that the lieutenant hit Scafa with a pistol. (R. 25-27)

Miller further testified that when this happened he and Scafa were absent without leave and did not have a pass: "We took off after chow at lunch and went to Rome. We had been there about a half an hour or so and started drinking", at about 1400 or 1430 hours, "from then on". After visiting the Italian home, where they had "three or four bottles of cognac at three bucks

263372

a bottle", Miller testified, "We decided to go out and went to a couple of bars". When asked if he was intoxicated at the time he was told to go to the "jeep", Miller answered "I was drinking at that time". He further testified that it was the lieutenant who told them to go to the "jeep", and "they all hit told us to go. I wanted to know why we had to go to the jeep and why he hit Pete". (R. 28-30)

Accused Scafa elected to remain silent.

4. It thus appears from the evidence, including the testimony and statement of accused Miller and the statement of accused Scafa, and from the pleas of guilty of each accused, that at the places and times alleged in the Specifications of Charge I, relating to each accused, accused Miller and Scafa each absented himself without proper leave from his organization and remained unauthorizedly absent as alleged. Their conviction thereof in violation of Article of War 61 was proper and would alone sustain the sentences.

It further appears from uncontradicted evidence that at the place and time alleged in Specification 1, Charge III, relating to accused Miller, and in Specification 1, Charge II, relating to accused Scafa, accused were ordered by Second Lieutenant Buck N. King to go with him and get in a truck. Accused tried to pull away and did not obey the order; subsequently they were forcibly taken to and placed in a "jeep". Lieutenant King was accused's superior officer, his command to come with him and get in a truck was a legal and proper one, designed to carry out the performance of his military duties at the time, and accused's refusal to comply therewith constituted willful disobedience, in violation of Article of War 64. The evidence shows that accused recognized Lieutenant King as an officer and addressed him as such.

As to Specification 2, Charge II, relating to accused Scafa, the evidence shows that while Second Lieutenant Buck N. King was seated in the rear of the "jeep", Scafa dismounted therefrom, went around to the left rear of the vehicle where Lieutenant King was sitting, and grabbed him by his leg and hand and attempted to pull him out of the vehicle. Scafa cursed and employed words denoting threats of physical violence against the officer. Lieutenant King was Scafa's superior officer, recognized as such, and he was acting in the execution of his office and properly carrying out his military duties at the time. Under the circumstances Scafa's acts constituted an offer of violence within the meaning of Article of War 64 (MCM, 1928, par. 134a).

It further appears from the evidence and from the pleas of guilty of each accused that at the place and time alleged in the Specification, Charge V, relating to Miller, and in the Specification, Charge IV, relating to Scafa, accused were drunk and disorderly as alleged, in violation of Article of War 96. Each accused admitted he was drunk, but Scafa denied that he was disorderly. In view of the conduct of accused in resisting an officer and refusing to obey his commands, Scafa's conduct in attempting to pull Lieutenant King out of the "jeep", the language used by each accused in addressing Lieutenant King, and the other facts and circumstances appearing in proof, the court was fully warranted in finding accused guilty as charged.

263372

(14)

5. In the review by the staff judge advocate it is stated:

"Each of the accused is a mature man. Each of them have two previous convictions by court-martial during their service, and have a bad reputation within the organization. I can see no reasonable ground upon which to base a belief that a period of confinement will reform these men to the extent that their services will be valuable enough to offset their detrimental value."

6. The charge sheets show that accused Miller is 30 years of age, was inducted into the Army 1 June 1942 and had no prior service; and that accused Scafa is 32 years of age, was inducted into the Army 16 March 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 sentences.

Donald R. Mackay, Judge Advocate.

(sick)
Henry C. Reisch, Judge Advocate.

263372

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

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

Board of Review

NATO 3236

UNITED STATES)

PENINSULAR BASE SECTION)

v.)

Trial by G.C.M., convened at
Naples, Italy, 24 June 1944.)

Private ROBERT W. SAUNDERS)
(35 269 120), 25th Chemical)
Decontamination Company.)

Dishonorable discharge and)
confinement for 12 years.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Robert W. Saunders, 25th Chemical Decontamination Company, did, at Casandrino, Italy, on or about 5 April 1944, willfully, deliberately, feloniously, unlawfully and with premeditation, with intent to kill, commit an assault upon Technician Fourth Grade Leo Bell, 12th Chemical Maintenance Company, by shooting him in the chest with a dangerous weapon, to wit, a service rifle.

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

Specification: In that Private Robert W. Saunders, 25th Chemical Decontamination Company did, without proper leave, absent himself from his organization near Casandrino, Italy, from on or about 2030 hours 5 April 1944 to on or about 2300 hours 5 April 1944.

263496

(16)

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 17 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, reduced the period of confinement to 12 years, 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 during the evening of 5 April 1944 about seven white American soldiers, including Technician Fourth Grade Leo A. Bell, members of the 12th Chemical Maintenance Company, went to a house in Casandrino (Italy) where they drank "vino" (R. 7,10,13). They were unarmed (R. 12). Some of the group had had "some trouble with some colored boys" (R. 13). After drinking the "vino" the group left, "went over by a doorway and were sitting there talking" when accused and some other colored American soldiers approached (R. 10). One of the colored soldiers, named Brown, armed with a rifle, said "If any of you white mother-fuckers want to fight come on out" (R. 10) and stated he was going to kill the "white mother-fuckers" (R. 13). Bell said "don't shoot", "wait a minute" and walked away from the group he was with. When Bell got near the colored soldiers, "two or three feet from the man that had the gun" someone said "stop, or I'll shoot" and, according to Bell, "Just as they said that they shot". The bullet struck Bell on the left chest. (R. 8,14) Bell then walked "down the street aways" (R. 9,14) and remembered that the next day he was in the hospital (R. 9).

Private James A. Brown, 25th Chemical Decontamination Company, testified that on the evening of 5 April he went to Casandrino where he met a member of his company named Woods who was armed with a rifle (R. 15). He testified that accompanied by Woods he went to investigate a report of fighting and that

"On the way down the street we met Saunders and Rankins. We all started arguing over the rifle. I grabbed a hold of the rifle and then Rankins hit me in the mouth. I went ahead on down the street and I met Sergeant Bell. He asked me to help his other friend back to camp which I told him I would. His friend couldn't stand up and was all bloody so I went across the street and picked him up and set him up against an iron telephone pole. I then went back across the street and knocked on the door. Seven or eight fellows came up. I got in an argument with one of them who called me a 'nigger.' I said, 'Anyone of you want to fight, I'll fight any of you.' None would come out so I buttoned my jacket up. Bell then came out. Saunders said, 'Get back in there.' About that time the piece went off and they all ran" (R. 16).

Witness also testified accused placed a shell in the chamber of the rifle when

"he told Sergeant Bell to get back in the archway. A

268496

couple of minutes before the piece went off. He told Sergeant Bell three times to get back in. He put one shell in the chamber and then the piece went off",

and positively identified accused as the man holding the rifle when it was discharged. Witness further testified accused was about ten feet from Bell at the time of the shooting and was holding the rifle "from the side" and not at his shoulder (R. 17). Witness also testified that when the rifle was discharged he was at least five feet away (R. 16).

Bell testified he did not have any trouble that evening with anyone and did not recall any dispute or other incident prior to the shooting. Witness also testified he had been drinking and could not remember the evening very clearly but would not say he was "really drunk". He did not hear any remark as he came out of the archway and neither he nor his group had any dispute with the colored soldiers. (R. 8,20,21)

First Lieutenant William H. Shearin, 25th Chemical Decontamination Company, testified that as investigating officer, he talked with accused and informed him he could "either make a sworn statement or an unsworn statement and that anything he said or put on paper could be used for or against him". Witness testified that he then showed accused a statement which was a copy of a statement accused had previously given to the "CID" and that accused carefully read and then signed it. Witness also testified that he gave accused an opportunity to withdraw the statement but that accused said "he wanted to let it stand". (R. 18,19) The statement was admitted in evidence (R. 19) and read as follows:

"At about 2030 hours, 5 April 1944, I left my camp without permission and went to Casandrino. I had a few drinks of wine, then I met several boys from my camp, they were all hollering and swearing about some white soldiers. They told me that they had had some trouble with some white soldiers. I remember seeing Rankins, Wood, and Brown, all from my organization. Woods had his rifle, and Rankins and Brown was trying to take it from him. All were saying something about shooting some white soldier. I joined in the tussle for the gun. Brown got the gun from Woods, then Rankins took the gun from Brown; Brown then went across the street where the white soldiers were and was cursing and hollering come on out you white son of a bitches if you want to fight. Rankins was holding the gun between his legs. I grabbed the gun from him, and went over where Brown was, Rankins and Woods followed behind me.

"The white soldiers were inside of a door way of an Italian building on the main street. Brown kept hollering at them. One of them Sgt. Bell from the twelfth Chemical whom I know came out of the door and stepped to the right of the door. I hollered at him saying don't come out here, don't come out here.

(18)

"I was holding the gun about waist high, my right was over the trigger guard my left hand was just above the balance of the gun.

"Rankins and Woods were standing behind me cursing at the white soldiers. Brown came over and took hold of me, at about this time the gun went off, hitting Sgt. Bell in the left shoulder. He grabbed his shoulder and said Oh. I worked the bolt of the gun reloading it. Then every one started to run away, as I started away. Russell Woods said to me give me my god damned gun and jerked it away from me. We all went back to camp. I don't know what Woods did with the gun. It was a 1903 U.S. Army rifle. When I got to camp I went in my tent, then came back out. Brown was standing outside, he said you shot Bell. I said yes I know I did. I said do you think he is hurt bad and Brown said I don't know. Brown told me not to say anything to anyone about it. I then went back" (Ex. 1).

An extract copy of the morning report of the 25th Chemical Decontamination Company was introduced in evidence. The defense stated it had no objection. The exhibit contained the following entry under date of 15 May 1944:

"35269120 Saunders, Robert W. Pvt dy to AWOL 2030
to dy 2300 (5 Apr '44)" (R. 20; Ex. 2).

4. It thus appears from the evidence that at the place and time alleged accused assaulted Technician Fourth Grade Leo Bell, the person named in the Specification, by shooting him in the left chest or shoulder with a service rifle. Accused and his companions had engaged upon a course of conduct designed to foment trouble with a group of white soldiers. They hurled obscene taunts and solicited physical violence. Then, as Bell who was unarmed approached accused, the latter loaded the rifle and fired, immediately minaciously reloading it. Accused's conduct was deliberate and malicious. The shooting was without justification or excuse and upon no rational basis could it be claimed that accused acted in self-defense. The facts and circumstances disclosed by the evidence warranted the court in finding accused guilty as alleged. The Specification though inartificially drawn is sufficient at least to support a conviction of the offense of assault with intent to commit voluntary manslaughter.

Likewise the evidence including accused's statement shows that accused absented himself without proper leave from his organization substantially as alleged in Charge II. All elements of the offense were clearly shown.

5. The charge sheet shows that accused is 25 years of age. He was inducted into the Army 25 February 1942 with no prior service.

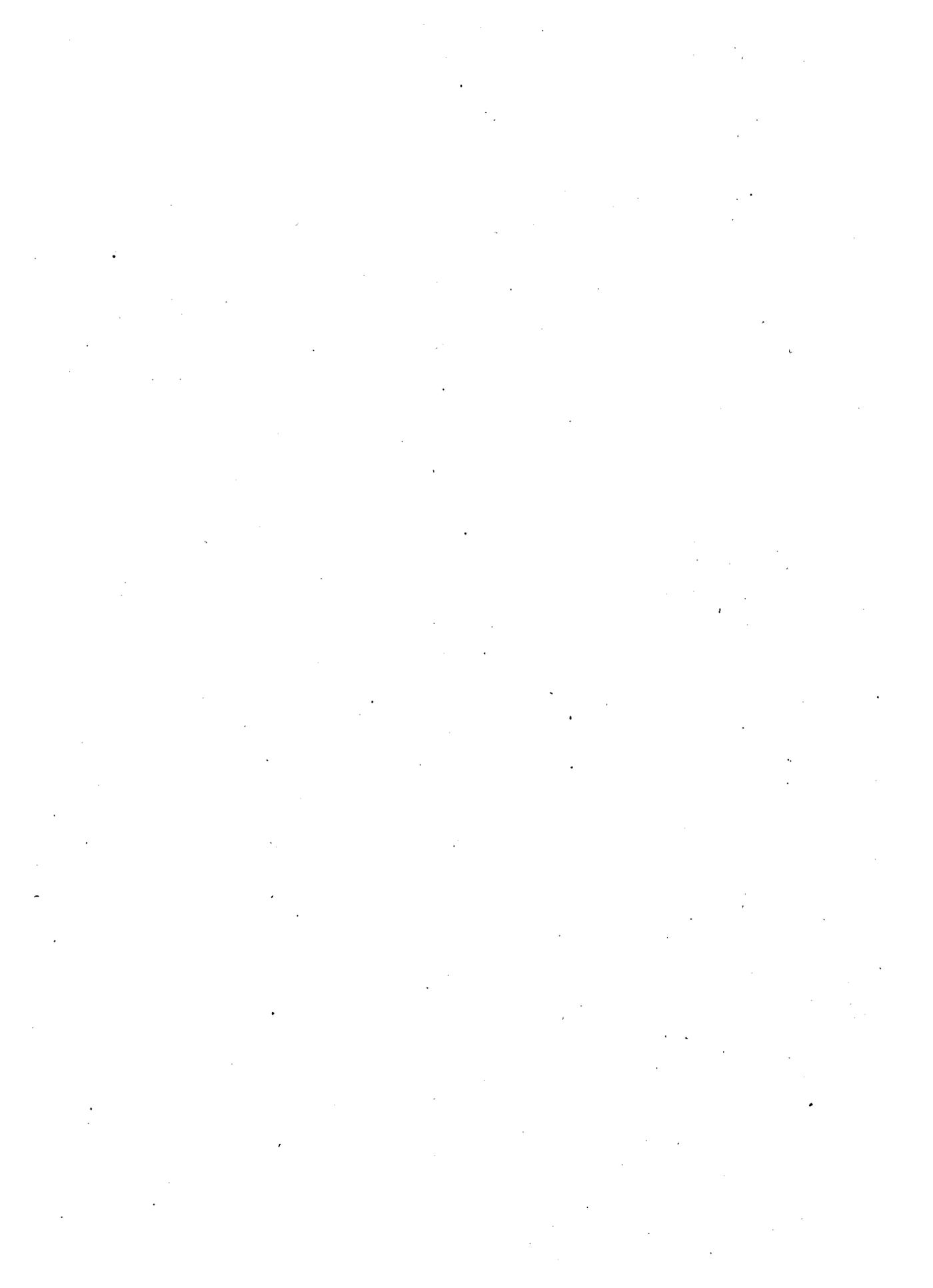
6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The

(19)

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 here involved, 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 D. DeLoach . Judge Advocate.
William P. Ryan . Judge Advocate.
Harry C. Rieck . Judge Advocate.

268496



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

AGO 534, U. S. Army,
13 September 1944.

Board of Review

NATO 3270

UNITED STATES)

v.)

Private MARVIN KISSEL)
(36 625 120), Company E,)
15th Infantry.)

3D INFANTRY DIVISION

) Trial by G.C.M., convened at
) Nettuno, Italy, 21 April 1944.
) Dishonorable discharge and
) confinement for 30 years.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Marvin (NMI) Kissel, Company "E", 15th Infantry, did, near Borgo Bainsizza, Italy, on or about 5 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 was apprehended at Pozzuoli, Italy, on or about 10 February 1944.

Specification 2: In that Private Marvin (NMI) Kissel, Company "E", 15th Infantry, did, near Nettuno, Italy, on or about 15 February 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

(22)

enemy, and did remain absent in desertion until he was apprehended near Nettuno, Italy, on or about 2 April 1944.

He pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence of one previous conviction by summary court-martial for entering an "off limits" 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 but reduced the period of confinement to 30 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 about 2 February 1944 the Service Company of the 15th Infantry was located at Borgo Bainsizza on the (Anzio) beachhead (Italy) (R. 24). Second Lieutenant Seymour Hartman, 15th Infantry, 3d Division Liaison Officer, testified that about 1 February 1944 he loaded some troops, including accused, who were replacements going to the 3d Division, on board an "LST" going to the Anzio beachhead (R. 14,15).

Captain Charles E. Morgan, Company E, 15th Infantry, testified that accused was assigned to Company E, of which witness was then in command, and which was stationed on the (Anzio) beachhead. Witness testified accused was on a list, dated 2 February, sent to Company E by the Personnel Center of the 2d Replacement Depot showing the replacements which were assigned on that date and that accused was among those then assigned. Captain Morgan could not recall the date on which the replacements arrived, but he testified accused "came up that night" and that witness "received" accused when "some of the men came back from the lines". Witness further testified that accused did not report on 5 February and was "AWOL"; that some time later a notice was received stating that accused was absent sick and another notice about 3 March 1944 that he was "AWOL"; and that on 4 March 1944 an entry was made in the morning report showing accused "from assigned absent sick corrected to read, assigned AWOL since February 5th". (R. 7-11) An extract copy of the morning report was admitted in evidence over objection by the defense (R. 9; Ex. A). Witness also testified accused was not present for duty with the company from 5 February to the day of trial (R. 10).

Second Lieutenant Eugene Halperin, 2651st Military Police Company, testified that on 10 February 1944 he saw accused on an "LST" at Pozzuoli (Italy) and that after investigating the circumstances "arrested him for AWOL". Witness also testified that when he asked accused what he was doing on the boat accused "hemmed and hawed so I took him to the military police station"

"where I questioned him as to where he had left his organization and he told me he left his organization and started telling me the complete story of what happened; that he had gone to a dispensary for medical treatment and on return from the dispensary he found that his outfit had moved out so he

crawled into a 2½-ton GI truck where he went to sleep and the next thing he knew he was on a ship which landed at Pozzuoli". (R. 12)

Witness also testified that "after a little more questioning" accused stated he had been sent to the 3d Division as a replacement. Witness further testified that the responses of accused to questions were voluntary (R. 12), that no force, threats or promises were employed, and that accused was not asked to make a statement (R. 13).

Lieutenant Hartman testified that on 10 February 1944 he asked accused

"how he returned back from the beachhead to Pozzuoli. He told me that he was,...when he arrived at the beachhead, he was not assigned to any company or regiment and didn't know what company and regiment he was assigned to. He did not feel well one morning and left the area he was at at the present time and proceeded to go to a hospital. I asked him the name of the hospital and he said he didn't know the name. After receiving treatment at the hospital he left and proceeded to look for his outfit. Not knowing which company or regiment he was assigned to, he couldn't find it. He then felt tired and laid on the back of a 2½-ton truck to go to sleep. He said when he awoke he found himself aboard an LST bound for Pozzuoli" (R. 15,16).

Witness testified he did not inform accused that he need not answer any of the questions witness asked him, that the questioning was prompted by witness' "curiosity", and that no force or promises were employed (R. 17). Lieutenant Hartman testified further that on 12 February 1944 "Major Frye", Provost Marshal of the 2d Replacement Depot, told him "accused was fit to go back to duty to his outfit" and that on that date witness again shipped accused to the Anzio beachhead (R. 16).

Sergeant John Rucklos, 206th Military Police Company, testified that about 2200 hours 2 April (1944) he went to the 56th Station Hospital near Nettuno where he took accused into his custody from the guards at the hospital who "had no definite charges other than the fact that the man had been loitering around the hospital and making a nuisance of himself" (R. 18,19).

Second Lieutenant Abraham Weiner, 15th Infantry, the investigating officer, testified that he warned accused that he need not make any statement, and that his failure to make one "would not be held against him", but that "if he did make a statement I would use that statement against him" (R. 20). He also testified that accused then made a statement which was introduced in evidence, the defense stating it had no objection (R. 21). It read in pertinent part as follows:

"Major Frye never examined me physically or mentally at the 29th Replacement Depot.

(24)

"The first time I came to the beachhead I was sent to the Service Company about 3½ miles from the front. Four or five days later I went to a dentist after having been sent there by some medics whom I do not know. I returned to the service company, and found that the replacements were gone. There was no equipment of mine left. I did not see anyone at Service Company & I did not know what outfit I was in.

"I joined up with a colored outfit about half a mile from the hospital - I don't know which hospital. One of the colored boys suggested that I go back to Naples. I thought it would be desertion & didn't go to Naples. I was sleeping on a 2½ ton G.I. truck & one morning I was sick & overslept. The next thing I knew, I was on the truck & it was on a ship going to Pozzuoli. The ship was an L.S.T. A Lieutenant apprehended me on the ship & he called the M.P.'s at Pozzuoli when we landed. The M.P.'s took me to 3rd Division Headquarters & they sent me back. I walked off the gang plank & a lieutenant accused me of jumping ship. I said I wasn't jumping ship, but he took me to 3rd Division Headquarters, where some major sent me to 29th Replacement Center. There I talked with Major Frye & I told him I did not know what outfit I was in when I was on the beachhead.

"About 3 days later I was put on a L.S.T. to the beachhead. We walked to the 3rd Division Assembly area. We were there about an hour when some M.P. and a lieutenant asked for me to come to the boat & cook a meal for the medics on board. I was on the ship until dark. Then I left the boat. I slept near the hospital area. I did not return to the 3rd Division Assembly area. For about a month I stayed in Nettuno where I saw a movie at the 'Castle' in Nettuno every other night. I slept in various buildings at nights & ate meals at the hospital and at various outfits bivouac(k)ed along the road.

"At the 56th Evacuation Hospital, some captain put me under guard & he sent for the M.P.'s, who took me down to Nettuno where I stayed for a night. They asked me what outfit I was in & I said 'Company "E" Fifteenth Infantry, Third Division.' A few hours later they brought me to Colonel Snyder who sent me to the stockade.

"The above statement is made of my own free will, after having my rights explained to me" (Ex. B).

Witness testified accused stated that at the time of his first absence he did not know what outfit he was in (R. 24,25).

Accused elected to remain silent, stating "There will be no further statement from me" (R. 26).

4. It thus appears that at the place alleged in Specification 1 accused absented himself from his organization without proper leave. He had been assigned to Company E and there is evidence warranting the conclusion that though he had arrived at the company area he left without reporting. Accused was apprehended on an "LST" when it arrived at Pozzuoli, Italy. Service on the Anzio beachhead at the time alleged involved combat with the enemy and was manifestly hazardous duty. Such facts were for judicial notice. The court was justified in disregarding accused's explanation of his absence and concluding that when he absented himself it was with the concurrent intent alleged.

It likewise appears from the evidence including accused's statement that when accused was returned to the Anzio beachhead he failed to join his organization and thus absented himself from his place of duty. That accused stayed in Nettuno and the rear area generally, instead of joining his organization, together with the other facts and circumstances here disclosed, warranted the conclusion that accused absented himself with the intent alleged. While accused was subjected to hazards by his presence at Nettuno, it is clear that it was far less hazardous than service with the combatant organization to which he was assigned (MCM, 1928, par. 130a; NATO 1087, Lapiska).

5. The defense objected to the introduction of the extract copy of the morning report

"unless it is first shown why the absence of February 5th was not entered on the morning report until March 4th and until it is further determined whether the witness has any knowledge of the entry" (R. 8,9).

The implication that the entry was based on hearsay and therefore incompetent is unsupported and is in fact contradicted by Captain Morgan's testimony. That witness testified that he "received" accused, that the latter did not report and was "AWOL". It is therefor apparent that the fact recorded was within the personal knowledge of Captain Morgan. The objection was properly overruled.

6. A report of a psychiatric examination of accused which is attached to the record of trial contains the following matter:

"A story of repeated evasions characterized by flippant excuses and inconsistencies which are modified as inconsistencies are exposed. ***

"No evidence mental derangement or disease. Frankly -doesn't want to get mixed up in any fighting. *** Also has measured risks of recent misbehaviour. Says he knows he has exposed himself to 'life to 50 yrs but I know a guy who got life and is now a Sgt. again'. Claims he knows another deserter who changed his name and is now working comfortably on an L.S.T. Summary - Despite big gaps

(26)

in knowledge and poor abstract thinking this soldier's misbehaviour has been consistently evasive in a calculated manner."

7. The charge sheet shows that accused is 22 years of age. He was inducted into the Army 20 November 1942 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.

Donald W. Mackay, Judge Advocate.
Walter J. Quinn, Judge Advocate.
Henry C. Kueich, Judge Advocate.

269399

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
20 November 1944.

Board of Review

NATO 3349

U N I T E D S T A T E S)
)
 v.)
)
 Privates LUPE P. GONZALES)
 (38 168 377), ALFRED C.)
 MCKINNEY (39 318 450), Private)
 First Class WILSON FINDLEY)
 (34 449 563) and Private CLEM)
 T. LAWRENCE (7 025 316), all of)
 Company E, 361st Infantry, 91st)
 Infantry Division.)

91ST INFANTRY DIVISION

Trial by G.C.M., convened at
APO 91, U. S. Army, 13 August
1944.
As to each accused: Dishonorable
discharge and confinement for
life.
Federal Reformatory, Chillicothe,
Ohio.

REVIEW by the BOARD OF REVIEW

Holmgren, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Clem T. Lawrence, Private Lupe P.
Gonzales, Private Alfred C. McKinney and Private First Class
Wilson Findley, all from Company E, 361st Infantry, and all
acting jointly and in pursuance of a common intent, did, at
Ponsacco, Italy, on or about 31 July 1944, forcibly and
feloniously, and against her will, have carnal knowledge of
Lina Pantani.

Each accused pleaded not guilty to and was found guilty of the Charge and
Specification. Evidence of two previous convictions by special courts-

271452

(28)

martial, one for absence without leave in violation of Article of War 61 and for wrongfully taking and carrying away a motor vehicle in violation of Article of War 96, and one for absence without leave in violation of Article of War 61, was introduced as to accused Lawrence. Evidence as to one previous conviction by special court-martial in each case for absence without leave in violation of Article of War 61, was introduced as to accused Gonzales and McKinney. No evidence as to previous convictions was introduced as to accused Findley. 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 the sentences, designated the Federal Reformatory "at" Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50.

3. The evidence shows that accused were members of Company E, 361st Infantry Regiment (R. 7). On 30 July 1944, between 1200 and 1300 hours, accused McKinney asked Private First Class Robert L. Sweet, of the same organization, to let him use his pistol, a .45 caliber automatic. McKinney did not ordinarily carry a pistol, and one was not issued to him. Sweet testified that "I took the gun off my belt and handed it to him" and McKinney "put the gun on his belt". At that time the pistol was loaded with seven rounds of ammunition. The following morning Sweet got his pistol back from accused Findley: "I went down and asked McKinney for it and he said that Findley had it. So I went down and got it from Findley". At that time the pistol was loaded, had five rounds of ammunition, and had been fired. The .45 caliber pistol, identified by Sweet as his, was introduced in evidence as Prosecution's Exhibit "A". (R. 7-9)

Technician Fourth Grade Richard J. Burke, Service Company, 361st Infantry Regiment, testified that on the evening of 30 July 1944 he "had occasion to see three of the accused", Lawrence, Gonzales and McKinney, "in the village of Ponsacco" (Italy). "I ran into them in a little house in the town***I went into this place and they were in there with another soldier and several Italian people drinking wine". Burke further testified that he entered the house at about 2230 hours and left shortly before 2400 hours, and when he left accused were still there. (R. 10,11) Burke testified that he knew where Lina Pantani lived, and that her home was approximately one-fourth of a mile northwest of the village of Ponsacco (Italy). He further testified that on the night of 30 July and the morning of 31 July 1944, Company E, 361st Infantry, "was bivouacked East of Ponsacco past Lina Pantani's residence about maybe a half-mile or a mile". (R. 11)

Lina Pantani lived at Ponsacco (Italy) with her father-in-law, Gesualdo Pantani, 71 years of age, her brother-in-law, Filiberto Pantani, 18 years of age, and her three children (R. 12,15,26,28,30,38). The house was owned by Gesualdo Pantani (R. 26); on the second floor were three bedrooms, a kitchen and a granary (R. 12).

201452

Filiberto Pantani testified that at 0030 hours, 31 July 1944, four American soldiers, whom he then saw in the courtroom, "approached the door" of the house where he lived and "knocked twice or three times". Witness was then in bed, in the same room with his father, sister-in-law, and the children. (R. 12-14) Witness continued:

"I approached the window and asked them what they wanted. They cried out, 'Open, Germans, Germans'. I went down and opened the door for them. They searched the rooms to see if there were any Germans there. Then they entered the kitchen and asked for something to eat. We gave them tomatoes, bread and to drink. They ate and then they asked me if I had any cigarettes. They said they had been five days away from their company. They had had nothing to eat, nothing to drink nor anything. They ate and asked for cigarettes and then began to converse about themselves" (R. 14).

Witness testified that he could understand "fairly well" the language of the "small, dark haired one" whom he identified as accused Gonzales (R. 13). Then, witness testified,

"my sister-in-law told them that she had a baby that wanted to sleep. 'I want to take him to bed to sleep' and they replied, 'Yes, yes'. After 15 or 20 minutes the young blond boy came up and went into the room where my sister-in-law was" (R. 14).

Witness identified "the young blond boy" as accused Lawrence. He testified that his sister-in-law cried out "Filiberto, Filiberto" and that he was going to go to her aid but one of the soldiers restrained him from going by pointing a gun or revolver at his stomach. He testified that Prosecution's Exhibit "A" was "the type of gun because I saw him playing with the slide". The soldier "pulled out the clip in order to impress the fact on me that it was loaded" and witness saw the ammunition in the clip. (R. 14) Witness "just stood there" for a few moments "and after a while the blond man (accused Lawrence) returned". Then,

"The soldier with the gun said, 'As I heard them yell I thought there were Germans. Therefore I restrained you from going.' Then they began to say that we were a family of Germans, that we were Germans". (R. 14)

Witness then showed him his identification card, which was returned to him. Then, "the other man pointing the gun at me obliged me, forced me to go and get my sister-in-law", and

"Then I went and got my sister and then they began to say that she was a German also. She said she would go and get her identification card. And she went and got her identification card and one of the men read it."

(30)

This was accused Findley who "held it in his hand and read the identification card. Then he ripped the picture from the identification card". (R. 15) Then, witness testified, Lina "went to the room of her father-in-law", witness' father, who "was in bed with a fever of 40.4". The soldiers "continued for a period of time to call for my sister" who

"kept coming out of the room where her children were and they kept saying that she should have left the boy. Said they didn't want the children around. The soldiers said that they did not want her to bring the children in this room to leave the baby."
(R. 15)

While Lina was in the room with her father-in-law, "the dark haired one (Gonzales) wanted to go downstairs to see if there were any Germans there". Witness accompanied him down "about 18 or 20 steps to the ground floor and as soon as we reached the bottom I heard my sister-in-law cry out". Then, witness continued, "I wanted to go upstairs and he (Gonzales) restrained me pointing the gun at me, and restrained me from going". (R. 15,16,21) Thereafter, "we went upstairs and we found all three of the soldiers in the room" with Lina and her father-in-law. As they entered the room accused Lawrence was "slapping" accused McKinney and the third man "was standing at the bottom of the bed leaning on the end of the bed". At that time Lawrence and Gonzales had guns, which they held "in their belts" and Gonzales "had his gun out because he came downstairs with me and he had the gun then in his hand drawn out in front of him". (R. 16,21,22) Then, witness testified, while he was standing in front of his father's bed, "the two approached me" and "asked me how old I was and I said I was eighteen. Then the soldier grabbed me and punched me" and "the blow he gave me made me fall into the bed". Witness was struck hard, his gums bled, and his "jaw was swollen for two or three days". (R. 16,24,25) Then witness' father, who had been in bed, "got up and went to the window and cried for help", whereupon one of the soldiers "grabbed him and pulled him back to the bed". Then accused Lawrence "pulled out his knife and ran it over the candle", which was lighted, "and the soldier took the dagger and pointed it at him. Then he grabbed the father-in-law and put the knife to his throat". (R. 16-18,25)

"They then walked to the lady, my sister-in-law. Then my sister-in-law fell to the ground and fainted. And they said that it was not true that she was fainted. She had the baby in her arms and they took the baby from her arms and brought it to me. Then he approached, Gonzales approached the woman and took her into the corner" (R. 17)

where he "did what he wished", that is, had intimate relations with Lina standing up against the wall in the corner, "and the other one (Lawrence) held the gun to the sister-in-law's head because she was moving. She did not want to stay there. They say, 'Buono, buono', with the gun kept holding to

her head". Then, "after the dark one (Gonzales) had finished, the blond one (Lawrence) came to the corner" where Lina was crying and saying "Enough, Pizon, enough". Witness "saw them lifting up her gown". He testified that he knew "positively" that they had intercourse with his sister-in-law and saw them put their private parts against her or in her. "The first one I saw very well. He lifted her dress and I could see it very well. I was in another corner holding the baby in my arms and every once in a while I could see". (R. 17,18,20,21,24,26) Subsequently, witness testified, Lina was taken out and into the "room where she sleeps with her husband". Witness heard her

"saying, 'Blessed Virgin, help me'. She did cry out to her mother for aid. 'Enough, enough. I am drowning, drowning.'" "She was addressing her mother, the Blessed Virgin, the mother of Christ. My father told me to go to Lina then and I started to go but ***that soldier (pointing to Lawrence) restrained me from going",

by opening the door and holding his knife. There was a guard outside the door of the room where witness and his father were; the guard changed from time to time but one man "was always there because I could hear them walking up and down". (R. 18-20) His sister-in-law was in her room with the soldiers "a long time, almost an hour" (R. 19). They left the house about 0400 or 0430 hours (R. 25).

Gesualdo Pantani, the father of Filiberto and the father-in-law of Lina, testified that he was in bed "with a high fever" when, at 0030 hours on 31 July 1944, four American soldiers entered the house. He testified in substantial corroboration of Filiberto as to the events in his room (R. 26,27). He testified that "they continued to ask my daughter-in-law to go with them at all times", and that

"I went to the window. I asked for help - cried for help. Then they took my daughter-in-law and pointed a knife at my throat so that I would go back to the bed. They continued coming and going and at that particular time my daughter-in-law fainted. And they said, 'No she is pretending she has fainted'".

After that, "they took her and put her in the corner", and "one pushing, turned my head with his hand and the other one had a dagger. One of the soldiers with his hand over my face turned my head and the other soldier with the knife held it at my throat". (R. 27) The soldier "with the dagger was a tall, blond one, a tall one who stuttered" (R. 29). Witness testified that another soldier was with his daughter-in-law in the corner

"holding her against the wall. She was making a noise at the time. She was saying, 'Leave me alone, leave me alone'. And I said, 'Leave her alone'. The one continued to hold the dagger at my throat at the time, and I was afraid". (R. 27,28)

(32)

Thereupon they took the girl into the other room and witness could hear her saying, "Virgin Mary, help me, mother, help me". The soldiers stayed in the room with Lina a "considerable length of time". Witness did not go to her rescue because he "was in bed with a fever and I told my son to go but he could not go he said because he was being threatened by the soldier". At that time "the children were in the room there, were crying. Filiberto, my son, was holding one of the children in his arms." (R. 28) Witness was unable to identify the soldiers in court (R. 27,29).

Lina Pantani testified that she was married, had three children, and lived at the home of her father-in-law in Ponsacco (Italy) (R. 30). At about 0030 hours (R. 44) on 31 July 1944 (R. 30), witness

"was sleeping in my bedroom and I heard someone knocking at the front door the door of the kitchen. I was sleeping in the same room with my brother-in-law and my three children were near me sleeping on a mattress on the floor. I told my brother-in-law to look out and see who it was. He looked out the window and saw that it was four American soldiers. They said, 'Here in Ponsacco there are three Germans. One we have killed and two have fled to this particular place.' My brother-in-law went down and opened the door to them."

Four soldiers entered the house and looked through all the rooms. They were armed. Witness testified that she got a good look at all four soldiers and that she saw them in the courtroom. Lina, her brother-in-law and the four soldiers then went to the kitchen, where she gave them tomatoes, wine and bread. (R. 31,39) One of them, accused Gonzales, said a few words in Italian: "He said they were missing from their company for a few days". Witness continued:

"As they were eating my child was crying and I was giving him suck. I said, 'Good night' to them and I went to the bedroom to feed my child. As I was giving suck to my child one of the soldiers entered the room and got on me. He jumped me."

This was accused Lawrence. Lina had her dress and underdrawers on and was on the bed. Lawrence "came on top of me but I kept pushing him away and finally he got off of me". (R. 32) While witness was in the bedroom, "every 10 minutes my brother-in-law would come in and say that they wanted me to go into the kitchen because they claimed that I was a German". She testified that she could not stay in the bedroom any longer because she was afraid so, with her child, she went to the kitchen. She there denied she was a German. She remained in the kitchen for about five minutes and the soldiers said "'Take the child out of the room and come back yourself'", so she went into her father-in-law's room intending to stay there. While in

that room, "my brother-in-law came in and said they wanted me alone in the kitchen without the child because they claimed that I am a German". (R. 33) "Then I went and got my identification card and showed it to them but they still insisted that I was a German". Witness then again went into her father-in-law's bedroom, and "all of the soldiers came into the room". One of the soldiers "began to slap" the one who was at the door; accused Lawrence and McKinney "were hitting each other" (R. 34,41); then "they stopped and they were all right for a while". Filiberto "left the room with the man who was carrying a pistol in his hands to look around downstairs". The soldiers took witness to her bedroom and asked her name and then she fainted and fell to the floor, where "one of them pointed the gun at me and said, 'Soo, soo', up, up". When she came to her senses she went to her father-in-law's room where "the short, blond one had already opened his pants and showed his personals". Her father-in-law "rose from the bed and went to the window to cry for help". (R. 34,37) They threw him on the bed and "took the knife and they passed it over the candle and they went to my father-in-law and put the knife to his throat". Witness' brother-in-law was "standing up against the bed. One had asked him how old he was. He said eighteen and they grabbed him by the chest and hit him". Then accused Gonzales and Lawrence put her "in the corner" and held her against the wall.

"Then one of the soldiers, the dark one (pointing to Gonzales) went up against my abdomen, against my ribs but he did not do anything. He did not have intimate relations with me then".

Witness still had her underdrawers on and Gonzales' trousers were open in the front. He put his private parts "between my shanks, between my legs but he did not do anything". (R. 35,36,41,42) Lawrence and Gonzales, one on either side of her, dragged her into her bedroom and threw her on the bed. They took off her underdrawers and lifted up her dress. She "saw the weapons, revolvers, in the hands of these men but if there were two or three I do not know". (R. 36,37,42) The other two accused entered the room. Witness continued:

"I was down on the bed and one of them did what he wanted to. I couldn't move, it was the same as if I was dead. As a dead person, like dead".

Gonzales had intercourse with her first and each of the other accused had intercourse with her, in turn. She testified that "They put it in, all four of them. They put it in." "They held my hands and pushed me on the bed on my back. Then one got on top of me while the other held my arms back". Lawrence and Findley "did it twice". (R. 37,38,42) She said to them, "Enough, enough, I am getting out of breath" and she "couldn't feel anything. While they were on me they held my arms", and "I was afraid I would be killed and I have three small children". (R. 38) The soldiers, who had

§34)

entered at 0030 hours, "left about 4 that morning". They did not give her any C rations or anything else, "but that morning when I got up I found on the table a small box, a savings bank. In my bedroom drawer I found this", and "outside the house there is a flower bush and in the bush we found two liters of wine, two flasks of wine". (R. 44) On the morning of 31 July C rations were sent to her by the Red Cross medical unit behind her house. These rations were found in her kitchen by Lieutenant Liberati (assistant defense counsel). (R. 43,45)

Sergeant E. G. Beigdale, 361st Infantry Regiment, testified for the defense that between 1300 and 1400 hours on the afternoon of 30 July 1944 he saw McKinney and Findley in the bivouac area in the vicinity of Ponsacco and that McKinney had four cans of C rations "in his shirt" at that time (R. 70,71).

First Lieutenant Amerigo M. Liberati, 348th Field Artillery Battalion, testified for the defense that when he went to the kitchen in the home of Mrs. Pantani he found "in a cabinet against the wall, on one of the shelves in the cabinet were three cans of 'C' rations". He asked her where she got them and "she said that a lieutenant in the medical corps came to her house that morning after the alleged rape and gave them to her". The cans contained meat. (R. 72,73)

Captain S. R. LaTona, Medical Corps, 1st Armored Infantry Battalion, 1st Armored Division, testified for the defense that he was the battalion surgeon and in charge of an aid station located "about 800 yards this way from Ponsacco". In the course of making a reconnaissance "around Ponsacco and the surrounding bivouac area" on the morning of 31 July 1944 he "noticed this other house near mine", about 100 or 150 yards from the station, and entered the yard. He there

"noticed a woman on the second story of the building. She was crying and pointing around and in general seemed very excited." "Later it developed that some men had entered her house the night before and she had had some trouble". (R. 74,75)

He testified that, to the best of his knowledge, neither he nor any member of his unit gave her any C rations (R. 75,76). He saw at the house a young boy who might have been the witness Filiberto Pantani. The boy complained of having been struck by soldiers but witness did not see any evidence of cuts although he "did not make a real physical examination." (R. 76,77)

Accused Lawrence testified that on the afternoon of 30 July the four accused met in Ponsacco and drank some wine. They continued drinking until about midnight. Returning to camp, they met some soldiers who told accused they could "get fixed up in a house over there". Then

"We went over there and knocked at the door. This lady and this boy came to the door and we told them, we explained to them that we were not Germans. When they let us in we went up to the kitchen and they let us have some wine. They brought us out some wine and this lady asked if we wanted some tomatoes. We could not understand what she was saying but we just said, 'Yes'. And then she brought us some tomatoes and bread. She didn't have a knife to cut it with so McKinney took the trench knife and cut the bread with it. He cut the bread and was fooling around with the knife and held it over the candle and moved it back and forth over the flame. We sat there eating and drinking for a while and when this boy came back in we asked him about this lady". (R. 46)

It was Gonzales who asked about the lady "and we all fixed it up. And so he said 'Wait'. He went in there and asked her if she would. First we gave her some 'C' rations", four cans of which McKinney had, "and she took them and went into her room. Then the kid went into her room and asked her; he came back out and told us it was all right". (R. 46) Lawrence continued:

"After the boy came out and said that it was all right that she would screw us, I was the first one to go on in. When I got in the room I saw her sitting on the bed there. I tried to ask her and she laid down on the bed. Then I got on top of her. When I got done I had three packages of cigarettes and I gave them to her and she set them on a bureau in her room. Then I hollered for the next man and Private McKinney came on up."

Thereafter,

"We stayed out in the kitchen and drank wine and talked. When McKinney came out, Findley went in and when Findley came out Gonzales went in. When Gonzales returned to the kitchen I went back and got the three packages of cigarettes that laid on the bureau. This lady tried to grab them from me, but we just walked out and I put the cigarettes back in my pocket." (R. 47)

He threatened no one with a dagger at any time, and did not see the old man who testified (Gesualdo Pantani) at any time except when they first went into the house. They did not enter his room. (R. 47) The woman offered no resistance at any time while he was having intercourse with her. She did not lie still, but "held me out a little bit". (R. 53) He had a ".45 automatic" in his hip pocket that night but did not take it out of his pocket in the house, and did not fire it, though "McKinney shot the

(36)

gun" (R. 47,48). The only child he saw was the 18 year old boy - "there was no baby". He remained in the house from two and a half to three hours, and arrived back in camp about 0500 hours "pretty drunk". McKinney was "about like the rest"; as to Findley, "I couldn't tell you if he was sober or not". Lawrence remembered everything "pretty well". (R. 48,49) Gonzales speaks Italian "a little. He understands some of it". (R. 49,50) Gonzales could understand the boy, and the boy him, well enough to make the transaction with his sister-in-law. All four had intercourse with the woman once that night. McKinney stutters. He did not see the old man get up and go to the window to yell for help. (R. 50,51) He did not throw the old man on the bed, nor push the boy around. He did not hear the woman cry or pray; "she didn't make any noise at all". There was a bank, "one of the fellows had it", but "I don't know anything about a scarf". They had about three quarts of wine, a couple of bottles of which they brought to the house, leaving them outside and forgetting them. (R. 51,52)

Accused McKinney, who the record (R. 53) states "stuttered badly as he testified", testified that when he completed kitchen police duty on 29 July 1944 he took four cans of C rations away from the kitchen with him. The day he left camp he and Findley left about 1400 hours and

"We went up town and had some of that vino and then about 8 o'clock we met Gonzales and Lawrence. And then we went all together. I had the gun and it was loaded. I wanted to empty it so I took out the clip and there was a shell in the chamber and I fired it. Then I took the gun and put it back into my pocket and went back with the rest of them. Lawrence wanted the gun so I gave it to him with the clip. Then us four went up."

Later they were told they

"could get a woman at a certain place up the road and so we went on up and we knocked at the door and before we went in we hid the vino in the bushes." (R. 53,54)

Mrs. Pantani and Filiberto came to the door.

"Then I was out and hiding that other vino and they just went on up and then I came up and then we all went into the kitchen. We had some bread and tomatoes and some of that other vino and then Gonzales took the knife from Lawrence and cut the bread and after he had cut the bread, then he took the knife and held it over the candle and then he gave it back and he put it in the case. Then this other boy was asking about that girl. Then the boy went in and asked her and then we put the rations on the table. She went and took them and went

into her room and she went in and came back and then this other boy asked the boy if he would ask her and he did and he came back and told him, 'Yes', and so Lawrence went in first and I was second to go in."
(R. 54,55)

When he went into the room, she was "just sitting on the edge of the bed and then she laid down on the bed and I got on her. When I came out Gonzales went in". Although he spoke no Italian, he indicated that he wanted to have intercourse with her by going and pointing to the bed. She made no resistance at all while he had intercourse with her. Findley went in the room after witness came out. He did not see Lawrence strike anyone in the house and Lawrence did not hit him. (R. 55) He borrowed the gun the first time from Private Sweet, then later Lawrence had it in his hip pocket, where he kept it at all times. "Private Findley had the holster there", which he wore without the gun "because he wanted it and I gave it to him". McKinney had the trench knife, which witness identified and which was admitted in evidence as Prosecution's Exhibit "B". (R. 56,57) It was not he, but Lawrence, who held the knife over the candle. They returned to the bivouac area "close to five". He did not remember hearing women scream. (R. 57) He did not know who had a bank and he had no scarf. The only people in the kitchen were "the boy and us four". Witness did not see the little children, nor the baby, nor "any kids, only the old man". (R. 58) The old man was "sleeping in bed", but witness "wasn't inside the bedroom door". He did not see the old man go to the window and call for help. Witness did not see the girl pushed up against the wall in the corner by any of them and none of them pushed the boy around. (R. 59) He did not have any idea what was in the rations cans, but they were "pretty heavy all four of them" and "I could tell one or two of them wasn't crackers" (R. 60).

Accused Findley testified that on 31 July, about midnight, the four accused

"started down the road toward camp and we met two soldiers who told us we could get fixed up in a house down there. So we went down to the house and knocked at the door and a lady and a boy came down and let us in. They took us upstairs and fed us bread and tomatoes. And we had some wine to drink. Gonzales asked the boy about the woman whether she would put out and the boy said, 'Yes'. The boy went into the bedroom where she was and when he came back, he said, 'Yes'. It was all right to come and then Lawrence went. Then McKinney went and then myself."

When he went into the room, the lady was standing up "and she started getting friendly with me. She grabbed me around the waist and lifted me up and then she unbuttoned my pants. Then she got on the bed and I got on top of her". She offered no resistance when he went in and did not yell out at all. When he had intercourse with her she did not pray; "if she

(38)

prayed, she must have prayed to herself", and if she cried she must have cried to herself. He next saw her when "she came back into the kitchen that night and we had a couple of drinks before we went back to camp". (R. 63) Gonzales followed witness (R. 62). Witness "wouldn't say I was drunk or sober either", when he went to the house he "knew what was going on". When he returned to camp in the morning he was "feeling fine. I wouldn't say drunk". (R. 62,63) He "happened to see" the old man at the house when "Lawrence struck a match and we looked into the room". Witness never did go into the father-in-law's room, did not see him get up and go to the window, and did not hear him yell. He heard no women screaming. (R. 63,64) He did not leave a bank in the house, had no red scarf and did not see one. He had nothing to do with the rations transaction and did not say anything to the girl. The gun was shot off "up in town there when McKinney was going to walk off by himself to take a leak". (R. 64)

Accused Gonzales testified that when the four accused went to the house, the woman and the boy opened the door (R. 65). They

"let us in. The woman had a candle and we went up the stairs. She went ahead and we were coming behind striking matches as we were going up the stairs and we looked in that one room and seen the old man. From there we went into the kitchen and they asked if we wanted some tomatoes and we didn't understand what they were saying. So we just moved our head and said, 'See, see'. Then she went out and came back and brought some tomatoes and bread. Lawrence took the knife from McKinney and Lawrence started to cut the bread with it."

At that time Lawrence had a pistol and McKinney had a knife, and no one else was armed. There was no gun out at any time "while we were in the house." Then

"we asked if the woman would. I say, 'Figi, Figi, Senorina?' She just stayed out there looking at us. I say to the boy, 'Bota' in Spanish. I try to tell him we would give them some cans. McKinney got the cans out and set them down. She got the cans and went into her room. We stayed out there a little while and I tell the kid to ask the senorina. So he went in the room where the woman was. I guess, I didn't see where he went. When he came back he said, 'See, see' and then Lawrence got up and went in".

Accused "went the last", and

"When I went in the first thing I told her was, 'Give me a kees'. I told her in Spanish and she said, 'All right'. She give it to me and she hug me and give me the kees. Then she ran and lay down with her back on the bed. And I went and got my prick out and she helped me put it in and we stayed there until we had

finished and when we finished I got up and went out to the kitchen and they were sitting out there drinking and talking to the kid".

When they left Lawrence "had a little trouble with some cigarettes. He took some cigarettes away from her". (R. 66,67) When witness had intercourse with the woman she offered no resistance of any kind. He did not force her to have intercourse with him at the point of a gun or of a knife. He did not hear any baby crying, did not strike the old man, whom he saw "just from the door", nor throw the old man around, or throw the boy around. He did not see Lawrence take a knife and run it across the old man's neck. (R. 67) Lawrence "had the pistol down here" and did not have it inside his shirt when they went into the house, and witness did not see anybody pull that gun. He was at the house "about three hours" and did not hear any children crying during that time and "didn't see any". He "just stood at the door" of the old man's room "but did not go inside". (R. 68) After all had had intercourse with the woman she came back to the kitchen and remained there chatting with them for about 15 minutes (R. 69).

In rebuttal, Private Manuel Gonzales, Regimental Headquarters Company, 361st Infantry, testified for the prosecution that on the morning of 31 July he "went to this house" with Colonel Blanchard, 361st Infantry, the investigating officer, and Major Orr, 361st Infantry, regimental surgeon. After they finished the investigation and were about to leave, "one of the boys went to the vehicle and brought two cans of meat for her". The rations were not given to anybody in particular but were left on a table. (R. 77,78)

Lieutenant Colonel Weston L. Blanchard, 361st Infantry, testified for the prosecution that he was the investigating officer in the case and on the morning after the alleged offense occurred went to see the woman who was alleged to have been raped. Accompanying him were Private Gonzales, as interpreter, and Major Orr, the medical officer. Witness testified: "I believe Major Orr inquired of somebody if the people had anything to eat and he sent the driver down to get some rations for them". (R. 82)

Staff Sergeant J. E. Orban, Company E, 361st Infantry, testified for the prosecution that he knew the four accused. In the early morning of 31 July 1944, when it was "just about breaking day", witness, while on outpost near Ponsacco,

"was coming along the road and I heard a scream from a house..I jumped into the ditch thinking maybe it was a patrol. Soon some soldiers came out to the road and walked up the road."

At the house he heard Lawrence say something to the other soldiers. Witness knew where Lina Pantani lived and the place where he heard the noise was between the Pantani house and camp. Staff Sergeant Kearney was with witness.

They did not investigate because they were not armed. (R. 78-80)

Virgilio Benvenuti, of Ponsacco (Italy), testified for the prosecution that he had known Lina Pantani "since she was a young girl of 7 or 8" and that she had lived all her life in Ponsacco. He testified that he knew her general reputation in the community for chastity and that it was "good in every line. I never heard any talk about her." He knew her reputation in the community for truth and veracity and "She is good and I haven't heard anyone knock against her. She is good in every line." He knew of nothing bad that was ever said about her. "I have known nothing wrong against the woman." (R. 83) Witness was "no relation" of the Pantani's: "I just know them" (R. 84).

Antonio Masini, of Ponsacco (Italy), testified for the prosecution that he had known Lina Pantani "since she was a small girl", that he knew her general reputation for chastity in the community and it was that of a "very honest woman with all her honor". He knew her general reputation for truth and veracity in the community and knew it to be that of "a very honest woman. She has been honest from her youth and since she has been married." He knew her and her husband very well and saw Mrs. Pantani "almost every day. My territory borders on hers". (R. 84,85)

Angiolo Grilli, of Ponsacco, near San Sebastian (Italy), testified for the prosecution that he had known Lina Pantani for 25 years. "You can almost say that I had seen her when she was born." He knew her general reputation for chastity in the community and it was that of a "very honest wife, very honest, her and her family and her sisters, descendants from a good family". (R. 85,86)

4. It thus appears from uncontradicted evidence, including the sworn testimony of each accused, that at the place and time alleged in the Specification each accused had sexual intercourse with Lina Pantani, the person named in the Specification. The only issue presented by the testimony was whether or not the intercourse was with the consent of the victim. The woman testified that she submitted through fear from violence and threats of violence by accused. Other witnesses testified in corroboration of the woman in this respect. Each accused in admitting that he had sexual intercourse with the woman denied that it was by force or without her consent and maintained to the contrary that the matter had been arranged with her brother-in-law and the bargain concluded by presenting her with cans of C rations. Upon all the evidence the court was justified in its findings that intercourse was accomplished by force and without the woman's consent. The court was warranted in finding each accused guilty of rape in violation of Article of War 92.

The circumstances fully justify the inference that if Lina failed or ceased to resist accused as much as she was able, absence or cessation of resistance was attributable to her fear of great bodily harm to herself and others and in no way negated want of consent (Bull. JAG, December 1942, sec. 450 (9)).

5. Although two persons cannot be jointly guilty of a single joint rape, because by the very nature of the act individual action is necessary, all persons present aiding and abetting another in the commission of rape are guilty as principals and punishable equally with the actual perpetrator of the crime (52 C.J. 1036; NATO 385, Speed; NATO 646, Simpson et al.). As this Board has previously observed, the joinder of the four accused was not therefore fatal error. Despite any appropriate criticism that it was bad pleading to charge the accused jointly as was done in this case, it is manifest that the allegations of the Specification taken in conjunction with the evidence fully support the position that each of the accused separately raped the woman. Since it clearly appears that each of accused could have been charged and found guilty as a principal for being an aider and abettor, his conviction thereunder would seem no less proper where proof shows him as the actual perpetrator of a separate and distinct rape, as well as an aider and abettor. Circumstances of a common venture and intent serve, moreover, to support the Specification. In view of these considerations, the irregularity in pleading, if such it was, cannot be held to have injuriously affected the substantial rights of the accused (Dig. Op. JAG, 1912-40, sec. 416 (17)). And there is authority for the view that two or more persons may be jointly indicted and convicted of rape on a count which charges them jointly and not separately with the offense (People v. Musial, 349, Ill. 516, 182 N.E. 608; NATO 779, Clark and Massie).

6. The four accused testified that Mrs. Pantani consented to the intercourse and implied that she did so in exchange for C rations which they claimed to have given her. Thereafter the prosecution in rebuttal presented testimony as to her good general reputation for chastity, truth and veracity. Although such testimony would have been inadmissible in the first instance, its admission in evidence as rebuttal testimony was proper, for the defense had attacked Mrs. Pantani's moral character (NATO 797, Lawson). As has been stated:

"When the accused attacks the chastity of the prosecuting witness***the prosecution may introduce evidence of her reputation for chastity to discredit such testimony" (Underhill's Criminal Evidence, pp. 1276,1277),

and again,

"In all cases when the reputation of the female is attacked (in a rape case), proof of her good character is admissible on behalf of the state, but not before it is attacked" (52 C.J., sec. 114, p. 1084).

The weight of civil authority probably limits this rebuttal evidence to proof of her general reputation for virtue and chastity, but in at least one case evidence of prosecutrix' reputation as to chastity and as to truthfulness was admitted by the court (Wilkerson v. State, 60 Tex. Cr. 388, 131 S.W. 1108). In any case, the proof of guilt, particularly in view of the testimony of the brother-in-law and the father-in-law, is so compelling that the

(42)

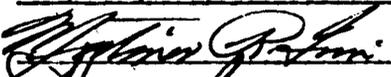
error, if any, in admitting evidence of Mrs. Pantani's reputation for truth and veracity as well as for chastity, could not have prejudicially affected accused's substantial rights (AW 37).

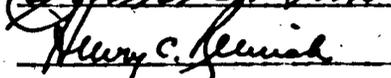
7. The charge sheets show that accused Gonzales is 23 years of age, was inducted into the Army 17 October 1942 and had no prior service; accused McKinney is 22 years of age, was inducted into the Army 30 September 1942 and had no prior service; accused Findley is 24 years of age, was inducted into the Army 28 October 1942 and had no prior service; and accused Lawrence is 22 years of age, enlisted in the Army 1 May 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 sentences. 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 2801, Title 22, Code of the District of Columbia.

(sick)

_____, 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,
23 September 1944.

Board of Review

NATO 3411

UNITED STATES	)	IV CORPS
)	
v.	)	Trial by G.C.M., convened at
	)	Casciana Alta, Italy, 21
Private WILLIAM J.N. PETERSON	)	August 1944.
(33 108 983), Battery C, 985th	)	Dishonorable discharge and
Field Artillery Battalion.	)	confinement for life.
	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private William J. N. Peterson, Battery C, 985th Field Artillery Battalion, did, at or near Sasso, Italy, on or about 1 July 1944, forcibly and feloniously, against her will, have carnal knowledge of Conchita Ballini.

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

Specification: In that Private William J. N. Peterson, Battery C, 985th Field Artillery Battalion, did without proper leave, absent himself from his organization at or near Sasso, Italy, from about 1 July 1944 to about 2 July 1944.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification and was found guilty of the Charges and Specifications. Evidence of two previous convictions by special courts-martial, both

(44)

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 1 July 1944 accused, a member of Battery C, 985th Field Artillery Battalion, obtained permission from the sergeant in charge of his gun section to be absent from the area for one hour. Accused left but did not return at the expiration of the hour and a subsequent search disclosed he was not in the area. (R. 6,7) An extract copy of the morning reports of accused's organization, admitted in evidence (R. 8), contained the following concerning accused: "AWOL as of 1 July 44 1600 hours" and under date of 3 July 1944, "AWOL to duty 1000 hours" (Ex. A). It was stipulated that accused returned to military control on 2 July 1944 (R. 45; Ex. B).

Lorenzo Ballini lived with his family on a farm in Toracci, Italy, about an hour's walk from Sasso. The nearest house was 700 or 800 meters distant. Accused, who had been at the house on 30 June 1944, arrived at Ballini's home, accompanied by another soldier (Private First Class Juan G. Marcial), about 1500 hours 1 July 1944 with a bundle of clothes which he wished to have washed. (R. 11,18,25,32) The soldiers left, but returned about 1930 hours. Accused had a rifle with him. When Lorenzo's wife announced dinner the soldiers asked if they could eat with the family. They ate with the family and, according to Lorenzo, after the supper accused and his companion talked with him "at the table like brothers". (R. 11,33) About 2200 hours Lorenzo's two daughters, Nella, who was 21 years of age, and "Concetta", who was 13 years of age, stated they were going to bed and obtaining their parents' consent, went to their room which was on the second floor of the house, "the second room from the stairs" (R. 11,18,19,23,33). The girls disrobed and went to bed, the elder wearing a petticoat, the younger "a shirt and the panties" (R. 20).

Accused and his companion asked permission of Lorenzo to sleep on the floor of the house but he told them that it would not be "good" and took them to the stable and "showed them that by placing straw on the floor they would be better". The soldiers replied "No, Americans do not sleep here" and stated they would sleep "upstairs". Lorenzo then showed the soldiers his grain room and put blankets on the floor there. When the soldiers entered that room accused stated "There are Germans". Accused, armed with his rifle, together with his companion, then searched the house, going in all of the rooms including the girls' bedroom. Then when Lorenzo's sons left the house and went to the stable to feed the cows and oxen, the soldiers went to the stable and on seeing the sons carrying hay "hollered 'Halt'". After Lorenzo explained his boys were feeding the animals, all returned to the house and the soldiers inspected a small room "off the middle of the stairs" where Lorenzo's wife kept "the chickens for hatching of eggs". (R. 13,33) In the room were some egg shells. The soldiers "called everyone into the

267994

room and said that there had been Germans eating there". Some of the family explained the egg shells were from "the hatching of chicks". The soldiers then stepped out of the small room, accused climbing two steps and pointing his rifle at the Italians in the room while his companion leaned against the door. (R. 14,37) Lorenzo testified that "Then they started talking between themselves and I could not understand what they were saying" (R. 14). Accused then fired his rifle into the small room. The bullet struck a lamp and put it out. Thereupon accused's companion shut the door to the room. (R. 14,37) The Italians remained in the room a short while but hearing another shot and hearing Concetta say "Oh, God, Mother" one of the sons opened the door and they all ran out (R. 15,34,37).

Accused then went to the door of the girls' room and said "Signorina", (according to Nella he said it "in the way that he would say it"). Neither girl answered and accused thereupon opened the door and entered the room (R. 20,26).

Nella testified that both girls were in bed, that accused "hit the door and opened it and came over" to where she was and pointed the rifle at her. She also testified "he was puffing on a cigarette so he could see where" she was. She testified she "avoided him and ran out of the room and in doing so" brushed against him, that he then "gave out a scream or a holler" and that he fired the rifle at her. She also testified that she ran out of the house and went to the house of her fiance to which her sister also came about 0130 hours the next morning. (R. 20,21)

Concetta testified that when accused entered the room she and Nella got off the bed so that they could run away and that accused "hollered and fired a shot" after Nella brushed past him (R. 26). She testified that Nella "ran out and hollered 'Oh, they have killed my little sister'" and that she herself remained in the room and "hollered, 'Oh, God, Mother'". She further testified accused "grabbed her" and "later" the other soldier entered the room and that the two of them ripped off her petticoat and panties. (R. 26,27) She further testified that accused "took me, after he took my clothes off of me, and threw me on the bed and he did what he liked", and that when he threw her on the bed he took a knife from his pocket, "pressed the button and the blade opened" and said "Now I am going to cut your throat because all your others are dead". She testified that one of the boards of the bed fell down and that accused kicked her onto a second bed, that accused was on top of her and that though she had fainted she could feel his weight on her and could tell what he was doing. She also testified that accused's penis entered her vagina, but that she did not know "if it all went in" because she had "fainted" and "did not know where" she was. She testified that it hurt a little. She also testified that accused's penis entered her vagina twice. She also testified that while accused was having intercourse with her his companion "was going around looking into the other rooms". She testified she did not consent and that she "hollered, 'Oh, God, Oh, God, Mother'" and afterwards fainted and "could not holler any more". She testified the second soldier also "hurt" her, "two times each". (R. 28, 30,31) She testified that she was afraid when she heard the first shot, but that "after they grabbed me I did not know where I was" and because of

(46)

that fact was not then afraid; that she was not herself. She also testified that the soldiers then went away, that she went to the home of her sister's fiance and that the next day she saw "this doctor of our town" (R. 29).

When a member of the court stated he would like to "have the last matter cleared up, being unconscious and still realizing what was going on", the interpreter stated:

"Sir, may I say something on that? In the Italian language you can't translate the word as unconscious, but most people don't give it that meaning as being fully asleep. They don't mean out as we do, they mean that a person just falls back and all the strength leaves him" (R. 31).

and when asked "something like being exhausted" the interpreter answered "That is right" (R. 31).

Traina Gioacchino testified he was a doctor and surgeon (R. 42), that he examined Concetta Ballini "the next day after the trouble happened" and

"found an enlargement of the large folds and the small folds of the vagina. Then also a rupture of the hymen and also blood stains on the periphery of the vagina" (R. 43).

This witness, asked

"Doctor, assume that on July 1st, at about 10:00 o'clock, Concetta Ballini was in good health and physical condition and, further, assuming that about 11:00 o'clock on July 2nd you found the condition that you have just described, can you state with a reasonable degree of certainty what caused that condition?" (R. 44),

replied in the affirmative and, asked "What caused it?", replied "The cause was a masculine attack". Witness further testified that the condition he observed could not have been caused through an accident (R. 45).

Accused made the following unsworn statement:

"Well, me and Marcial from my outfit had permission to leave the outfit for a little while, an hour, to go after some eggs and wine, try to get a little wine. We went to this Italian family's house and we was drinking wine and we stayed longer than we were supposed to, probably two hours, two and a half hours. When we got back to where the outfit had been in camp they had moved up, and so there was a house right up on a little hill and we went up there and there was some laundry that had been left there by some of the boys in my outfit. They wanted us to sign for it, wanted us to take it. I knew it was somebody who belonged to the outfit, so

267394

I was going to take it. She made me sign for it. We left there and went down to another house in the valley and had some wine there with the man and his wife. Then we went up to this family again. They asked us to eat, we believed, and whether Marcial asked him to eat I don't know, but he paid them for our eating, and we wanted to sleep there and they showed us a place to sleep in the barn. The barn is attached to the house right off the kitchen. It was right by the cows and some hay. We didn't want to sleep there, and we came back in the house and they had promised him some wine the night before. We was there the night before that and that's why I got permission to go with him to get it, because I could talk Italian to him. When we got there they didn't give it to us, only what we was drinking, so I thought that they had some and wanted to look around the house and in that room just to see if they did have wine in there, and it was full. There was plenty of it. So we went upstairs and he was talking about sleeping to them and telling him we were looking for Germans. We just wanted to look around the house and see what they did have, and one room was bare and there was no blankets on the floor where they said they wanted us to sleep, and there was a room with a couple of beds with two girls. I don't think they were in bed yet. I heard a noise then. It was quite loud and I went to look out the window. It sounded like at first it was outside. I went in the room and looked out the window. I turned and come back, pretty near to the door, pulled the trigger on this carbine, because the carbine had been fired in the afternoon. I let the Italian fellow fire it. When we run downstairs the two boys were in the barn. That's where the noise was coming from, this barn, so I looked in there and I hollered halt at them and made them come out. Then we all went back upstairs again, because we still wanted to get a little bottle of wine out of that room on the way out. We went back up the stairs, and there is a little room with no windows or anything in it that was on the landing like, very nearly to the top, and I went in that room and they came in and they started talking a lot, and trying to explain something to me. When they all went in I stepped out of the room and Marcial was in the doorway and I told him to come on out, close the door, and we'd go. And he was right in the doorway and the door was open only a little ways and I fired a shot. That put the light out in that room. Whether he closed the door or not I don't know."

He continued:

"I went back down the stairs and gathered up the clothes we had brought and went back down to where the camp was. It wasn't right in my own bunk, it was where we had been having

267394

a little roast like to cook some potatoes, fry some potatoes for ourselves. The biggest part of the section was in on it. Two of the fellows had our tent there. Where I had my tent was over in the field a little farther. It was right on this road to this house. It went back on to there. Next I went up from there, decided to go up to this house on the hill again. It was right near the camp on top of the hill and I tried to get in there and they thought I was a German or something and I couldn't make them understand. I tried to make them understand I belonged to that camp where the big guns was. I didn't know how to say gun to them. I said 'Boom, boom,' and they opened the door and they grabbed that gun away from me. And one of the men had a shotgun, so I run, run back to where the camp was, and Marcial and I went from there--he was right there--and we went over to an Italian house where he went to sleep there. He wanted to sleep in there and they didn't have any place only the floor. I told him I wasn't going to sleep on the floor and I went back out and slept on the straw until morning and went over and got him in the morning and we went up to this Italian family on the hill again. It was 6:30, 7:00 o'clock, early in the morning, and he got up there a little ahead of me. He turned around and he said, 'Hurry up,' something like that, and I got up and didn't see anybody with any shotgun or anything. I no more than get on top with him and they come running out and surrounded us and they jumped on me and tied me up, and that's when they shot him and they held him captive until the captain--I think he was from the 403 ack-ack outfit--came and released me and he brought this doctor with him and a priest. I went with the captain. He was moving up. He said he'd return me to my outfit, and as he moved up it was late so he said, 'We will wait until tomorrow morning.' And he didn't return me to the outfit until the next day" (R. 47,48).

4. It thus appears that at the place and time alleged accused had unlawful carnal knowledge of Conchita Ballini, aged 13, the female named in the Specification, Charge I. Immediately before the act of intercourse took place accused fired a rifle, tore off his victim's clothing, threw her on a bed, kicked her onto another bed, exhibited a knife with which he threatened to cut her throat, and thereupon had sexual intercourse with her. She testified she "hollered" and did not consent. Under the circumstances evidenced by the testimony further resistance on the part of the victim could not reasonably be expected. The facts disclosed by the evidence warrant the inference that the intercourse was forcible and without the consent of the victim. All elements of the offense of rape were satisfactorily established (MCM, 1928, par. 149b).

The finding of guilty of violation of Article of War 61 was likewise warranted, for the evidence, including accused's unsworn statement, and his plea of guilty show that accused absented himself without proper leave from

267994

his organization as alleged in Charge II and its Specification.

5. The Specification, Charge I, charges the name of the victim as "Conchita" Ballini; the evidence establishes the name of the victim as "Concetta" Ballini (R. 15,23). No issue was made of this on the trial and there is no showing that accused was in any way misled. The law does not regard the spelling of names so much as their sound. Extreme exactness in paraphrasing or rendering into English names foreign to that language is not required (45 C.J. 383). These two names are sounded alike in the English language and the variance in the spelling is immaterial (NATO 910, Hudgins).

6. The charge sheet shows that accused is 28 years of age, was inducted into the Army 13 January 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. 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 2801, Title 22, Code of the District of Columbia.

Donald N. Mackay, Judge Advocate.
 (sick)
Henry C. Reisch, Judge Advocate.

267994



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

APO 534, U. S. Army,
17 October 1944.

Board of Review

NATO 3444

UNITED STATES)

PENINSULAR BASE SECTION

v.)

Trial by G.C.M., convened at
Naples, Italy, 29 July 1944.

Private MAURICE E. AUD)
(6 685 616), Company B, 40th)
Engineer Regiment.)

Dishonorable discharge and
confinement for 40 years.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification 1: In that Private Maurice E. Aud, Company "B",
40th Engineer Regiment, did, without proper leave, absent
himself from his station near Casoria, Italy, from about
22 November 1943 to about 23 February 1944.

Specification 2: In that Private Maurice E. Aud, Company "B",
40th Engineer Regiment, did, without proper leave, absent
himself from his station at the Stockade, Peninsular Base
Section, near Melito, Italy, from about 16 March 1944 to
about 23 March 1944.

(52)

Specification 3: In that Private Maurice E. Aud, Company "B", 40th Engineer Regiment, did, without proper leave, absent himself from his station at the Stockade, Peninsular Base Section, near Melito, Italy, from about 6 April 1944 to about 9 April 1944.

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

Specification 1: In that Private Maurice E. Aud, Company "B", 40th Engineer Regiment, having been duly placed in confinement in the Stockade, Peninsular Base Section, on or about 3 March 1944, did, at Dump E-252, near Melito, Italy, on or about 16 March 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Maurice E. Aud, Company "B", 40th Engineer Regiment, having been duly placed in confinement in the Stockade, Peninsular Base Section, on or about 23 March 1944, did, at Dump E-252, near Melito, Italy, on or about 6 April 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that Private Maurice E. Aud, Company "B", 40th Engineer Regiment, did, in conjunction with Private Carmine G. Della Vecchia, 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 Italian 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).

He pleaded not guilty to the Charges and Specifications and was found guilty of Charges I and II and their Specifications, guilty of Specification 1, Charge III, except the words "U. S. Currency" appearing twice therein, and substituting the words "Italian Lires" in both instances, of the excepted words not guilty, and of the substituted words guilty, guilty of Specification 2, Charge III except the words "Eighty one Hundred Italian lire (8100) from the person of Mario Sorrentino, about Ten

269744

Thousand Italian 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 the words "Eight Thousand lire (8000) from the person of Berti Cesare, and about Six Thousand Three Hundred lire from the person of Nazzaro Raffaele, the property of such persons, respectively, of an aggregate value of about One Hundred Forty-three dollars (\$143.00)", of the excepted words not guilty, of the substituted words guilty, and guilty of Charge III. 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 term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority disapproved the finding of guilty of Specification 1, Charge III, approved only so much of the findings of guilty of Specification 2, Charge III as "involves a finding that the accused did, at the time and place alleged, by force and violence and by putting them in fear, feloniously take, steal, and carry away, about eight thousand (8000) lire from the person of Berti Cesare and about six thousand and three hundred (6300) lire from the person of Nazzaro Raffaele, the property of such persons, respectively, of an aggregate value of about one hundred forty-three dollars (\$143.00)", approved the sentence but reduced the period of confinement to 40 years, designated the "United States" Penitentiary, Leisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50 1/2.

3. The evidence with respect to Specification 1, Charge I, shows that the morning report of accused's organization, evidenced by an extract copy thereof, carried accused "duty to AWOL as of 1900, 23 Nov 43" (R. 7; Ex. 1). In a statement of accused, introduced without objection, the commencement of his unauthorized absence was fixed as of 22 November 1943 (R. 21). The evidence further shows that he was apprehended on 23 February 1944 "in a home in Naples (Italy)" (R. 20).

The evidence with respect to Specification 2, Charge I, and Specification 1, Charge II, shows that on 16 March 1944 accused was a prisoner, confined in the stockade, Peninsular Base Section, and while on a work detail near Melito, Italy, he escaped and absented himself therefrom before he was set at liberty by proper authority and remained absent without authority until about 23 March 1944 (R. 7,10,11; Ex. 2).

The evidence with respect to Specification 3, Charge I, and Specification 2, Charge II, shows that after accused's escape from confinement in the stockade, Peninsular Base Section, while on a work detail near Melito, Italy, on about 16 March 1944 he was subsequently "brought back and again placed in confinement" in the same stockade and that he was still

(54)

so confined on or about 6 April 1944. On 6, 8 or 16 April he again escaped and absented himself from a work detail near Melito, Italy, before he was set at liberty by proper authority and remained absent without authority until about 9 April 1944. (R. 7,10,11; Ex. 2)

The evidence with respect to Specification 2, Charge III, shows that on about 23 February 1944, 14 or 15 civilians were gathered at a banquet in a private home in Naples, Italy (R. 12,14). "They were having a game. They were playing, just playing with each other, card games" (R. 12). While they were so engaged "two Americans came in", one of whom was the accused. The accused "stood in the door" with a large pistol in his hand (R. 12,14), while his companion, who was in civilian clothes, walked into the room and told those present to put their hands up. Nazzaro Raffaele testified "He made us put all our money on the table. He made us pull out our wallets and he took rings and silver bracelets from some of the people". (R. 14) Berti Cesare testified that accused's companion said to accused, "if they move shoot them". Witness also testified "They made us put our wallets on the table. They took all the money." (R. 12) The accused and his companion then put all the money and the "jewels" they had taken into a bag and left (R. 12,14). Nazzaro testified "We let them take everything because we were afraid. They had the gun" (R. 14), and "they were very much afraid he was going to shoot" (R. 15). Berti also testified "We were afraid". Accused and his companion took "8000 or so lires", "a little over 8000", from Berti Cesare (R. 12) and 6,300 lire from Nazzaro Raffaele (R. 14).

An agent of the Criminal Investigation Division, North African Theater of Operations, testified that after he had warned accused that he need not make a statement and in the event he made a statement it could be used "for or against him" in the event of trial, accused signed a statement on 1 March 1944. Defense stating "no objection", a portion of the statement was received in evidence (R. 21) and read as follows:

"On or about 22nd of November 1943, I got drunk and went A. W. O. L. from my company. From time to time I bummed soldiers for money. At one time I borrowed \$50.00 from a Madam at a house of prostitution. I held up two American soldiers named Roberts and Hamilton. I believe it was about \$800.00 that I took from them. I did all that stuff alone without any help. I used a .45 automatic on those holdups. My friend Juliano gave me civilian clothes. I only wore civilian clothes twice and both times I had my American uniform on underneath. On the 23 February 1944 I met another American soldier named Grecco. I met him through Juliano. Grecco had on civilian clothes that night. On or about 1930 hours, 23 February 1944, Grecco and I held up and robbed about 30 civilians in a home at No. 7 Anzio Porto Galleria. I was holding the civilians at bay with my .45 automatic while Grecco relieved the civilians of their money and jewelry. We then went downstairs

269744

and received \$150.00 apiece. We had split four ways, the two civilians who showed us where to hold up the civilians and Grecco and i. The .45 automatic that I have been using I stole from a tent in Company C of the 40th Engineer Regiment after I went A. W. O. L." (R. 21).

Accused elected to remain silent (R. 22).

4. It thus appears from the evidence, including accused's pretrial statement, that on the date alleged in Specification 1, Charge I, accused absented himself from his station without proper leave and remained unauthorizedly absent until about 23 February 1944 when he was apprehended in Naples, Italy. Though it does not appear that the offense occurred at Casoria, 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 Specifications 2 and 3, Charge I, and the Specifications of Charge II, there is evidence that at the respective places and times alleged accused absented himself from his station without proper leave and remained on each occasion so absent, as alleged. At each time accused absented himself he was a prisoner duly placed in arrest at the stockade, Peninsular Base Section, as alleged, and working as a prisoner under guard at a military installation. Accused, by leaving, on each occasion, 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. The findings as to these specifications were warranted by the evidence. (MCM, 1928, pars. 132, 139b)

With respect to Specification 2 of Charge III the evidence, including accused's pretrial statement, shows that at the place and time alleged, accused, armed with a pistol, was present and presented the pistol and stood guard while a companion took from Berti Cesare, a person named in the Specification, about 8000 lire, property of Cesare, and from Nazzaro Raffaele, also a person named in the Specification, about 6300 lire, property of Raffaele. That the lire was of the value found by the court was warranted and that accused had the fraudulent intent to deprive each of the owners permanently of his property was manifest both from the testimony of Cesare and Raffaele and from accused's statement of 1 March 1944. The larcenous taking was committed with a showing of force and violence and was accomplished by putting both Cesare and Raffaele in fear. All elements of the offense of robbery, in violation of Article of War 93, were amply shown by the evidence which supports the findings as approved (MCM, 1928, par. 149f).

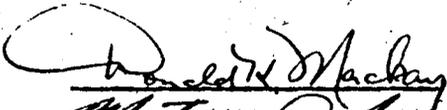
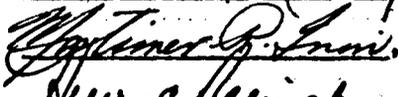
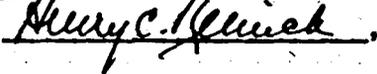
5. Exhibit 2, an extract copy of the morning report of Disciplinary Training Stockade, Peninsular Base Section, signed by an officer certifying he is the prison officer of that stockade and official custodian

(56)

of the morning reports of that command, was received in evidence over objection by the defense that it was not prepared and signed by the commanding officer of the Disciplinary Training Stockade. Paragraph 13, Army Regulation 600-375, 17 May 1943, prior to Change 6, dated 30 August 1944, provided that the prison officer would keep the morning report. The objection was not well made and the court properly admitted the extract copy.

6. The charge sheet shows that accused is 26 years of age, and enlisted in the Army 29 May 1942. His prior service consisted of an enlistment 29 September 1938 to 3 July 1941.

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 Mackay, Judge Advocate.

Christopher P. Inoué, Judge Advocate.

Murray C. Kenick, Judge Advocate.

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

AGO 534, U. S. Army,
9 October 1944.

Board of Review

NATO 3569

UNITED STATES	)	88TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Spedaletto, Italy, 11 August
Private ROBERT M. HARRAH	)	1944.
(35 769 688), Company B,	)	As to each accused: Dishonorable
351st Infantry, and Private	)	discharge and confinement for
PAUL A. DORDAL (32 799 052),	)	20 years.
Company A, 351st Infantry.	)	Federal Reformatory, Chillicothe,
	)	Ohio.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Robert M. Harrah, Company B, and Private Paul A. Dordal, Company A, 351st Infantry, acting jointly, and in pursuance of a common intent, did, near Marti, Italy, on or about 25 July 1944, with intent to commit a felony, to wit, rape, commit an assault upon Flora Ciampini, by willfully and feloniously throwing the said Flora Ciampini to the ground, striking her in the face with fists and tearing her clothing.

Each 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 as to accused Harrah. Each was sentenced to dishonorable discharge, forfeiture

of all pay and allowances due or to become due, and confinement at hard labor for 20 years, all members of the court present concurring. The reviewing authority approved each sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that in July 1944 Flora Ciampini, 21 years of age and unmarried (R. 12), was living in a cave or air-raid shelter near Marti, Italy, with her mother and father. A girl named Anna also lived in the area "a bit down further" from the Ciampini cave. (R. 6,7,10,12) In the latter part of the afternoon (R. 20,21) on 25 July Harrah and Dordal were apparently looking for Anna (R. 7). Harrah, armed with a rifle, and Dordal, armed with a pistol, approached the Ciampini cave outside of which Flora was standing in company with her father and some other Italians. The two accused approached and Harrah pointed his rifle at Flora. He did not speak but made motions for her to go into the cave. About this time the soldiers exchanged weapons. The father "interfered" and thereupon Harrah struck him under the eye with his fist and at the same time Dordal struck the father on the back with the butt of his rifle. (R. 7,13,16) Harrah pointed the pistol at Flora and forced her into a dark recess of the cave. When she screamed and called for help saying "They are killing me, papa help me", the father ran inside and grabbed Harrah who was stooping over Flora. Harrah kicked the father and struck him, whereupon the father went out of the cave in search of help. Dordal, now armed with the rifle, loaded it and placed himself outside of the opening to the cave and pointed the rifle at the Italians thereabouts. (R. 7,8,10,13,14,16)

When Harrah forced Flora into the dark recess of the cave she was screaming and she testified that to quiet her he punched her in the face a number of times. One blow struck her in the eye and caused a "big swelling". Other punches caused her mouth to bleed. She testified that Harrah then pushed her to the floor and held her there with his hands on her shoulders and that he tore her undershirt and step-ins. Flora also testified she was trying very hard to escape and "wiggle out" of Harrah's way. He grabbed her "with his hand and tried to choke" her and at the same time was beating her back against the ground. She testified "it was all against my will***I felt like dying instead of surrendering". She also testified that she was sure "I was being choked and prayed to Madonna several times". She further testified that so far as she remembered Harrah was "not exactly on my body" but was on his knees in a stooping position and that because of the darkness in the recess she could not tell whether his "pants were open or otherwise". Flora testified Harrah then left her and walked out of the cave. She went to an American "soldier" doctor after the incident and later was visited by an Italian doctor. She testified she had never seen either accused before and that she was not given anything by them. Asked whether other American soldiers had been to the cave where she lived, she replied "Very often a few Americans would be walking by and would stop and give us a few cigarettes and caramels and chat with my father or brother", and testified that "At times when they would stop and chat my father would offer them some wine socially". (R. 8,9) Flora also testified that Harrah told her the rifle was loaded (R. 11).

Biase Ciampini, Flora's father, testified that he tried to help his daughter but "it was impossible because he had a gun in his hand". The father also testified that

"then all our neighbors and the people who had come out after hearing the screams, were all trying to shout and help but were afraid to move on account of the man with the gun. At this time two American soldiers arrived."
(R. 13)

Both accused then ran out of the cave for a distance of 25 or 30 meters where they were overtaken by two other American soldiers (R. 15). Her father testified that when Flora came out of the cave she had blood on her face and was scratched on the throat and arms and was "in a very bad condition". He testified that she ran to him, "hugged me tightly and was hysterical". (R. 14)

Flora's uncle, Amilcare Ciampini, testified that when she came out of the cave her eyes were "marked up", that she had a tear on the side of her dress and her step-ins were all torn. Witness also observed that her clothing was dirty. (R. 17)

Private Daniel D'Angelo, Company B, 351st Infantry, testified that on 25 July, near Marti, Italy, he was approached by some Italians who told him that there were two soldiers in a cave trying to rape a girl and that he ran "down there" and into the cave. He testified

"When I got in there this girl was trying to struggle away from a couple of fellows there. I hollered to them and they let go of the girl and the girl went by me and I chased the fellows who went through the opening. When I go into the light I recognized Harrah and hollered to him to halt. He would not stop. Another fellow I know stopped him and I went over to talk to him and he pulled a carbine on me. I grabbed the carbine from him and when I did he pulled the knife out of his pocket and Davis stopped him from doing so. I told him he would have to come back to the company with me and I would turn him over to the CO."

Witness identified Dordal as the "other fellow with him". He further testified he saw that the girl's eye was "all puffed up and her jaw was bleeding" and that her blouse was "ripped off". This witness testified that Harrah "looked like he had a few drinks but he was not drunk enough that he didn't know what he was doing" and that Dordal did not "seem like he was drunk at all". (R. 20) Witness testified that when he arrived at the cave it was too dark for him to see whether the accused had "ahold of her" but that he knew she was struggling to get away "by the way she was screaming" (R. 21).

Staff Sergeant Francis Patrick Connolly, Company D, 351st Infantry, testified that when he and another soldier "went dashing over" to the cave

he saw a girl, whose skirt and dress were ripped, holding her mouth from which blood was dripping, and observed a big blue spot on the side of her eye "as if she were socked". He testified also that he saw two men walking from the direction of the cave, that one said he was from Company A and that just then Harrah pointed a carbine at witness' chest and pulling back the bolt asked "What's it to you". Witness testified that in his opinion both accused were sober and walked naturally. (R. 21,22)

A sergeant from Dordal's company testified Dordal was a good combat soldier (R. 19).

Each accused elected to remain silent (R. 23).

4. It thus appears from the evidence that at the place and time alleged in the Specification accused Harrah struck Flora Ciampini, the person named in the Specification. He compelled her to go into a dark recess of a cave, pushing her and menacing her with a pistol, and there forced her to the ground. He stooped over her, tore her underwear and prevented her from escaping. The actions of accused justified an inference of a concurrent intent to have sexual intercourse with the girl and the violence employed indicated an intention to overcome any resistance which might be offered. Flora resisted strenuously and clearly did not and would not consent to the intercourse intended. All elements of the offense charged are supported adequately by the evidence. Once an assault with intent to commit rape has been committed it is no defense that accused desisted before accomplishing his purpose. (MCM, 1928, par. 1491).

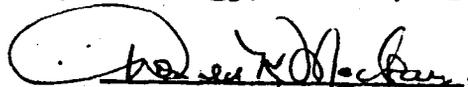
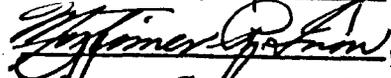
During the felonious sexual assault by Harrah, accused Dordal stood in the doorway of the cave armed with a rifle, effectively preventing interference by the father and the other Italians present. By so doing Dordal aided and abetted Harrah in committing that assault and thus became a principal (NATO 1074, Ketchum and Washington). The court was justified in inferring that Dordal knew of Harrah's purpose to rape the girl and knowingly assisted him in his attempt to accomplish such purpose.

Guilt as charged is sufficiently established in the case of each accused.

5. The charge sheets show that accused Harrah is 23 years of age, was inducted into the Army 5 July 1943 and had no prior service; that accused Dordal is 23 years of age, was inducted into the Army 10 February 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 sentences. Penitentiary confinement is authorized 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.

269841

 Judge Advocate.
 Judge Advocate.
- 4 -  Judge Advocate.

(62)

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 50 $\frac{1}{2}$.

3. The evidence shows that on 9 August 1944 accused and Private Thomas J. Woods, were members of the eighth gun section of Battery A, 450th Antiaircraft Artillery Automatic Weapons Battalion, stationed at Cecina Airfield, Italy (R. 5,10). At about 0200 hours on the above date accused was observed sitting on the edge of a "forty millimeter pit" with a Garand rifle, facing and about eight feet from Woods who was also sitting on the edge of the pit "half raised up on one elbow with one foot in the pit" facing accused (R. 7-9). A member of accused's battery who arrived at the pit about five minutes before the shooting (R. 15) testified:

"When I came up to the pit to call up to find out what time it was so I could wake my relief up, the deceased was sitting there. I didn't hear any conversation, except the accused said that he hated to do it, but that he had to do it. He said that his rifle was loaded and he was going to shoot. He had had his rifle down by his side and I had not seen it. Woods said, 'You have the rifle and the ammunition, go ahead and shoot.' And he raised his gun - -"

and further:

"And then Gilbert raised his rifle and I jumped against Woods to knock the rifle out of the way, but Gilbert had already shot. Gilbert gave me the rifle then without any objection. I asked him if he knew what he had done and he said he didn't mean to do it. I took the rifle to the tent and called my corporal and he called the sergeant and then Gilbert was put under arrest and some of the other men helped to get Woods out of the pit and then is when I went for medical aid" (R. 8).

Witness further testified that just before the shooting Woods had his hands in his overcoat pockets and did not take them out or change his position in any way immediately before he was shot (R. 8,9). Witness further testified that Woods' gun was at the pit but that Woods did not have it in his possession. In witness' opinion accused was drunk. (R. 9)

Woods was removed to the battalion aid station where he was pronounced dead by the battalion surgeon (R. 10,13) who testified:

"This man was brought to the aid station and placed on a litter. I ordered the sergeant to cut away his clothes covering the upper part of the body and in the lower mid-axillary line on the left lower part of the left chest I found a small penetrating wound which was about a half of

an inch in diameter and was very ragged and circular. There was quite a bit of blood oozing from it and quite a bit of air around the wound. The body was still warm; so I felt for the pulse and in the absence of pulse, I listened for heart movement and found no heart activity. Then I checked his eyes and found the pupils greatly dilated and fixed and then I tried the mirror test and also the gauze test over his mouth and there was no indication of any odor of alcohol. I knew that he was dead, but I wasn't quite satisfied that such a small wound could have caused his death; so, I examined the body further. On raising the head and upper portion of the body I discovered another wound about one inch in length and about a half of an inch gap and that was on the upper mid-portion of the right shoulder of the region of the right scapula. I knew that this was the cause of instant death. Some way or another the bullet had come up through the upper part of the right shoulder. As I moved the body and clothing a small brass colored bullet fell to the blanket of the litter. The projectile was about one and a fourth inches long, slightly curved and had a short depression on the base opposite to the concave side" (R. 12,13).

Witness identified the bullet mentioned above as a "thirty caliber" and testified that the gunshot wound was the cause of Woods' death (R. 13).

The acting commanding officer of accused's battery testified that after the shooting he observed accused "with respect to his sobriety", at approximately 0230 hours on the day of the homicide, at which time accused "seemed to be fairly sober" but witness "couldn't say whether he had been drinking or not" (R. 11). Asked upon what he based his opinion as to accused's sobriety witness testified:

"I couldn't say whether he had been drinking or not. When I spoke to him, he seemed to have all his faculties, talked very sober and seemed to understand what had taken place" (R. 12).

The battalion executive officer testified that in the pursuance of his duties as investigating officer appointed to investigate the charges against accused, he saw accused in the battery area on the day of the shooting and after advising accused of his rights under Article of War 24, explaining to him that he did not have to make a statement and could remain silent and that if he did make a statement it could be used against him in the future, accused then made a sworn oral statement to him (R. 14,15) as follows:

"He stated that on the 8th of August he had permission from the chief of his section to be absent from the gun section during the afternoon; that sometime during that afternoon he had met Private Woods, the deceased, and

between the two of them they had gotten two eggs from a farm house with the intention of taking the two eggs and later sharing them together; that he then left with the eggs and didn't see Private Woods again until that evening about 11:30. Prior to his meeting Woods at 11:30, he had taken the eggs to some woman and she had cooked them and he had eaten them. At 11:30 that evening he met Woods again at the farmhouse and he told him that he had eaten both of the eggs; that Woods then became angry and told the accused that he was going to shoot him. Woods then went back to the gun section to go on guard. The accused said that he had shot the deceased first because he was afraid that the deceased would shoot him; that he was sorry he had done it" (R. 15).

Witness further testified that he "believed" accused said that "Woods said that he was going to shoot him when he got back to the section" (R. 15).

Accused elected to remain silent (R. 16).

4. It thus appears from the uncontroverted evidence as well as from accused's sworn extrajudicial statement that at the place and time alleged accused killed Private Thomas J. Woods, the person named in the Specification, by shooting him with a rifle as alleged.

The evidence discloses no legal provocation, excuse or justification for the homicide. According to accused's sworn statement as related by the investigating officer, several hours prior to the shooting Woods became angry when accused informed him that he had eaten the two eggs they had previously procured and Woods told accused he was going to kill him when he returned to the section. There is no suggestion in the evidence that Woods was attempting to carry out this threat at the time he was shot. On the contrary it is shown by uncontroverted testimony that immediately preceding the shooting Woods was some eight feet away from accused in a semi-reclining position with his hands in his overcoat pockets and was not armed. It further appears that Woods did not change his position immediately before he was shot by accused.

One witness testified that in his opinion accused was drunk at the time he committed the homicide. Accused's acting battery commander testified that he observed accused about 30 minutes after the shooting and that at that time accused seemed to be fairly sober and had all his faculties and "talked very sober" and seemed to understand what had occurred. There is no evidence that at the time the homicide was committed accused was so intoxicated as not to know what he was doing. His use of a deadly weapon, his declaration immediately preceding the shooting that he "hated to do it but had to do it," and that his rifle "was loaded and he was going to shoot," as well as other circumstances in evidence, warranted the court in concluding that the homicide was committed with malice aforethought, deliberately and with premeditation.

All elements of the offense alleged were established by substantial evidence. Accused was properly found guilty as charged.

5. The charge sheet shows that accused is 30 years of age. He was inducted into the Army 27 February 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. 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.

Donald D. Mahony, Judge Advocate.
Walter P. Green, Judge Advocate.
Henry C. Russell, Judge Advocate.



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 3611

UNITED STATES)

II CORPS)

v.)

Trial by G.C.M., convened in
the vicinity of Imprunetta,
Italy, 2 September 1944.

Private First Class JUAN G.
MARCIAL (98 438 623), Battery
C, 985th Field Artillery
Battalion.)

Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

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

Specification: In that Private First Class Juan G. Marcial,
Battery C, 985th Field Artillery Battalion, did, at the
farm home of Lorenzo Ballini, near Sasso, Italy, on or
about 1 July 1944, forcibly and feloniously against her
will, have carnal knowledge of Conchita Ballini.

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

Specification: In that Private First Class Juan G. Marcial,
Battery C, 985th Field Artillery Battalion, did, without
proper leave, absent himself from his organization near
Sasso, Italy, from 1 July 1944, to about 3 July 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 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. With reference to the Specification, Charge I, the evidence shows that about 2000 hours on the evening of 1 July 1944 accused, a member of Battery C, 985th Field Artillery Battalion, and another unnamed American soldier, had supper at the farm home of Lorenzo Ballini near Sasso, Italy. (R. 5,6,8,9,16,22,33,36). Residing with Ballini and present on the evening in question were his wife, two daughters, Conchita, the prosecutrix, 13 years of age, and Nella, 21 years of age, and two sons (R. 8-10,15,20,22, 33). Nella's fiance was a guest for supper (R. 16). After supper Nella's fiance left and she and Conchita went upstairs to their room and retired (R. 12,16,17,23,34). Accused and his companion, who was taller than accused, inquired as to a place to sleep and were shown a place in the stable but accused demurred, saying they preferred to sleep in the house (R. 10,34). Accused and his companion, who had a rifle, then searched the house for Germans (R. 10,13,17,36). Ballini told them there were no Germans there but they continued their search (R. 10). While Ballini, his wife and two sons were in a small room off the stairway, accused's companion fired his rifle, the bullet going through a wall. The companion then went upstairs, knocked on and opened the door of the room occupied by the two girls, calling "Signorina" (R. 12,13,24,37). Nella, the elder daughter, jumped out of bed, touched accused's companion, who again fired his rifle, then ran down the stairs and, with the entire family, fled from the home, leaving Conchita alone with the two soldiers (R. 12,17,24,34,35,37).

Conchita testified that accused, whom she described as the smaller of the two, and his companion, who had a rifle, entered her room and that she was "so scared" she "fell unconscious", "fainted", that although she "fainted" she could see, "only with my eyes", but was no longer "in myself" and "could not feel anything", and that she had on a shirt and a pair of drawers and that accused's companion tore her shirt open and both accused and his companion tore her drawers (R. 24,27-29,32). She testified further that accused's companion "opened his pants" and "got in contact with me and when he finished the small one came into contact with me while the tall one was pacing about the room". She testified further that accused's penis entered her vagina twice, that he was on top of her twice and that he struck her twice in the face while he was on top of her, that she did not consent to accused's having sexual intercourse with her, did not want him to have intercourse with her and screamed "God, God, Mama" and that "it" hurt her, that afterward she had blood on her "lower parts". (R. 24,25,32) She testified further that when she screamed for her mother, accused's companion took out a knife and said

"I am going to cut off your neck and said it was no use screaming because the rest of my family have already their heads cut off" (R. 25).

Conchita testified further that after accused and his companion left her it was about ten minutes before she could walk, she was "sore in the hips", and she then went "about 2:00 at night" immediately to the house of Nella's fiance (R. 25,26,30). When she arrived she was clad only in a coat, had fingerprints on her face and appeared frightened (R. 18). Next morning Conchita informed her parents what had happened and was examined by the town doctor (R. 26,31).

The town doctor of Sasso testified that he examined Conchita at 1130 hours on 2 July 1944 and that he found:

"first, swelling of the top lips of the vagina and swelling on the smaller lips, ruptures of the vagina, traces of sperm cells, traces or spots of blood around the vagina and physical condition very troubled" (R. 38).

And further:

"Eyes swollen from having cried much--wet. One of the cheeks swollen by having been slapped" (R. 39).

Asked if the evidence led him to believe that there had been recent sexual intercourse with the girl, the doctor testified "Yes, naturally" (R. 39).

The mother of prosecutrix testified that about 0800 hours on the morning following the assault she examined her daughter's room and found blood "in the sheets" on the bed and in the "piss box" (R. 35).

With respect to the Specification, Charge II, an extract copy of the morning report of accused's organization was, without objection, introduced in evidence and contained the following entry:

"2 July 1944

38438623 Marcial Juan C Pfc
Above EM duty to AWOL as of 1 July 44 1600 hours"
(R. 7; Ex. A).

The section sergeant of accused's gun section testified that on 1 July 1944 accused requested permission to leave the area for one hour, failed to return and was absent without leave. Witness testified further that he personally made a search of the area and that accused was not there although he did not have permission to be absent. Witness also testified that accused was absent from the section without permission on 2 and 3 July 1944 (R. 5,6).

It was stipulated that accused returned to military control on 3 July 1944 (R. 39; Ex. B).

The defense offered no evidence and accused elected to remain silent (R. 40).

4. It thus appears from the evidence that at the place and time

(70)

alleged in the Specification, Charge I, accused had unlawful carnal knowledge of Conchita Ballini, a female child 13 years of age, the person named in the Specification. It further appears that following the firing of a rifle accused assisted in tearing off part of the undergarments of prosecutrix and while accomplishing his venal purpose struck her twice in the face and that his companion brandished a knife threatening the life of the young victim.

There is no suggestion in the evidence that prosecutrix consented to the act. She testified unequivocally that she did not consent, that she called for assistance, and that she was so frightened she fainted. Under the circumstances disclosed by the evidence resistance on the part of prosecutrix would have proved futile. With reference to the amount of resistance to be expected from one so young, it has been said:

"In all cases, the circumstances and conditions surrounding the parties to the transaction are to be considered in determining whether adequate resistance was offered by the female. It is proper to consider the age and strength of the woman, and her mental condition as bearing upon the question whether the act was against her will and consent, and upon the extent of the resistance which the law required her to make. If the girl is very young and of a mind not enlightened on the question, this consideration will lead the court to demand less clear proof of opposition than in the case of an older and more intelligent female, or even lead to a conviction where there was no apparent opposition" (44 Am. Jur., Rape, sec. 7, p. 906).

The offense charged was clearly established by competent evidence.

It further appears from uncontroverted oral testimony as well as documentary evidence that at the place and time alleged in the Specification, Charge II, accused absented himself from his organization without authority and remained unauthorizedly absent until, as stipulated, he returned to military control 3 July 1944. All elements of the offense charged were clearly established.

5. The charge sheet shows that accused is 21 years of age. He was inducted into the Army 21 January 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. 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

(71)

and so punishable by penitentiary confinement for more than one year by
Section 2801, Title 22, Code of the District of Columbia.

Donald W. King, Judge Advocate.
William P. Jones, Judge Advocate.
Henry C. Lewis, Judge Advocate.

263370



CONFIDENTIAL

(73)

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

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

Board of Review

NATO 3644

UNITED STATES)

v.)

Private JOSHUA BROCKINGTON)
(34 250 602), 3270th)
Quartermaster Service Company.)

ARMY AIR FORCE SERVICE COMMAND
MEDITERRANEAN THEATER OF OPERATIONS

) Trial by G.C.M., convened at
) Bari, Italy, 20 July 1944.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary,
) Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Joshua Brockington, 3270th Quartermaster Service Company, did, at Bari, Italy on or about April 8, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one T. B. Whiskin, T/10687261, 1505 Artillery Platoon, British Royal Army Service Corps, a human being, by shooting him with a pistol, to wit: an Italian Beretta, number 849571.

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".

269809

CONFIDENTIAL

(72)

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 in the evening of 8 April 1944, T. B. Whiskin and another British soldier, members of "1505 Artillery Platoon, R.A.S.C.", had a few drinks at a canteen and at about 2300 hours were joined by another British soldier. They talked together for awhile in their vehicle park and then all decided to go to a house near their area where they "knew there was a woman". When they arrived at the house, they rapped on the door several times. There was no answer. Finally Whiskin said in a loud voice "I'll knock again", and as he did so the door opened inwardly "as if the latch had slipped". When Whiskin was standing "about in the doorway" and stepping over the sill a shot was fired inside the house, the interior of which was very dark. The three started to run away but Whiskin called out to one of his companions saying, "Burgess, I've been shot", and thereupon fell to the ground. (R. 9,10,12-14) Whiskin, in a state of collapse, was taken to his organization's dispensary where it was discovered that he had been shot "between the third and fourth ribs through the heart" and "out under the left arm". He died while his wounds were being dressed. (R. 10, 14,15,20)

One of deceased's companions returned to the scene of the shooting and saw accused and another colored soldier leaving. They accompanied the English soldier to his organizational area (R. 11) where they were searched by a British lieutenant. This officer identified accused at the trial and testified that when he searched accused he found a Beretta pistol, #849571, and six rounds of ammunition on his person. The pistol was admitted in evidence, (R. 21; Ex. 3) as were four of the six rounds of ammunition (R. 24; Ex. 4). A spent cartridge case found in "the house" was also received in evidence (R. 24; Ex. 5). All of these exhibits as well as the two other rounds of ammunition were turned over to "C.I.D. Agent Morley" (R. 23,24) who in turn delivered them to "Brian T. Fitzgerald, another Agent" (R. 26,27).

A provost sergeant who was on duty 9 April 1944, at the 98th General Hospital, testified that he undressed the body of deceased, which he identified by his "AB 64, soldier's property book which he always carries", and that as he pulled off deceased's shirt a bullet fell out of a hole in the flesh under the left arm (R. 16-18). The bullet was turned over to "Agent Fitzgerald" (R. 19). Without objection by defense, the bullet was admitted in evidence (R. 17; Ex. 2).

After the search was completed accused and "Ernest Moore", another American soldier, were taken into custody by an agent of the Criminal Investigation Division (R. 26,28).

Brian T. Fitzgerald, Agent, Criminal Investigation Division, sent to "our ballistics expert in Algiers, Lieutenant Bird" four rounds of the ammunition, the pistol, the empty shell and the bullet, by "D.A.L.S." (R. 31, 32).

It was stipulated, with the full knowledge and expressed consent of accused, (R. 39) that First Lieutenant George R. Bird, Corps of Military Police, was a "qualified ballistics expert" and that if present as a witness would testify that he fired test shots with "Beretta Pistol, #849571", that he compared the bullets and shell cases with those sent to him and that in his opinion they were fired from the same pistol (R. 37-39; Ex. 10).

Fitzgerald testified that on 9 April 1944, while investigating a shooting in the Fesca district of Bari (R. 28), he went to a house in which an Italian woman lived, located about 100 yards to the rear of the "1505 Artillery Platoon" (R. 29). The house consisted of a living room and a bedroom, connected by a doorway over which a sheet was hung. The sheet had a hole in it and the edge of the hole showed slight traces of powder burns. The door of the house, which led into the living room near the doorway to the bedroom, was made of rough planking about one-half an inch thick and had a small hole through it, the exterior side showing ragged splinters. Witness also testified that a line passing through both holes would pass into the bedroom to the head of the bed. (R. 30,31; Ex. 6) Fitzgerald also testified that the only means of locking the door was a flat bolt held in place by a receiver made of heavy tin, nailed to the door frame. The receiver did not work properly and looked as though someone had hammered it. Witness found the door hard to open. (R. 33,34)

Fred C. Rose, Agent, Criminal Investigation Division, testified that he told accused he could remain silent and need not make a statement or that he could make a "sworn statement if he so desired" and that anything he said might be used against him. No threats of punishment or promises of leniency or reward were made and on 10 April 1944 accused told witness what to write and when the statement was typed signed and swore to it. (R. 40,41) This statement, admitted in evidence, (R. 42; Ex. 11), reads in pertinent part as follows:

"On April 7, in the afternoon, while on pass, I met a little boy whom I told I wanted a signorina, so he took me to a house near the underpass where there was a signorina. I had intercourse with her and then took her home in a carriage. Her real home was near the British depot near the Foggia Road. I spent the night with her and then the next morning returned to camp in time for guard duty.

"On the next day, April 8, I spoke with ERNEST MOORE, and I mentioned that I knew where we could get some signorinas. Although we didn't have passes, we left camp about 1230 hours and walked towards the house near the underpass where I had been the day before. Just before MOORE and I arrived at the house, I saw the girl with whom I had intercourse the day before, walking on the street. I stopped her and talked to her. She was with a little boy at the time. I asked her where she was going and she said home. When I

asked how, she said on a bike, but I told her it was no good for both her and the boy to be on a bike, so she said that she'd take a train. I asked what time the train runs and she said about 3:30 P.M., so I said to take a carriage. MOORE and I walked ahead to get a carriage when I turned around and saw her getting into one. She caught up with us and we told her to go ahead, that we'd meet her at her house. Our reason was that we were afraid the M.P.'s in town would pick us up if we rode through town with her in a carriage. We walked through town and out towards her house. As we neared the British dump located by the Foggia Road, the 'signorina' drove up in a carriage. With her were another signorina, two British soldiers. She was holding a bundle of foodstuffs. She told us to get into the carriage, which we did, and we rode the rest of the way to her house. We got there about 1600 hours.

"When we got to her house, there were two Italian laborers working on the building. We all entered the house and sat down to eat. The others all had some of the dark and some of the clear wine, but I didn't drink any. Just before sundown, the second signorina left to go back to Bari. As she left, the civilians quit working and two small boys entered. As the civilian laborers started to leave, the signorinas asked them to wait because there were too many soldiers in her house. Upon hearing this, the British soldiers left. Then MOORE tried to leave, but I persuaded him to stay with me. Shortly after this, the civilian laborers and the two boys left the house.

"MOORE and I took off our coats and hung them up in the front room. The signorina locked the front door and we all went into the bedroom. MOORE and I stripped to our undershirts. He got on the far side of the bed near the wall; I was on the outside of the bed, furthest from the wall. I took my clothes and placed them on the floor next to the bed. Then I took my Italian Beretta pistol, which I always carry loaded in my right hip pants pocket and placed it on the small table next to the head of the bed. MOORE had intercourse first with the signorina. Then, I also had intercourse with her. Then we all tried to go to sleep. When I placed my gun on the small table, I injected one shell into the chamber because I was frightened of the British soldiers and I wanted to be ready in case there was trouble. Then a short time later there was a knock at the door. We all got up, got partly dressed and went to the door. As we opened it, I saw some British soldiers. I told them that there was nothing doing that night, so they went away. We returned to bed. Later, there was knocking on the door again; I told the British soldiers that there was nothing doing that night but they said that they would return later."

CONFIDENTIAL

(77)

Continuing:

"The next time there was knocking, we didn't get out of bed to open the door. After twelve, I was awakened by a persistent knocking on the door. Someone yelled, 'Open up, or I'll shoot.' Then I heard the door broken open. I grabbed my gun because I was frightened and pulled the trigger. After I shot the pistol, we all got out of bed; I lit the candle. We smelled the smoke from the shot. I put the pistol into my right hip pocket. We went to the door; it was open; we looked out but didn't see anyone. MOORE said that I'd scared them off and that they wouldn't return again that night. Then we took some nails and a hammer and fixed the door back. As we returned to the bedroom, we heard a car approach the house, so we finished dressing. Then we heard knocking and an Englishman say, 'Open up.' We went outside and a British doctor said that someone had been shot. He asked MOORE and me to go to the dispensary with him. There the doctor in charge asked us for our identification. We gave our name, rank and serial number and organization. Then the Doctor searched and found a pocket knife on MOORE and my pistol in my pocket. He took the knife and pistol and said that we were under arrest. Some time later an American came and we were searched again. Then we were taken to the M.P. Station (British) and from there to the American M.P. Station." (Ex. 11)

Private Ernest Moore, 3270th Quartermaster Service Company, a witness for the defense, testified that after the group arrived at the Italian woman's house they all sat around and talked. He further testified:

"One of the girls, the girl that came with the two Canadian soldiers, she couldn't get the prices she wanted so she left. After she left we still sat around and talked and so then the Canadian soldiers tried to talk to this girl we were with. She told them she was out so they got up and left and then Brockington and I stayed there. Then during the evening there was several, I would say, four or five groups of English soldiers which came up and asked if the girls was doing anything. She told them no. She was occupied for the night. There was one group that came that night in question and they said they wanted us to finish up because when they came back they was going to have their fun. The Italians finished working and they left. I was intending to leave with the workers but Brockington persuaded me to stay on." (R. 43,44)

He also testified that about 2100 hours they went to bed. He had intercourse with the girl and then went to sleep. Later, when he was awakened,

(78)

he got up and dressed and found the door three-quarters open and the "catch" on the side of the panel of the door broken loose and "the sliding bar" bent in. He testified that he repaired the damage and that shortly thereafter a British truck drove up and witness was asked if he heard a shot. He testified "I said no". (R. 44,46) Witness testified he saw accused with a pistol in his hand when leaving camp and saw him put it back in his pocket, but did not see it at any time during the night (R. 47).

Accused testified that he came from South Carolina and that in his home state "they didn't allow colored and white to live and associate with one another" and that "when the soldiers come up, sir, I was scared***" (R. 48,49). He had been scared earlier in the evening when "a couple of soldiers came to the door and was arguing" (R. 50) and "I was scared sir, from being there with this girl. I was afraid. I didn't know what they would think of my being in there with this girl. I was scared". Accused further testified that another reason that he "was scared was a bunch of the boys was getting beat up down town" (R. 51), but that he had not had any trouble with British soldiers (R. 58). Accused testified that he had the pistol with him because he had carried it on guard that morning and did not take it from his pocket before going to town, that it was not his custom to carry a Beretta pistol on guard and that he did not carry it habitually. (R. 50) Accused carried the pistol when on guard because he "had it as a souvenir" and "just carried it on me" (R. 52). He kept the pistol in the mattress on his bed and in making up the bed that morning he "stuck" the pistol in his pocket and forgot to take it out. He did not keep the pistol loaded; he put the clip in the gun when he was on guard (R. 53) but did not pay any attention to the number of rounds (R. 54). When he put the pistol by the head of the bed he did not work the slide and put a round of ammunition in the chamber (R. 56). He testified his statement was true wherein he said:

"Then I took my Italian Beretta pistol which I always carry loaded in my right hip pants pocket and placed it on the small table next to the head of the bed" (R. 58).

Accused knew that about 0030 or 0100 hours that night there was some knocking at the door and that "in my scaredness" he shot. As far as he could remember he was sitting on the bed with the pistol in his hand. He did not remember when it went off. He did not shoot at any particular thing or person and could not see anyone at the time he shot. (R. 52) He was not able to identify his gun "because I never paid any attention to it" (R. 54). He woke, sat up in bed and when he came to his senses the pistol was in his hand, already fired. He could not remember when the gun went off (R. 55, 60,62). The statement which he signed was the truth as far as he could remember (R. 57). Accused was sure he did not hear any talking or statements outside; he had not had trouble with anybody and nobody struck or in any way mistreated him (R. 55).

It was stipulated that if Chaplain C. H. Hinter, 246th Quartermaster Service Battalion, were present as a witness he would testify that he had

CONFIDENTIAL (79)

known accused approximately two years, that accused was a regular attendant at Sunday church services where he sang in the church quartette and that "he is a soldier of good religious character". The Chaplain did not know of any prior trouble. (R. 62)

4. It thus appears from undisputed evidence that as alleged accused, with a pistol, shot and killed T. B. Whiskin, the person named in the Specification. When shot deceased was in the main entry way leading into what is described as the living room of a two-room house, the door to which had just swung inwardly upon his knocking. The accused, when he fired the pistol, was in bed with an Italian prostitute. The bullet passed through the door while posited about parallel with the curtained entrance to the bedroom. It was late at night and the interior of the house and the surroundings were dark. It appears that prior to the shooting some British soldiers from their near-by area had called at the house but had departed when told by accused "there was nothing doing that night". There is evidence that deceased, with two companions, rapped on the door of the house several times and that it opened, as if loosened from its catch, upon a knock given by deceased about simultaneously with his announcement in a loud voice: "I'll knock again". There is no evidence that he or his companions were armed or were at the house for any reason except the presence therein of a woman given to indiscriminate lewdness for hire. It is indicated that the house was a place which soldiers in general frequented and at which other prostitutes plied their trade. It is shown that accused, before getting into bed with the prostitute, injected a shell into the chamber of his Beretta pistol and placed it on a small table near the head of the bed because, as he stated, "I was frightened of the British soldiers and I wanted to be ready in case there was trouble". There is substantial evidentiary support for the view that the knocking on the door and the subsequent presence of deceased and his companions at the threshold of the house was done and accomplished without violence and under circumstances such as to exclude justification for a belief on the part of accused of a concomitant purpose to assault or offer personal violence to him or anyone within the abode - a purpose which if present under appropriate conditions might, according to some authorities, render a homicide justifiable within the rule known as defense of habitation (40 C.J.S., Homicide, sec. 109 et seq.). But here the homicide was clearly without legal excuse, provocation or justification. It was demonstrably the result of an act committed in utter wantonness and with reckless disregard of human life. Homicide under such circumstances constitutes murder. Malice aforethought, the requisite element of such an offense, may be inferred from a state of mind involving,

"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" (MCM, 1928, par. 148a).

The court was warranted in finding accused guilty as alleged.

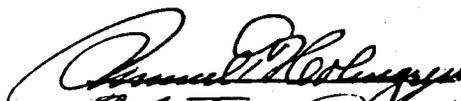
- 7 - CONFIDENTIAL

(80)

Accused advanced several explanations for his act. In his pretrial statement accused asserts he was awakened by a persistent knocking on the door, heard someone yell "Open up, or I'll shoot" and then heard the door broken in. He states therein that he was frightened, grabbed the pistol and fired. On the witness stand however accused attributed his alleged fear to the fact he was associating with a white woman, testifying he was afraid because he did not know "what they would think of my being in there with this girl". He denied hearing any talking outside and also testified he did not recall when he fired the fatal shot, claiming that he was awakened from a sleep, sat up in bed and when he came to his senses discovered in his hand the pistol, already fired. This testimony clearly contradicted, as well as was contradicted by, both the pretrial statement under oath and his earlier testimony. Finally there is his testimony that he was afraid of British soldiers and that one of his associates had been "beat up" recently. This testimony is similarly at variance with his other explanations and is directly contradicted by accused's further testimony that he had had no trouble with British soldiers or in fact with anyone. Then, his pretrial statement that he placed the gun on the table by the bed after he had inserted a shell into the chamber because he wanted to be ready in case of trouble with the British soldiers, suggests not only defiance but a calculated and deliberate intention to fire the pistol should intrusion occur. But whatever the theory thus advanced, it could imply no basis for legal excuse or justification and with the many contradictions as well, the court was fully justified in concluding that the homicide was murder.

5. The charge sheet shows that accused is 25 years of age. He was inducted into the Army 17 February 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. 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.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

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

AFPO 534, U. S. Army,
17 October 1944.

Board of Review

NATO 3661

UNITED STATES)

v.)

Private FRANK M. MANRIQUEZ)
(39 129 729), Company E,)
15th Infantry.)

3D INFANTRY DIVISION

) Trial by G.C.M., convened at
) Pozzuoli, Italy, 2 July 1944.
) Dishonorable discharge and
) confinement for 20 years.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irien and Remick, Judge Advocates.

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

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

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

Specification: In that Private Frank M. Manriquez Company "E" 15th Infantry did at Nisida Italy on or about 20 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 with the enemy and did remain absent in desertion until he was apprehended at Bagnoli, Italy on or about 25 April 1944.

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

Specification: In that Private Frank M. Manriquez Company "E" 15th Infantry, having been duly placed in confinement in the stockade at Bagnoli Italy on or about 25 April 1944

268946

(82)

did at Bagnoli Italy on or about 26 April 1944 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of the Charges and Specifications. 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 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. Second Lieutenant Seymour Hartman, Company D, 15th Infantry Regiment, testified that he was "Division liaison officer" and that his duties consisted of shipping men from the 7th Replacement Depot to the 3d Division. On 20 March (1944) accused "was put on a shipping roster that was to take him to the Anzio beachhead". "The roll call was held at the 7th Replacement Depot and there he boarded a truck which, in turn, took him to the Misida***or Pozzuoli docks", Italy. (R. 7,8) Lieutenant Hartman further testified that "the roll was called again and I placed Private Manriquez on an LST or LCI to take him to the Anzio beachhead" and that witness personally called the roster and personally inspected each man as he went on board. (R. 8)

The president of the court stated that the court would take "judicial notice of the fact that the accused's unit was on the Anzio beachhead at the time in question and that any part of the Anzio beachhead was, at that time, considered to be a combat area", which defense stated was satisfactory (R. 18).

Corporal Walter J. Sierakowski, 51st Military Police Company, testified that on 25 April 1944, when he was "in charge of the vice squad" at Bagnoli, Italy,

"we received word that there was a prostitute at No. 2 Via Cicerone, Bagnoli. I went up there with two men and sent them into the house and made contact with the prostitute and they brought her out and I went inside and checked around and saw a raincoat and other GI clothing. A few drawers I pulled out also contained GI clothing" (R. 9,10),

and that

"We checked up all this clothing and brought it out to the jeep and were getting ready to pull away from there when Manriquez, the soldier later identified as Manriquez, came up and claimed it was his laundry. I asked him when he brought this

268946

laundry up there and he said he brought it up that very morning at half past eight. At the time he came to the jeep it was half past ten. I asked him how could it be your laundry, it is dry cleaned and pressed. I told him to get into the jeep and go down to headquarters and the laundry will be checked and if it is yours they will let you have it. When he got to the headquarters they found he was an AWOL" (R. 10).

It was stipulated that Second Lieutenant William F. Beckman, if present, would testify:

"I was OD of Staging Area #1 on April 25, 1944 when at 1445 hours I personally admitted Frank M. Manriquez, Private, 39129729, to the main guard-house of Staging Area #1. He was placed in confinement and under guard at that time." (R. 10,11)

Corporal Sierakowski testified that after he had taken accused into custody on 25 April, he saw him two days later, on 27 April,

"In the same vicinity, just standing around being still on duty with the vice squad. I happened to look over towards this house where we had made contact with this prostitute and I saw the same soldier, Manriquez. I was not very sure because I was quite some distance from him. I began walking towards him and he glanced towards me and recognized me and started walking away. I got up to him and asked him if he was Manriquez and he replied I had made a mistake. I asked him if he had a pass and he said no. I said let me see your pass? He showed me his dog tags and it was Manriquez so I took him to headquarters". (R. 11)

He positively identified accused as being the same man whom he twice arrested; "on both occasions he came quietly and gave me no trouble". (R. 11,12)

First Lieutenant George G. Cohn, Headquarters, 15th Infantry Regiment, testified that he was investigating officer, and that in the performance of his duties he "informed the accused of the meaning of the 24th Article of War and repeated it several times to make certain that he understood what I had said". Witness used no force or coercion or any threats against accused, who indicated that he understood what witness said. Accused then signed a statement, which was given voluntarily and of his own free will and read to him, before he signed it, in the presence of

268946

(84)

Lieutenant Weiner and Private Fair. Accused indicated that he fully understood his rights in not making any statement whatsoever if he so desired, and indicated that the statement was the statement he wished to make. (R. 12-14) The statement of accused, indicating in substance what accused told Lieutenant Cohn, in the form of a sworn affidavit was admitted in evidence without objection (R. 14-16), and reads, in material part, as follows:

"I was inducted 1 April 1943 and came overseas as a replacement September 21, 1943. I was assigned to the third Division November 1944 & sent to Co E 15th Inf. In the first part of February 1944, I was feeling sick & was sent to the 21st General Hospital. They operated on my tonsils. Later I was sent to the 29th Repl Bn at Naples around the race track. About that time I received a letter from New York City to go there at my conv(en)ience about my citizenship. I asked the chaplain to help me about this & saw several other officers - but none of them was able to help me. I told a Sgt in the orderly room I didn't want to go back & join my outfit until I straightened out my citizenship papers. He said he couldn't do anything.

"On the second week in March I was placed on an LCI to be shipped back to Anzio Beach. The boat was tied to the dock so I walked off the boat. I went to Bagnoli & stayed there about 38 or 48 days when the MP's picked me up. They took me down to the stockade. I walked out of the stockade that night & went back to Bagnoli. The next day I was picked up by the MPs again.

"Later they put me on a IST under guard & brought me back to Anzio beachhead" (R. 14-15; Ex. A).

Accused elected to remain silent.

4. It thus appears from the evidence, including accused's voluntary statement before trial, that at the place and time alleged in the Specification, Charge I, accused absented himself from a landing craft, on which he had been loaded by his division liaison officer to be transported to his organization on the Anzio beachhead, Italy, and that he remained absent for the period alleged until apprehended at Bagnoli, Italy. That accused did not have leave to so absent himself was inferable from his statement that he "walked off the boat" and from the other circumstances in evidence. It is apparent from accused's statement that he knew he was placed on the boat to be shipped to the Anzio beachhead where service was manifestly hazardous

and it may be inferred his absence was motivated by a desire to avoid such service. Accused's place of duty was with the group going to the beachhead and absenting himself therefrom was the gravamen of the offense. The facts and circumstances warrant the inference that accused absented himself without proper leave from his organization and that when he so absented himself he had the concurrent intention of avoiding the duty alleged. Violation of Article of War 58 was established (MCM, 1928, par. 130a).

It further appears from the evidence, including accused's voluntary statement, that at the place and time alleged in the Specification, Charge II, accused was duly placed in confinement and under guard in the stockade at Bagnoli, Italy. Accused admitted that that night he walked out of the stockade. Though the evidence fails to show with explicitness that accused escaped therefrom without having been released or set at liberty by proper authority, those elements of the offense are properly deducible from the facts and circumstances of the case. It cannot be said that the court erred in here finding a violation of Article of War 69.

5. The review by the staff judge advocate, accompanying the record of trial, contains the following:

"a. The accused is 26 years old and has served for 1 year and 3 months. His commanding officer reports that 'his desire to shirk duty from combat has seenawed his allegiance between the United States and Mexico.' Apparently the accused was restored to duty after these offenses because the company commander further reports that the accused turned in the face of the enemy in May.

"b. The accused's confused loyalty to this country, as evidenced by his offenses and the report of his company commander indicates an attitude that does not warrant an opportunity for rehabilitation. It is inferable also that he consorted with a prostitute during his absence, since his clothing was found in her house. This, combined with his effort to deceive the military policeman on two occasions and his escape from confinement, indicates a low moral character".

268946

6. The charge sheet shows that accused is about 25 years of age, that he was inducted into the Army 1 April 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.

W. G. Ed. W. McBay, Judge Advocate.

W. Thomas J. P. P. P., Judge Advocate.

Henry C. Kluwick, Judge Advocate.



(87)

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

APO 534, U. S. Army,
6 October 1944.

Board of Review

NATO 3662

UNITED STATES)

v.)

Private BENJAMIN P. FUNARO)
(32 540 278), Company M,)
30th Infantry.)

) 3D INFANTRY DIVISION

) Trial by G.C.M., convened at
) Rome, Italy, 20 June 1944.
) Dishonorable discharge and
) confinement for 25 years.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Benjamin P. Funaro, Company "M", 30th Infantry, did, in the vicinity of Nettuno, Italy, on or about 4 March 1944, desert the service of the United States by absenting himself without proper leave enroute to his organization, with intent to avoid hazardous duty, to wit: Combat with the enemy, and did remain absent in desertion until he was apprehended at Personnel Center No. 6, Naples, Italy, on or about 26 May 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 the term of his natural life, three-fourths of the members of the court present concurring. The reviewing

268714

(88)

authority approved the sentence but reduced the period of confinement to 25 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 50 $\frac{1}{2}$.

3. The evidence shows that on 3 March 1944, at the 3d Division Administration Center at Pozzuoli, Italy, Technician Fifth Grade Vernon J. Alves, Headquarters Company, 3d Infantry Division, was "assisting in preparing a shipment of prisoners from the PBS Stockade for shipment to the Anzio Beachhead". Alves testified that he "prepared the embarkation roster and embarkation cards and assisted in having the men sign the embarkation cards at the Administration Center while they were being equipped by our supply sergeant preparatory to embarking". The embarkation roster prepared by Alves, bearing the heading "Returnee Roster, 3 March 1944", and containing the name of accused, "Pvt. FUNARO, Benjamin P., 32540278, Company 'M', 30th Inf." was identified by Alves and introduced into evidence without objection by defense. (R. 4-6; Ex. A). Alves described the circumstances under which he first saw the men, as follows:

"They arrived after noon chow. The roll was called while they were on the trucks. As each name was called the man climbed down from the truck and lined up. After the entire roll was called the men marched across the street and halted in front of the supply tent."

The roll was called from the "Returnee Roster" and Alves testified that there were no absentees. Thereafter, the men

"squared off in front of piles of clothing which were laid out. While fixing packs and checking clothing that had been issued to them they were addressed"

and "told that they were being returned to their units which were in combat on the Anzio Beachhead", and "were told that it was expected that they be good soldiers and fight with their units". (R. 5) At 1400 or 1415 hours, "after the address was made to them", they "left the area in trucks for the docks" (R. 6).

Technical Sergeant Oliver T. Varner, 29th Replacement Battalion, testified that on 3 March 1944 he was "a medical hold" at the 7th Replacement Depot, at the racetrack near Naples (Italy), and that his duties were "to bring these prisoners to the Anzio Beachhead from the Nisida docks", which were located in the Naples area, near Bagnoli (Italy) (R. 6). He was accompanied by "Sergeant Gregory and Lieutenant Rainey out of the 30th Infantry". He testified that he first saw the prisoners at 1400 or 1500 hours, and

"We received the prisoners from Lieutenant Lindsey. We had a roll call and loaded them on the boat. At the time each man loaded on the boat Lieutenant Lindsey handed him an envelope. They were put on the boat and

the boat pushed off from the Nisida docks for Anzio around 4 or 4:30." (R. 7)

He testified that the roll was called from Prosecution's Exhibit "A" (the "Returnee Roster"). "The last names were called and the men answered with their first name and middle initial". He testified that no names failed to respond. They left the Nisida docks at 1600 or 1630 hours, arrived at Anzio, Italy, the next morning, 4 March, at about 1000 hours, and "moved about a mile and a quarter to the Assembly Area". Varner further testified: "After we got to the Assembly Area I put the prisoners near the fence because it was raining. I called the roll and they were all present". The roll was called from the "Returnee Roster", on which accused's name and organization, Company M, 30th Infantry, was shown. (R. 7) Varner testified that he called that name and that a man answered to that name when it was called. Then Varner "went inside of a building and told Lt. Monarch that I had 24 prisoners to deliver to him. He was in charge of the replacement pool" at the assembly area, and handling personnel debarking at Anzio. (R. 8)

Chief Warrant Officer R. H. Lewis, 30th Infantry, testified that he was and had been Personnel Officer of the 30th Infantry Regiment since 5 December 1943 and in that capacity was custodian of the morning reports of Company M, 30th Infantry. He was required by Army regulations to process the morning reports and keep them regularly on file in his office. He testified that he had made an examination of the morning reports of Company M, with relation to accused, which "consisted of going through the morning reports from 3 March to 15 June 1944 and his name did not appear". Defense counsel stated in court that the morning reports had been made available to him. Mr. Lewis further testified that if accused had changed his status in any way after 4 March 1944 and before 26 May 1944 with reference to duty, an entry to that effect would appear on those morning reports, and that it would not have been possible for accused to have returned to duty with his organization without an entry appearing on the morning report. "If he reported back to his company he would have been picked up on the morning report". When asked by defense, "Couldn't there have been a slip on the part of the 1st sergeant ...he could have been in the company and yet not picked up on the morning report...isn't that possible?" Witness answered "No, sir". Witness testified that other than accused there was no member of the 30th Infantry whose last name is Funaro. He further testified that on 4 March 1944, Company M, 30th Infantry, was "located on what is known as the Anzio beachhead", where it had engaged in combat with the enemy and suffered casualties. (R. 9,10)

Major C. W. Azbell, commanding 29th Replacement Battalion, 7th Replacement Depot, Bagnoli, Italy, identified accused in court and testified accused "gave me his name as Benjamin Funaro". Witness also testified that he had heard there were organized gambling and professional crap games taking place in his battalion area, and

"so on May 26th about 7:30 I had some non-coms and one officer gather the men who operated tables at that time and bring them in for an interview with me so I could

find out what the situation was. One of these men gave me his name as Benjamin Funaro" (R. 11).

Witness continued:

"As I recall it, I stated that I was investigating the gambling and asked him to give me his name and serial number which he did. I asked him to tell me his organization and he said, 'Sir, I am AWOL from the 3d Division'" (R. 12).

Witness testified that he did not warn accused of his rights under Article of War 24, but that he used no force or compulsion to get the answer, offered no promise or gratuity in return therefor and that the information which came out was in response to the question what organization accused was from. Witness had accused "placed in the stockade and the next day notified the 3d Division Rear that we were holding him there". Personnel Center #6 is operated by the 7th Replacement Depot. (R. 12,13)

Accused elected to remain silent.

4. There is evidence warranting the conclusion that at the time accused is alleged to have deserted the service he was being returned to his organization which was then on the Anzio beachhead, and that accused, after reaching the beachhead, absented himself and remained absent until he was apprehended near Naples on the date alleged. The morning report of his organization significantly fails to contain any entry showing that accused reached his company. From those circumstances and the further fact that when accused was apprehended approximately 100 miles in the rear he volunteered the statement that he was "AWOL" from his division, an absence without leave as alleged may be reasonably inferred. The evidence shows that accused's company was engaged in combat with the enemy on the beachhead and suffered casualties. From those and the other facts and circumstances in evidence the court was warranted in concluding that when accused so absented himself without leave from his place of duty it was with the concurrent intent to avoid hazardous duty as alleged. The evidence shows that on 4 March 1944 accused had reached the Anzio beachhead and as that is in the vicinity of Nettuno, Italy, it would appear that the allegation as to the place of the desertion was substantially established. Similarly accused's apprehension was shown to have been by the commanding officer of a replacement battalion connected with Personnel Center #6, near Naples, which is substantial proof of the allegation of the Specification. All elements of the offense alleged were sufficiently established (AW 28; MCM, 1928, par. 130a).

5. Accused's statement to Major Azbell that he was absent without leave from his organization was admitted in evidence, although it was shown that accused had not been advised as to his rights under Article of War 24. This was proper. The statement was not a confession of the offense charged but simply an admission, and as such was admissible in evidence without any showing that it was voluntarily made (MCM, 1928, par. 114b).

6. A psychiatric report of an examination of accused, accompanying the record of trial, contains the following:

"Soldier is shrewd and sullen. He answered questions fully but in the taking of his history, objected, as was his right, to certain inquiries into his past, but frankly admitted that he had been convicted of civil offences more than once.

"There was no evidence of mental disease, derangement or disorder at the time of examination and his history and behaviour did not suggest that he had suffered from any temporary mental disturbance due to combat or otherwise of a nature to affect his responsible judgement.

"Intelligence is above average with a mental age of 19 years (Kent Test). His military attitude is lacking in team sense, personal quality of responsibility or self respect. There is little hope that any measures would sustain his desire to perform his duty, because ordinary appeals do not affect his emotional values."

7. The charge sheet shows that accused is 23 years of age, that he was inducted into the Army 24 October 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of desertion in time of war.

Donald R. McKay . Judge Advocate.
Walter R. Brown . Judge Advocate.
Henry C. Keenick . Judge Advocate.



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

(93)

APO 534, U. S. Army,
18 October 1944.

Board of Review

NATO 3806

U N I T E D S T A T E S)

v.)

Private ROBERT L. LEMASTER)
(34 210 546), Company B,)
30th Infantry.)

3D INFANTRY DIVISION

Trial by G.C.M., convened at
Pozzuoli, Italy, 16 July 1944.
Dishonorable discharge and
confinement for 30 years.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Mackay, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert L. Lemaster, Company "B", 30th Infantry, did, at or near Venafro, Italy, on or about 5 November, 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 with the enemy, and did remain absent in desertion until he returned to military control at or near Palermo, Sicily, on or about 25 May, 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 the term of his natural life, three-fourths of the members of the court present concurring. The

269507

reviewing authority approved the sentence but reduced the period of confinement to 30 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, a member of Company B, 30th Infantry Regiment, was present on the afternoon of 5 November 1943 when the members of his platoon were informed they would move forward to engage in an attack against the enemy. After supper accused with his squad was transported some 20 miles by truck to a point near Venafro, Italy, where they detrucked preparatory to moving forward by foot, got in formation and awaited the hour to attack. Accused's squad leader then made a search of the entire platoon area and went up and down the platoon calling accused's name but did not find him. Accused was not given permission to be absent and was not present for duty with his company at any time between 5 November 1943 and 7 July 1944. Accused's platoon engaged in the planned attack. (R. 7-11)

After Article of War 24 had been explained to accused and after the investigating officer had informed him that he need not answer any questions asked him and that any answers he gave would be voluntary on his part and might be used "for or against him in a court-martial", accused made the following sworn-written statement which was introduced in evidence without objection:

"I absented myself from my organization between the 5th and 10th of November, 1943. At that time, my company was located South of Venafro, Italy, in a rest area. We were told that we were to load up on trucks and that we were going to move out; I didn't know whether this meant we were returning to combat or not, but I knew it meant that we were going toward the front.

"I got on the trucks with the rest of the Company. As I recall, we rode about five miles and then the convoy stopped near a cross-road. All the troops dismounted and advanced along the road afoot. I didn't advance with them but joined up with an Engineer outfit that was just off the road from where we dismounted. The reason I stayed with the Engineers was that we arrived at this X-road late at night and I was tired.

"The next day, I started toward Caserta and I arrived at my destination about a day and a half later. After I left the Engineers and before I came to Caserta, I asked a few soldiers if they knew where my company was located, but I could never find it so decided to go to Caserta. I

stayed in Caserta about one week, and during that time I lived in various civilian places. When I left Caserta, I went to Naples and stayed there for about two months and during that time I returned to Caserta and also visited other towns and villages nearby.

"After staying in Naples, I next went to the other side of Italy and visited Foggia, Bari, Benevento, Avellino, and other small towns along the road of travel. I remained in this part of Italy for about one month, again living with civilians. I then returned to Caserta and surrounding towns and remained about one or two months.

"During the first part of May, I was in a town near Nola, Italy, vicinity of Avellino. On the outskirts of this particular town was an American Airport. I caught a ride on a C-47 and went to a town near Gela, Sicily. From here I went to Catania, stayed there for about 2 days, and then went on to Messina. I stayed in Messina about two or three days and then traveled to Palermo. I rode on American and British vehicles but I did not tell the drivers that I was absent from my organization. I stayed in Palermo about one day and then returned to Messina, staying there about two days; from Messina I returned to Palermo, remained there about one day, and then surrendered myself to the Military Police. This was about the 25th of May, and this was the first time that I had returned to military control since absenting myself in November, 1943. I was then confined to the IBS Stockade until Sunday, 2 July, at which time I was taken to the FBS Stockade and remained there until I was returned to Company 'B' on 7 July, 1944.

"While I was in Caserta, I made inquiries as to the location of my organization. At times, I was told they were in combat, and at other times, in rest. However, I did not make any attempt to rejoin them. From the period of about 5 November, 1943, when I went absent from my organization, to about 25 May, 1944, I was continuously absent and never confined to any military hospital nor was I under military control in any other way.

"When I first went absent from the Company, I had quite a bit of money in my possession, and that held me over financially for about 3 months. When

I became broke, I ate with civilians and also with American and British troops. Until I turned in at Palermo, Sicily, I never disclosed my absence to any officer, M.P., or other military authority." (R. 12,14; Ex. A)

Accused elected to make an unsworn statement through counsel as follows:

"The accused has informed his defense counsel that he joined the First Division in North Africa and partook with the First Division through the entire Sicilian campaign. After the Sicilian campaign the accused was transferred to the Third Infantry Division and went with the Third on their landing at Salerno and fought with the Third up to Venafro. The accused wishes to ask of the court to weigh these circumstances and if they find him guilty of any charge it should be one of a lesser charge, that is under Article of War 61, as he had at no time entertained any thought of absenting himself permanently from his organization and I wish to invite the court's attention to the fact that the accused did turn himself in voluntarily to military control" (R. 17,18).

4. It thus appears from accused's sworn pretrial statement as well as from uncontroverted evidence that at the place and time alleged accused absented himself without proper leave from his organization and remained unauthorizedly absent until he surrendered himself to military control on or about 25 May 1944, more than six months afterwards, at Palermo, Sicily. At the time accused absented himself he had been informed his platoon was about to engage in an attack against the enemy, his platoon had been moved into position and the attack was imminent. After accused absented himself his platoon engaged in the planned attack which he avoided participating in by his unauthorized absence. Accused's pretrial statement discloses that during his extended absence he learned in reply to inquiries that his organization was in combat but that he made no attempt to return to it and surrendered himself to military control only after a long absence during which time he travelled over a large part of southern Italy and parts of Sicily. Neither accused's statement nor the evidence suggests the slightest legal excuse, explanation or justification for his actions. The evidence considered with accused's statement forecloses any conclusion other than that accused absented himself with the intention of avoiding the hazardous duty of combat with the enemy as alleged, in violation of Article of War 58 (MCM, 1928, par. 130a).

5. The staff judge advocate's review contains the following:

"The Division Psychiatrist reports an opinion that, at the time of the offense, accused was mentally responsible for his crime***"

"His commanding officer reports that accused's prior efficiency was unsatisfactory and that he was very much afraid of combat. At one time he abandoned his automatic rifle while under fire to run to a place of safety. His previous record shows that he was AWOL 'in September 1942' for a period of 131 days for which he was not tried".

6. The charge sheet shows that accused is 27 years of age. He was inducted into the Army 11 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 the sentence.

Donald H. MacKay, Judge Advocate.
Stephen G. Lewis, Judge Advocate.
Henry C. Reenick, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
15 November 1944.

Board of Review

NATO 3850

U N I T E D S T A T E S

v.

Private FLOYD DAVIS
(34 270 824), 3271st
Quartermaster Service
Company.

) ARMY AIR FORCE SERVICE COMMAND
) MEDITERRANEAN THEATER OF OPERATIONS

) Trial by G.C.M., convened at
) Adriatic Depot, APO 388, U. S.
) Army, 6 September 1944.
) Dishonorable discharge and
) confinement for life.
) U. S. Penitentiary, Lewisburg,
) Pennsylvania.

REVIEW by the BOARD OF REVIEW

Holmgren, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Floyd Davis, 3271st Quartermaster Service Company, did, at Foggia, Italy, on or about 1 July 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Antonio Emidio, a human being, by cutting him with a knife.

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

271950

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 about 2130 hours on the night of 30 June 1944 accused and Private Frank Poole, both members of the 3271st Quartermaster Service Company, went to an Italian home in Foggia, Italy, "seeking young ladies"; where they drank wine and talked with four British soldiers, two or three American soldiers, three Italian men and an Italian woman (R. 9-11,15,16,18,21,24,25,27). Among the Italians present were Antonio Emidio and Matteo Bevilacqua (R. 15,16). At about 2230 hours the other soldiers departed. Accused and Poole, although requested to leave, remained sitting at a table talking, joking and drinking wine (R. 10,11,17,18,21,22,25). Poole borrowed a pocket knife from accused and in a jesting way threatened and actually cut Bevilacqua on his left arm (R. 12,18,22,26). While Poole was threatening Bevilacqua with the knife Emidio struck Poole in the back of the head with a chair (R. 12,14,19,22,26). Poole then told Bevilacqua he was "only kidding", closed the knife and gave it to accused who was standing near the door (R. 12,19,22,26). Emidio then told accused and Poole to "go away" and, with the assistance of another Italian, pushed accused out of the room. Accused, with the pocket knife "under his palm", followed Emidio as he reentered the room (R. 13,22). Poole who was talking to Bevilacqua in the hall heard a woman scream and accused said to him "Let's go", "I cut this fellow" (R. 26,27). Accused and Poole then left. Emidio was heard to cry out "God help me", "I am dying" and was found with "his stomach cut and ruined" and "the room was full of blood" (R. 13,14,23,34). Emidio was carried to the civilian hospital in Foggia where he died the following day. Emidio was found to have received six stab wounds. Death resulted from insufficient respiration caused by the pulmonary passage being exposed as a result of a "penetration of the thorax" caused by "a puncture, an incision penetrating the cavity". (R. 6,7,9)

The following voluntary, sworn pretrial statement of accused, given after he had been informed that he did not have to make any statement and that anything he said might be used against him was, without objection, introduced in evidence:

"On Friday 30 June 1944 at about 1900 hours, Pvt. Frank Poole and I left camp. We went to _____ and had some eggs, drank a glass of wine and talked 'til about 2200 hours. We then left and visited some Italian's home, which was in a bombed building, near the center of the city on a nearby street. On arriving we found other soldiers and joined them in their drinking. After a while the other soldiers left. Poole and I remained there talking with the Italians. Somehow Poole and one of the Italians began to play. The Italians was trying to show Poole how to hold a man with a knife, which Poole had borrowed from me. While they were playing another Italian hit Poole on the head two times with a chair. I rushed over, shoved Poole aside, and asked him for my knife.

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

(101)

Poole closed the knife and put it into my pocket. I turned to the Italian with the chair and told him that Poole was only playing, when suddenly he advanced towards me with the chair. I made about two steps backwards, opening my knife, by which time the Italian was upon me and had hit me with the chair. I threw up my left hand and struck at him with the knife. About this time someone hit me on the right side of my head. Poole and I then ran out and proceeded on to our camp. I threw the knife in our company latrine 2 July 1944" (R. 28,30,31; Ex. B).

Accused elected to remain silent and the defense offered no evidence (R. 35).

4. It thus appears from the evidence that at the place and time alleged Antonio Emidio, the person named in the Specification, received six stab wounds which resulted in his death the following day. It further appears that shortly before the stabbing occurred accused and a soldier companion who had been hit over the head by Emidio, had become unwanted guests in an Italian home and Emidio had told them they must leave and with the assistance of another Italian ejected accused. It further appears that when Emidio reentered the room after ejecting accused, accused followed him with his pocket knife "under his palm". Almost immediately Emidio was heard to exclaim "God help me" and "I am dying" and accused told his companion "I cut this fellow", "Let's go". These facts and other circumstances in evidence, considered with accused's pretrial statement, amply warrant the conclusion that accused inflicted the fatal stab wounds. Malice is inferable from the use of a deadly weapon and other circumstances in evidence. The court properly found accused guilty of murder as charged.

Although the issue was not raised or supported by affirmative defense evidence, the statement of accused suggests that he stabbed Emidio in self-defense. To justify or excuse a homicide on the ground of self-defense, it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor, and that the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or to prevent great bodily harm to himself. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (MCM, 1928, par. 148a; 26 Am. Jur. Homicide, sec. 126, p. 242). Except in accused's statement there is no suggestion in the evidence that at the time of the stabbing accused was in immediate danger of losing his own life or of receiving serious bodily harm. Moreover, accused's statement fails to establish that there was no convenient or reasonable mode of escaping, retreating or declining combat. There is affirmative evidence showing that after accused had been ejected from the room by Emidio and another Italian accused reentered the room with his pocket knife in his hand and, it may be inferred, assaulted Emidio. The court was warranted in concluding that if accused had theretofore been in imminent danger of great bodily harm the danger had passed

271950

(102)

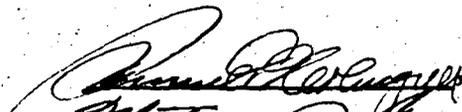
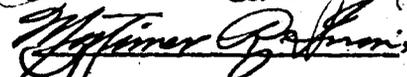
and was no longer pending when he voluntarily returned to the fray armed with a dangerous weapon. As has been said:

"Where after the original difficulty had ceased or deceased had abandoned it, or accused had an opportunity of declining further combat, and he instead continued the struggle or renewed the combat, he became the aggressor, irrespective of whether he was at fault in bringing on the original difficulty, and is not justified in claiming self-defense***" (40 C.J.S., Homicide, sec. 193, p. 1020).

The facts and circumstances disclosed by the evidence warrant the conclusion that accused did not stab Emidio in self-defense, and that the homicide was neither justifiable nor excusable.

5. The charge sheet shows that accused is 24 years of age. He was inducted into the Army 25 February 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. 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.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

271950

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
30 November 1944.

Board of Review

NATO 3906

UNITED STATES)

v.)

Private BOOKER T. RAY)
(34 659 885), Company A,)
909th Air Base Security)
Battalion.)

FIFTEENTH AIR FORCE

Trial by G.C.M., convened at
APO 520, U. S. Army, 11
September 1944.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Booker T. Ray, Company A, 909th Air Base Security Battalion did, at Galatina, Italy, on or about 4 July, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Raffaele Carlino, a human being by shooting him with a caliber thirty-eight (.38) Smith and Wesson revolver.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for unlawfully carrying a concealed weapon in violation of Article of War 96 and 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 life", three-fourths of the members of the court present concurring. The

276898

(104)

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 the evening of 3 July 1944, accused and Privates A. B. Pharr and C. D. Morris, all members of the 909th Air Base Security Battalion, and a soldier named Frank Jordan were in Galatina (Italy) (R. 4,5,11,20). There were seven or eight soldiers "in a lot of different places" drinking "Cognac, Strega, Champagne, Annisette, vino" (R. 11). At the last place, "the Cassina", Private Morris and Jordan became involved in "an argument about something", in which "Morris do the shooting" (R. 5,11). Sometime after 2400 hours Privates Pharr, Morris and accused left Galatina and started down the road back to camp. Pharr was "high" and Morris, who had brought his "caliber .38 Smith and Wesson revolver" and 32 rounds of ammunition with him to Galatina that day, was "drunk". (R. 5,10,20,23) "Sometime during the night" the gun "went out of" Morris's possession (R. 21). They came to a railroad crossing and "stood around there for a long time trying to catch a ride back to camp", but being unsuccessful "started to walking down the road" again. "About five or six hundred yards" from the railroad crossing the three soldiers stopped on the side of the road to rest and wait for a ride. Pharr and Morris lay down and went to sleep. (R. 5,23)

Shortly thereafter, four Italian carts in convoy came by on their way from Galatina to Lecce (R. 5,6,23,37,43,48,51). Accused stopped the last cart and asked for a ride; then the other carts stopped, the occupants dismounted, and Morris and Pharr "walked to the wagon" where accused was talking to the Italian driver (R. 6,23,38). Some controversy arose between the soldiers and one or more of the Italians, in which hot words were used on both sides. Morris heard the words "figli di putani" used, meaning "son-of-a-bitch", but did not know who said them. (R. 26,27) Some of the Italians heard the words "moneta" or "dare moneta", meaning "money" or "give money" (R. 41,42,49,53). In any event, Pharr either proceeded toward or attempted to climb on one of the carts, which precipitated an objection and resistance or attempt at resistance by one Carlino who advanced toward him with a whip (R. 6,7,23,26). Morris testified that he saw Pharr struck with the whip (R. 26), but Pharr stated that although the Italian "started at" him with the whip, struck at him "a lot of times" and tried to hit him "down across the head", he (Pharr) "knocked back the lick off every time", and was never struck or hit at any time with the whip handle on any part of his body (R. 7,86,87). Morris testified that as Pharr "was attempting to get on the wagon to ride on it" one of the Italians "grabbed hold to him and pulled him back off". Then,

"When this Italian had ahold of Pharr, Ray went up to him and try to pull him away from him. When Ray come up and attempted to pull Pharr away, they all started gathering around", and "Ray fired a shot into the crowd". (R. 23)

76898

Pharr testified that the Italians were "going to gang up on me and two shots were fired" by accused "to try to scare them back, but they kept coming up. Another shot was made and hit" the Italian (Carlino) "in the hip, and he went down on the knees and he get up again and grabbed me on the back", by the belt (R. 7). Then, while the Italian held him he moved his head to the left, whereupon accused shot "right along my shoulder", about 12 or 18 inches from the head (R. 8,17). Then Pharr, either "to keep from getting blood over me" or because "I got tired of him holding to me", pushed the Italian in the ditch. Pharr testified that "five shots in all" were fired on the road, and "I know two shots hit" the Italian. "There was some more shooting but they come from a high-powered rifle". (R. 16) Morris thought three or four shots were fired but "couldn't say how many shots were fired at all, because more shooting was going on" (R. 24,27).

One Italian witness testified that five shots were fired, but did not know whether Carlino "was hit with the second or third shot" (R. 39); another, that he heard four or five shots fired and "saw Carlino dead on the ground" (R. 43); another, that he heard four or five shots and "saw the flame" (R. 47); another, that he heard two shots fired and "after the first shots were fired" Carlino "was talking zig-zag" (R. 49,50); another, that he heard a pistol fired and was "sure of two or three shots" (R. 52). None of them saw Carlino raise his whip or strike anyone with it (R. 41,44, 46,50,53,54).

Pharr testified that after the last shot was fired he "went through a gateway and on out through the grapefield where Morris was". Accused joined them in the field and they started back to camp. While running through the grapefield accused said to Pharr, "Italian, he won't talk no more". (R. 8,9) Morris testified that accused gave his pistol back to him some time "after the argument with the Italians", and he subsequently turned it over to Captain Benjamin E. Liddle (R. 22,24,25,30).

An autopsy was performed 5 July 1944 on the body of "a certain Raffaele Carlino" at the "receiving vault in Galatina" (R. 30). Captain Edward J. D'Arata, Medical Corps, 909th Air Base Security Battalion, testified that he participated in the autopsy (R. 30) and

"found three wounds, apparently caused by the bullets. One was located in the right thigh, the inner aspect along the upper third. It was a perforated wound going through and through. The second wound's point of entrance was at the right buttock. No point of exit could be found. Dissection of the latter area traced the bullet path as far as the scrotum or scrotus sac. The third wound was a through and through wound. Its point of entrance was at the right temporal bone. The point of exit was on a lower level on the left side, towards the rear to the left of what we call phoramem magnum, through which the spinal column proceeds from the brain proper."

He further testified that the cause of death was

"Profound surgical shock caused by a penetrated wound of the brain which hit the vital centers at the base of the brain, which struck the respiratory processes. Those were penetrated by the path of the bullet." (R. 31)

Mr. William B. Burden, Criminal Investigating Office, testified that he interviewed accused several times between 5 July and 9 July, on each occasion warning him "of the rights under the 24th Article of War" by telling him "that any statement that he was to give us must of necessity be of his own free will, and he must give them knowing that any statement that he gives us can be used against him at a trial, if there is a trial", and that on 9 July accused signed and swore to a statement which, read into the record over objection by the defense (R. 32-35), was in pertinent part as follows:

"I left my organization on the evening of the 3rd of July 1944 about 1700 hours and hitchhiked into the town of Galatina. I met a Sgt. from the Air Base and we went together to a bar to have a drink. We then went to a place called the Cassina where we stayed until after dark. During the evening Pvt. MORRIS and Pvt. JORDAN became engaged in an argument during which argument Pvt. MORRIS fired his Cal. 38 Smith and Wesson revolver several times. After the argument Pvt. MORRIS, Pvt. PHARR and myself left Galatina and started back to camp. We stopped at a railroad crossing just outside of Galatina where we attempted to catch a ride. It was at this time, observing that Pvt. MORRIS and Pvt. PHARR were quite drunk, that I asked Pvt. MORRIS to permit me to carry the revolver. Unable to catch a ride we started walking back to camp on the Lecce - Galatina highway. Pvt. MORRIS and Pvt. PHARR were quite drunk and decided to rest alongside the road. After about thirty minutes, I noticed four horse-drawn carts approaching, headed toward Lecce. I called to the driver of one of the carts asking him for a ride back to camp. Two of the men dismounted from the second cart and started speaking to me in Italian. At this time I was carrying the revolver concealed in my shirt. I then called to Pvt. MORRIS who was sleeping alongside the road, asking him to tell me what the Italians were saying. Pvt. PHARR came to the scene and one of the Italians started striking at him with a whip handle. Pvt. MORRIS and I tried to separate Pvt. PHARR from the Italian

who was striking at him. At this time, all the Italians on the other three carts dismounted and started rushing at us. Two Italians were grappling with Pvt. PHARR. One was in front of PHARR and the other, holding a whip handle was striking at him from the rear and holding PHARR from the rear. From a distance of about 14 (fourteen) feet, I fired the Cal. 38 Smith and Wesson revolver in the direction of the Italian that was striking at Pvt. PHARR. To my knowledge he was beating Pvt. PHARR with his whip handle. The Italian still held on to Pvt. PHARR, so I ran to the side in order not to hit PHARR and from a distance of about 10 (ten) feet, I fired the second shot at the same Italian who was still holding PHARR. I then attempted to fire again at the Italian, pulling the trigger one or twice more, but I do not believe that it fired as I believe that all rounds had been expended. Pvt. PHARR was able to break loose from the Italian, and started running out across a grape field with Pvt. MORRIS and myself. We had ran about 50 (fifty) yards across the field when we heard shots coming from the direction of the Italians on the road. Fearing that they might hit us we stopped and lay down in the field. After only a few minutes we observed that the Italians were looking for us, we again started running toward camp. The group of Italians chased us for some time, occasionally firing at us. When we arrived in camp I returned the revolver to Pvt. MORRIS. At no time during the incident, was I actually struck by the Italians, but as they were holding Pvt. PHARR and swinging this whip handle, I believed that he was being struck and seriously injured" (R. 35,36; Ex. 4).

Accused testified that on 3 July (1944) C. D. Morris and Frank Jordan had been involved in some shooting in Galatina and on the way back to camp with Pharr and Morris he "forced" Morris to give him the pistol "because he was drinking and to avoid trouble because he is liable to start shooting at someone" (R. 58-60). Pharr and Morris lay down to rest on the side of the road (R. 60,61) and after about 30 minutes four carts approached. Accused asked for a ride to camp and the carts stopped. "Then this Italian got off the second cart", and, accused continued,

"he come to me and started to talk in Italian to me. I didn't understand, so I went and pulled Morris' hand and woke him up, and asked him to understand what the Italian was saying, and he didn't understand him, and Morris and this Italian were talking and then Pharr he got up and he goes towards the

cart, and then this Italian shove him back, and Pharr said something to him, and this Italian had the whip in his hand and then he strike Pharr with it after he shoved him back, and at that time, Morris, he ran out and then all the Italians off the first cart and the second cart they ran back where we was at. There wasn't any off the third cart at that time, so then I tried to get Pharr away from the Italian what was beating him with the whip stick and at that time they started gathering on us so fast, I left out the crowd myself, and then Pharr went to hollering for help, asking us to help him, and Morris, he made the answer, 'I'm not going in the crowd.', and then they went to yelling, but what they was saying, I couldn't understand."

Then, accused testified,

"I see that I couldn't get Pharr out of the crowd, I shot once, and then I shot again, but the second shot, I didn't hit anyone, and then when I shot the second shot, the Italian guard at the gas dump they come running out there and they was shooting too, and then I shot the third time, and I believe I hit this guy in the head, and then Pharr was able to break loose from him and we break into a run. We run across the grapefield, and those Italian guards, they was still hunting us, firing at us with their pieces. They was close behind us, and we fell down right where we was at, and then we find that they was looking for us, we started running again, and they were still behind us, firing, and we ran until we got almost to camp before I returned the .38 back to Morris."
(R. 62,63)

He testified that the Italian struck Pharr "with the whip. With the stick, not the whip, the stick" and "this Italian was hanging on to him" (R. 63,64); that Pharr was yelling "You all please come help me you aren't going to let him do like that" (R. 65,66) and said "Will you all please come and help me, don't let him kill me" a "good many times" (R. 67). Accused testified that he "thought they was going to kill" Pharr and "I shot to hit that guy what was hitting on Pharr then" (R. 67, 68). He fired a total of three shots (R. 68,69). The second shot was not fired "at anyone" (R. 74), but at the third shot "I moved up close like and shot at the Italian". At that time accused was about three and a half feet from the Italian. (R. 75,84) The Italian did not strike accused, and only one person grabbed Pharr (R. 79).

Private Morris testified for the defense that "between the first and

276898

second shots" he noticed some people approaching the scene and they "had something in their hands. I thought it was a gun, because some more shots come after the third shot was fired" (R. 84).

4. It thus appears from undisputed evidence that at the time and place alleged accused with a revolver shot and killed Raffaele Carlino, the person named in the Specification. Late at night and on a dark country road accused stopped a convoy of four Italian carts, seeking transportation to camp for himself and his two drunken companions. A general melee ensued in the course of which Private Pharr, a companion of accused, became involved in a dispute between himself and deceased, during which the latter struck or endeavored to strike Pharr with a whip. Accused fired at least three shots with his revolver, the third of which at least, he deliberately aimed at deceased from close proximity. Accused admitted that he intentionally shot Carlino but advanced as excuse for the killing the assault on Pharr. There is a conflict in the testimony as to whether or not deceased struck Pharr with his whip or used the whip at all. Pharr testified that Carlino struck at him many times, but denied that he was ever hit with the whip on any part of his body.

The doctrine of self-defense may sometimes be extended to the protection of certain persons occupying a particular relationship to an accused, such as parent and child, or husband and wife, or master and servant, and excusable homicide includes this as well as cases of another category wherein fatal wounds are inflicted in the prevention of felonies by violence (Wharton's Criminal Law, Vol. I, secs. 428, 626). No particular relationship is shown, but it might be contended that accused acted to prevent a felony. The legal principles applicable under such circumstances have been stated as follows:

"The duty of interfering to prevent a felony is*** not limited by the relationship of the party interfering to the party attacked, but depends on the fierceness of the attack and the probability that by such intervention alone could the felony be prevented***if a party attempting a felony be not armed (either actually or apparently) with a deadly weapon, or does not possess (either actually or apparently) such superior strength and determination as to enable him to effect his purpose unless he be killed, then killing him by a deadly weapon is not excusable" (Wharton, op. cit. secs. 626, 630; See also 30 C.J. 81).

The court was justified in concluding that accused had no reasonable cause to believe that a felonious assault was being committed against Pharr by Carlino. Accused and his companions provoked the difficulty in the beginning and there is evidence that accused or his companions used the words "moneta" or "dare moneta" meaning "money" or "give money", which would have justified Carlino in resisting an attempt to take money from him by

force. Even if the appearances justified a belief that a felony was being attempted, it is manifest, moreover, that the force employed by accused to resist the attack and to subdue the attacker exceeded that which was necessary under the circumstances. There was no legal excuse or justification for the killing, and the court was warranted in finding accused guilty as charged (MCM, 1928, par. 148a).

5. Defense offered "to prove on behalf of the defendant that on the night in question, a Carabinieri stopped Meli, that he told him that he must not proceed on that road alone, that there had been a number of robberies on that road and that he must go in convoy. It is further offered to show that at the time of the incident, that this witness and the others were frightened because of the reputation for hold-ups on this particular road, which had previously occurred. We offer that as a background of the instances involved. At this time we are attempting to show the background and mental status of the Italians who were there present, from which the court may deduce and understand that perhaps the mental status of the deceased was also the same" (R. 56). The law member ruled that "the offer of evidence will not be admitted" (R. 57).

The ruling of the law member was correct. Evidence to be admissible must be material and relevant and the alleged mental condition of Italian bystanders was neither.

6. Similarly a ruling of the law member in permitting accused's statement to be read into the record was correct. Inasmuch as accused therein attempted to justify the killing by the alleged attack on Pharr, the statement was not a confession (MCM, 1928, par. 114b). Moreover, it was sufficiently shown to have been voluntarily made.

7. The charge sheet shows that accused is about 20 years of age, was inducted into the Army 19 June 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. 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.

Walter R. Linn, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Keesick, Judge Advocate.

about 15 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Madame Lucy Collomp.

Accused expressly consented to be jointly tried. Each pleaded not guilty to and was found guilty of the Charge and Specification pertaining to him. No evidence of previous convictions was introduced as to either accused.

Accused Maxey 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 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.

Accused Hollingsworth 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 the morning of 15 August 1944, accused, members of the 3277th Quartermaster Service Company, landed with the invading Seventh United States Army on the southern coast of France in the vicinity of St. Tropez (R. 38,57). At about 1700 hours accused appeared at the home of Monsieur Cesar Collomp, a farmer residing about two kilometers from St. Tropez, and requested wine which Collomp gave them. Collomp and accused attempted but were unable to converse because of linguistic difficulties. (R. 9,10,27,35) Maxey was outside, standing at the door, when Madame Collomp, the 22 year old wife of Monsieur Collomp, appeared (R. 11). Accused remained for about ten minutes and, as they were leaving, one of them asked Madame Collomp, "Are you Madame or Mademoiselle?" (R. 11,27).

About 2200 hours the same evening accused returned to the Collomp home, knocked noisily on the door and fired their rifles. Collomp, who was awakened by the noise, opened the upstairs bedroom window and inquired who was there. Accused replied "Americans", whereupon Collomp, carrying a lamp, went down and admitted them. Accused asked about "Tedeschi", causing Collomp, who understood Italian but no English, to believe they desired to search the house for Germans (R. 11,25,27,28,35). There were two bedrooms on the second floor, one of which was the Collomp's bedroom and the other the bedroom of a Madame Niel and Collomp's infant son. While accused were searching two downstairs rooms, Madame Collomp got out of bed (R. 11,12,28), put on a "sort of shirt and dress" (R. 33) and joined Madame Niel and the child in their bedroom (R. 11,12,28). After searching the two downstairs rooms accused, with Collomp carrying the lamp, proceeded upstairs. They first entered the room occupied by the two women and the child. Hollingsworth looked under the bed, then pointed his rifle at the child and worked

the bolt. (R. 12,21,32) Madame Niel noticed that Maxey had a "rather yellow" ring on the little finger of his right hand (R. 37). Maxey then pushed Collomp in the other bedroom, looked under the bed, forced open a wardrobe, shook out everything inside, then went out leaving Collomp in the room and shutting the door (R. 13). Collomp came out of the room and Maxey indicated that he wanted to speak to Madame Collomp. Collomp told his wife Maxey desired to speak to her and said "Go and see what is the matter". Madame Collomp got up from the bed and went to see what accused wanted. Maxey took Madame Collomp by the arm and pulled her into her bedroom, closed the door, held it, then pushed her toward the bed. (R. 13,14,28,33,35) Madame Collomp called "Cesar, Cesar" and Collomp, hearing his wife screaming, forced the door open whereupon his wife rushed into his arms (R. 14,29,35). Hollingsworth - who "was laughing all the time" - and Maxey then talked together "for awhile", after which Maxey took the lamp and made Collomp and his wife understand "by motion" that they were to go downstairs (R. 14,21, 29,32,33,36). Maxey went first holding the lamp, followed by the Collomps and Hollingsworth (R. 14,29). Maxey opened the door leading into the garden and thereupon took Madame Collomp by the arm and dragged her, screaming, outside. Collomp gave Maxey a "bang on the wrist" causing him to release Madame Collomp. Maxey then flung the door open, stepped out two paces, "bolted his rifle", "got his rifle ready", and held it in "a firing position" pointed at Collomp, who held up his hands. Maxey then swung at Collomp with the butt of his rifle, Collomp ducked, taking the blow on the shoulder and wrist. Collomp "was hurt and had to let go" of his wife. Maxey then dragged Madame Collomp outside. The door was closed and Hollingsworth, holding his rifle pointed at Collomp, ordered Collomp not to move. (R. 14-16,22,29)

As to what Maxey did after dragging her out into the garden, Madame Collomp testified that,

"He held me by the arm. When we got in back of the house, I saw him doing something with his rifle. I don't know anything about weapons, so I didn't know what he was doing with it, and he forced me to walk in front of him about fifty yards away from the house. When we got about fifty yards away, he made me understand to stop. He pushed me to make me understand I must lie down." (R. 29)

Furthermore, the following colloquy:

"Q Did you lie down?

A He put his rifle down on the ground. He lifted my skirt and then, 'he took me.'

Q What did he do actually? Did he take his pants down?

A He opened his pants.

Q Did he get on top of you?

A Yes.

(134)

Q Did his penis penetrate your vagina?

A Yes.

Q He completed the act of intercourse with you?

A Yes.

Q Why didn't you resist?

A At the time I thought if I ran away or yelled, he was going to kill me. I wanted to live for my baby and husband" (R. 29,30).

and, "I was scared, I didn't know what I was doing", and further:

"I was shaking with fright. When he pushed my shoulder, I laid down. I was so scared, I didn't want to resist" (R. 33).

After detaining Collomp in the kitchen for eight to ten minutes with his rifle pointed at him, Hollingsworth went out into the garden and called for "Maxey". Collomp thereupon yelled for help and Hollingsworth immediately returned, closed the door, and again went out and called "Maxey", who at that time was returning to the house, preceded by Madame Collomp. (R. 15-17, 30) Madame Collomp, crying and shaking all over, rushed into her husband's arms screaming, "I've had it", "I've been raped", "He took me" (R. 17-19, 31,36). Collomp locked the entrance door, then carried his wife upstairs and laid her on the bed (R. 18,31). Accused remained for half an hour, knocking on the door and firing their rifles. One bullet broke a window in the room where Madame Niel and the Collomps were, struck the ceiling and then fell to the floor. (R. 18,31) For about two hours Collomp and Madame Niel yelled for help (R. 18,31,36,37).

About 2300 hours accused appeared at the chateau of Monsieur Michel Nehme, some 250 to 300 yards from the Collomp residence (R. 42,43,45). In response to their knocking, Mademoiselle Henriette Nehme, daughter of Monsieur Nehme, came downstairs and Maxey, whom she saw through a hole in the door, said "Sleep, Sleep", which Mademoiselle Nehme interpreted to mean they desired a place to sleep. She called her father who showed accused to a little house adjoining the chateau where other American soldiers, including Private George Boston, 4133d Quartermaster Company, were staying. (R. 39,40,43,50,51) One of these soldiers told Nehme to give accused some wine. Nehme accordingly took accused into the kitchen of the chateau and being unable to find a funnel with which to pour wine into their canteens called his daughter. (R. 40,41,43,44) One of accused offered to pay for the wine, but his offer was declined (R. 41). Maxey took two photographs from his wallet, one of a white woman and one of a little colored girl and exhibited them to Mademoiselle Nehme. He told her the white woman was his wife. (R. 41)

Private George Boston testified that he stayed at the chateau of "a French family" on "yellow beach" the night of D day, August 15th, and that accused came there "between 12 and 12:30" and spent the night there. Witness testified further that accused Maxey stated "he had been to a house at night sometime and had intercourse" but did not say "who he had it with". (R. 51,52)

Madame Niel testified that the following morning she asked Madame Collomp "what did the man do", and she replied "He forced me to lie down" and "He raped me" (R. 36).

Accused's company commander testified that accused landed with their platoon on "yellow beach" at about 1030 or 1100 hours on the morning of 15 August 1944, but were absent at about 1730 that afternoon when their unit returned to "yellow beach" where it remained until 2130 when it embarked on an "LCI" for "red beach", which was at Cavalliere. Witness testified further that accused had not been sent out on any detail to pick up packs or hunt Germans and that after the company landed he did not see accused again until 0830 hours the morning of 16 August (1944) when accused rejoined the company. (R. 38,39)

First Lieutenant Lewis Burnstein, 504th Military Police Battalion, testified that pursuant to directions of the Provost Marshal, Seventh Army, he investigated the case and interrogated accused Hollingsworth who stated he and "another soldier" had been at the Collomp home and also at the chateau of Monsieur Nehme where they encountered two other colored soldiers (R. 44-46). Witness testified further that on 20 August (1944) he placed accused under arrest and conducted them to the bivouac area of the 3252d Quartermaster Service Company near St. Tropez where arrangements were made to have four colored soldiers of approximately the same height and complexion as accused line up with them preparatory to determining if the Collomps and Madame Niel could identify them (R. 46). The Collomps and Madame Niel were then brought to the bivouac area and one at a time allowed to view the group of six colored soldiers each of whom had on either a helmet or helmet liner (R. 46). Without hesitation, Madame Collomp and then Monsieur Collomp immediately identified Maxey and Hollingsworth (R. 19,20,31,47).

Witness testified further that when apprehended Maxey was wearing a ring on the small finger of his right hand and "withdrew" another ring in the shape of a heart which he stated he wore on the little finger of his left hand, and he said that "on the day of the invasion he had been wearing both of them". Both rings were "a yellow gold color". (R. 47,48)

Witness testified further that when Maxey was apprehended he handed witness a wallet and that witness

"Retained it in my possession and later on brought it up to Miss Nehme and showed her this wallet, asked her if she'd seen it before. She said it was the same wallet and picture that the colored soldier had shown to her

(116)

August 15th when he created a disturbance and had been in her kitchen" (R. 47).

Asked on cross-examination if Hollingsworth showed any reluctance to answer questions witness testified "Well, I would state it was voluntary, that is his statements were voluntary if that's what you mean" (R. 50).

Witness testified further that he stated in his report that both Collomp and Madame Collomp, at the time witness interviewed them, indicated that "one soldier tried to calm the other" while "they were upstairs, just prior to the time one of the soldiers was supposed to have taken Madame Collomp out of the house" and explained that the word "calm" was the best synonym to describe the impression he intended to convey (R. 48,49).

Accused Hollingsworth elected to make an unsworn statement and in response to interrogatories propounded by defense counsel stated that he went to the Collomp home on the evening of D day, 15 August 1944, but did not fire his rifle, and that Lieutenant Burnstein subsequently examined his rifle and found it had not been fired. After Collomp opened the door Hollingsworth and another soldier entered the house and went upstairs and entered a room where he saw a little boy, a big fat lady and a man and his wife. The other soldier took "Mrs. Collomp" to another room and Hollingsworth did not point his rifle at Collomp or any person but had it against his leg, and did not in any way try to prevent Collomp from going to his wife's assistance. When the other soldier was taking "Mrs. Collomp" from the house, Collomp did not in any way ask Hollingsworth to "stop the taking of Mrs. Collomp from the house" but Collomp at the time was "just hollering", "yelling", and the other soldier struck "Mr. Collomp" with his rifle. Hollingsworth further stated that he "wanted to help the man", that he rubbed "this man's shoulder"; and while doing so he had his rifle which was not loaded "Twixt my legs". He stated that he tried to tell Collomp he "was going to help him" and that within two minutes from the time the other soldier "left the room" he went to look for him, "to try to get the other soldier in". He went outside the house about "three or four" yards and in the dark called the other soldier. He got no answer. There was nothing to prevent Collomp from leaving the house after witness left to search for the other soldier. (R. 54-57)

The law member directed that the statement of Hollingsworth be considered only as relating to accused Hollingsworth (R. 54).

Lieutenant Michael F. Sullivan, recalled as a witness for the defense, testified that accused Hollingsworth had been a member of his company for 11 months and that prior to the alleged incident he had no court-martial record, had a good character and perhaps had been given company punishment but not on a serious charge (R. 57,58).

Accused Maxey elected to remain silent (R. 57).

4. It thus appears from the evidence that at the place and time

alleged accused Maxey had unlawful carnal knowledge of Madame Lucy Collomp, the woman named in the Specification, by force and without her consent. In the afternoon of the day the assault occurred accused, members of our invasion forces just landed on the southern coast of France, stopped by the farmhouse of Monsieur Cesar Collomp, the woman's husband and requested wine. On that occasion they noticed Madame Collomp, whom they asked whether she was a "Madame or Mademoiselle". Then at night accused again went to the Collomp home. They fired their rifles, pounded on the door of the house and importunately gained admittance upon the pretext of searching for Germans. Their real purpose soon became manifest, for Maxey, accompanied by Hollingsworth's knowing intermittent laughs, seized Madame Collomp, pulled her into her bedroom and pushed her toward the bed. She called for her husband, screamed and succeeded in forcing open the door and rushing into the arms of her husband. Thereupon, following a brief conversation between the two accused, Maxey motioned the Collomps to go downstairs. There, after striking and fighting off Monsieur Collomp, Maxey forcibly dragged the woman, who screamed, out of the door leading into the garden. The door was closed and inside the house Hollingsworth, pointing his rifle at Monsieur Collomp, ordered him not to move. There is evidence that Maxey, with his rifle forced Madame Collomp about 50 yards away from the house where he pushed her shoulder to indicate she should lie down on the ground. He thereupon had sexual intercourse with her. The woman shook with fright and thought if she ran or resisted she would be killed. Upon completion of the act, Maxey got up and the woman, crying and shaking, rushed to her husband screaming "I've had it", "I've been raped", "He took me". That the act of sexual intercourse was accomplished with force and without the woman's consent is clearly inferable from the circumstances. The phase of her testimony that she did not want to resist is fully explicable by her fear-engrossed state of mind induced by the accused's violent conduct. It is rape, though a female may yield through fear. Upon the facts and circumstances disclosed the court was clearly warranted in finding Maxey guilty of the offense charged.

As to Hollingsworth, the evidence likewise supports the findings of guilty. His conduct throughout was one of countenancing and rendering aid to Maxey in the perpetration of the physical rape. And with his rifle he effectively restrained the woman's husband from going to her assistance. As aptly stated:

"Although two persons cannot be jointly guilty of a single joint rape, because by the very nature of the act individual action is necessary, all persons present aiding and abetting another in the commission of rape are guilty as principals and punishable equally with the actual perpetrator of the crime" (52 C.J. sec. 50, p. 1036).

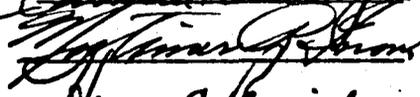
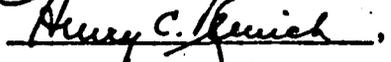
Hollingsworth was properly charged and found guilty as a principal (NATO 385, Speed; 52 C.J. Rape, sec. 73, pp. 1049, 1050).

5. While certain evidence introduced was hearsay, it is patent that it was purely cumulative of facts already competently established. The

competency of the testimony relating to the extra-judicial identifications of accused was questionable (CM 187116, Martinovich; Gray v. State, 137 S.W. (2) 777, 138 Tex. Cr. R. 587), but the identifications of accused in court were positive and unequivocal. It is inconceivable that consideration of such and other questionable evidence, even though it had been admitted upon objection by defense, could have influenced the findings of the court or, if error, could have injuriously affected the substantial rights of the accused.

6. The charge sheet shows that accused Maxey is 22 years of age and was inducted into the Army 16 November 1942. No prior service is shown. Accused Hollingsworth is 25 years of age 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 sentences. 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, in the case of Hollingsworth, 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 2801, Title 22, Code of the District of Columbia.

 Judge Advocate.
 Judge Advocate.
 , Judge Advocate.

CONFIDENTIAL

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

APC 534, U. S. Army,
28 October 1944.

Board of Review

NATO 3940

UNITED STATES

v.

Privates CURTIS L. MAXEY
(34 554 198) and L. B.
HOLLINGSWORTH (34 429 655),
both of 3277th Quartermaster
Service Company.

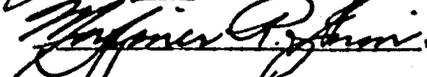
SEVENTH ARMY

Trial by G.C.M., convened at
St. Tropez, France, 4 September
1944.
Maxey: Death.
Hollingsworth: Dishonorable
discharge and confinement for
life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Holmgren, Irion and Remick, 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 sentence as to Maxey.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

NATO 3940 1st Ind.
Branch Office of The Judge Advocate General, NATCUSA, APO 534, U. S. Army,
28 October 1944.

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

- 1. In the case of Privates Curtis L. Maxey (34 554 198) and L. B. Hollingsworth (34 429 655), both of 3277 Quartermaster Service Company,

CONFIDENTIAL

(120)

NATO 3940, 1st Ind.
28 October 1944 (Continued).

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as to Maxey, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. A separate holding with respect to the sentence as to Hollingsworth has been transmitted to the reviewing authority, the Commanding General, Seventh Army, who will publish a general court-martial order in the case pertaining to Hollingsworth. It is recommended that a general court-martial order promulgating the proceedings as to Maxey be published by your headquarters.

3. 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 3940).



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

(Sentence ordered executed. GCMO 79, NATO, 28 Oct 1944)

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
7 December 1944.

Board of Review

MTO 4061

UNITED STATES	)	IV CORPS
)	
v.	)	Trial by G.C.M., convened at
	)	Staffoli, Italy, 25 September
Private GARFIELD O. JONES	)	1944.
(14 032 655), Company B,	)	Dishonorable discharge and
894th Tank Destroyer	)	confinement for life.
Battalion.	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Garfield O. Jones, Company B, 894th Tank Destroyer Battalion, did, at Vicarello, Italy, on or about 18 August 1944, with malice aforethought, willfully, deliberately, feloniously and unlawfully, and with premeditation, kill one Aldo Dini, a human being, by shooting him with a pistol.

CHARGE II: Violation of the 93d 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 its Specification and not guilty of Charge II and

its 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. 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 50 $\frac{1}{2}$.

3. The evidence shows that about 2215 hours on 18 August 1944 accused, Sergeant Michael P. Collins, Corporal Everett Beardon, Private Donald E. Cole and Private Robert J. Hogland, all members of Company B, 894th Tank Destroyer Battalion, were proceeding north from Vicarello, Italy, to their camp area in a "jeep" driven by accused (R. 36,60,68,78,84,100,101). Accused and Collins were armed with ".45s". Hogland had a "Luger", and the other two soldiers were not armed. (R. 36,72) Because it was a dark night, raining, and tank traffic on the highway was heavy, the soldiers stopped at a farmhouse about a mile north of Vicarello (R. 31,33,36,37,39,60,61,69,73,78,84,101). Collins, Beardon and Cole entered the kitchen of the house where they found Aldo Dini, an Italian civilian, who was soon joined by his sister Giulia Betti Dini (R. 24,25,28,37,61,84,116). Accused and Hogland remained with the "jeep" which was parked near a stairway leading to a room occupied by Giulio Dini, his wife, baby, mother and sister (R. 18,20,24,40,61; Ex. 1). Giulio Dini upon learning there were some American soldiers at the foot of the stairs came down with his mother and sister to investigate (R. 17,18,30).

Accused "with insistence" asked Giulio for some wine and eggs. Giulio replied he was a refugee, not a farmer, and did not have any wine or eggs. (R. 15,17,18,30) As Giulio attempted to "back up" the stairs he was "grabbed" by the arm and struck over the head with the butt of a pistol by one of the soldiers (R. 19,21,31,33). Giulio could not recognize his assailant (R. 23). Giulio freed himself and ran up the stairway to his room (R. 19,20,61,115). Giulio's mother shouted "Run, Aldo, they have wounded Giulio" (R. 31). The three soldiers and Aldo and Giulia, who were in the kitchen, heard the shouting. Aldo ran up the stairs to Giulio's room to see what had happened to him and was told Giulio had been injured by "the Americans". (R. 20,25,31,37,61,115) Aldo, who appeared to be angry, said "I will go down" and descended the stairway immediately. Giulio testified that Aldo had no weapon when he left the room. As he came down the stairway Aldo said "Where are those villains?" (R. 20,21,25,28,31,33) Accused called to Hogland "Watch out, he's got a gun" (R. 70,74,88).

When Aldo reached the bottom of the stairway two soldiers advanced toward him and one of them struck him knocking him down (R. 26,29,32). Aldo was then shot through the head with a pistol, the bullet entering the right and exiting from the left side of the skull, "a through and through wound", causing instantaneous death (R. 7-9,26,29,32). Aldo's sister testified that she was an eyewitness to the shooting and that Aldo was "on the ground" when he was shot (R. 26,29). Powder burns were found on Aldo's face and abrasions on the back of his head (R. 8-10,12,13).

After the shooting, accused and the other four soldiers returned to their camp in the "jeep". It was agreed en route to say nothing about "the incident", their reason being that they had kept the vehicle overtime when it was needed for other company duties. Either en route or after arrival at camp, accused said he had "fired one shot straight up in the air" during the "incident" and that he "had borrowed the gun and didn't think it would be best to say anything about it". (R. 39,40) Upon arrival at camp, accused left the pistol he was carrying in a box in the first platoon "CP" (R. 61).

Aldo's sister testified she saw Aldo come down the stairs, saw him knocked to the ground and shot, and that he was not armed; that the family had no weapon in their possession on that date and there were no guns or weapons in the house (R. 25,28). Aldo's mother testified that she saw Aldo as he descended the stairway and he did not have a weapon (R. 31,34).

On 20 August 1944, an agent of the Criminal Investigations Division, Fifth Army, explained Article of War 24 to accused and told him he did not have to make a statement but if he did it could be "held against him", and interviewed him in the presence of his company commander and another agent. Accused did not at that time give a statement except to the effect that he was "in town" in the company of other members of his organization but returned to his area. (R. 41,42,45,47) The company commander testified that the agents told the five soldiers "it would be better" if the man who "was guilty" came to the company commander and "talked it over" with him; that the company commander "would be acting more or less as a father to the man who did it, and they could tell their troubles" to him. One of the agents testified he assembled the suspected men, including accused, and told them that they did not have to make a statement but if they did make a statement it "would" be used against them, and that if he "were in their shoes" he would "take the company commander into my confidence and inform him what had happened". After the agents had departed accused's company commander talked to the five soldiers who had been at the farmhouse when the alleged offense occurred and "told them--the man who was guilty, it would be better in the long run, and he would probably come out lighter--if they told about it" (R. 43,48). Later that night, accused asked the company commander if he would advise accused to make a statement and "to admit it if he did it". The company commander told accused he "would" because he thought "it would be better" for accused "in case of trial. The court would probably be easier on him" (R. 48,52). The company commander did not "use any threat on" accused but told accused he would "help" as much as he could "as his company commander" (R. 48).

About 0900 hours the following morning, in the presence of the company commander, and after accused had again been informed of his rights under Article of War 24 and told "about not having to make a statement" and that "anything he said would be used against him", accused gave a statement to two Criminal Investigations Division agents (R. 42,43,45-48,58,59). "During the time" accused was making the statement his company commander asked "if he understood the 24th Article of War, and did he know what he was doing,

and he said yes" (R. 59). The statement was taken in longhand by one of the agents, signed by accused and, as a witness, by the company commander (R. 48; Ex. 2). At the time accused gave the statement the agents "didn't hold out hope" to accused that "it would possibly be easier for him if he confessed" (R. 58). The company commander testified that in his opinion the meaning of Article of War 24 was not explained to accused in such a manner that accused "understood it beyond a reasonable doubt", that the meaning of the Article was "not fully comprehended" by accused, but that accused was told "that he didn't have to make a statement but if he made one it could be held against him", but the "meaning itself" was "not explained" (R. 50). The company commander testified that accused "should have been explained the consequences of making a statement; which were not explained" and that those consequences were "that if he did make a statement it could be used against him in future courts-martial" (R. 51). The company commander answered in the affirmative a question as to whether he was present and heard what in his opinion "was Pvt. Jones being correctly informed of his rights under the 24th Article of War?" and testified further that the "two CID men told him he didn't have to make a statement, but if he did make one it could be used against him", and that the agents did not appear to use any force or duress on accused to obtain the statement and did not promise accused anything (R. 47,49,53).

One of the investigating agents testified that accused's company commander was present at all interviews with accused and made no complaint that accused's rights were not fully explained to him and that the company commander told "the men" they "didn't have to make a statement, but if they did make a statement it would be used against them" (R. 56,57). The defense objected to the introduction of accused's statement

"upon the grounds that the taking of a signed confession in a murder case is an extremely ticklish proposition. You do not know under what mental conditions the accused may be laboring at that time. It is true that the prosecution has shown evidence of the accused's presence at the farmhouse, but there has been no evidence that anyone saw him shoot the man—to say, 'I saw Pvt Jones take this gun and shoot this man.' The MCM states very clearly that it is a very ticklish thing to deal with and great damage or a great injustice may be done the accused if that statement is admitted" (R. 60).

The following statement of accused was received in evidence over the above objection:

"I, the undersigned, having been read the 24th Article of War and being warned of my rights as a soldier declare and say:

"On the night of August 18th 1944 at about between 2200 hours to 2300 hours we were returning from Vicarello

Italy. It was raining and we stopped in to a farmhouse in order to get out of the rain. Three men went into the house, Sgt Collins, T/5 Beardon and Pvt Cole. I went up to an Italian civilian, who was outside the house, and asked him for some 'Vino'. He was in an excitable mood. We talked for about 2 minutes. All of a sudden he hit me for no reason at all. I hit him back and he fell on the stairs. He jumped up and ran upstairs. A large crowd gathered in the meanwhile. Hogeland was with me all the time when all this happened. Almost immediately, after the civilian ran upstairs a civilian Italian came down with an Italian rifle at port arms. I shouted to Hogeland. 'Look Out Hogeland, he's got a gun'. When the civilian came out of the door, Hogeland ran in the direction of the Highway and I shot the civilian. I shot him when he reached the grassline which is about 15 feet from the house. He was crouched down when he came toward me, shouting 'Dove Americano', I think he said it twice. I ran toward the jeep because there were about 20 Italian civilians threatening me. We all got in the jeep and missing Hogeland, yelled for him. He answered from the Highway. We backed out on the highway, picked up Hogeland and left for Camp.

"To the best of my ability the gun I used was a .45 cal. U. S. Army service automatic and it was faulty in that, it did not reload properly. When I returned to Camp, I left the pistol in the first platoon C.P. I left it in a box there.

"I declare that the above statement is true and correct to the best of my ability" (R. 60; Ex. 2).

An agent of the Criminal Investigations Division testified that after taking the statement, he exhibited two pistols to accused and accused "picked out" a "rather new .45" as "the pistol he used on the night of 18 August" and accused said "I believe this is the gun I had on that night". The pistol, a "U.S. Pistol, caliber .45" was introduced in evidence. (R. 64; Ex. 3)

Sergeant Collins testified for the defense that he was a member of the group including accused that stopped at the farmhouse near Vicarello on the night of 18 August 1944 and he and two of the other soldiers went into the house but remained "just a minute" when witness heard "a commotion" outside. As he came out the door he heard an "American" voice, he did not know whose, say "Watch out, he's got a gun", and "took cover", but it was dark and he could not see accused or any civilians and if there was a shot fired, witness did not recall having heard it (R. 68-70, 72-75). Witness testified further he saw a "form" lying on the ground but did not inquire as to "why it was lying there" and that he returned to camp with accused in the "jeep" but did not have any conversation with accused en route and "we

never discussed the incident", but when they were "nearly back to camp" accused "said he had a fight" (R. 71,72,74,75).

Corporal Beardon testified for the defense that he was a member of the group with accused on the night of the alleged offense and with Collins and Cole entered the farmhouse. While in the house he heard a "commotion" outside and went out and saw a "big bunch of people", and heard "women screaming and hollering", but did not hear any shots. It was very dark and he could not distinguish soldiers from civilians, and did not go to where the "commotion" was and on the way back to camp nothing was said "about the trouble". On cross-examination witness testified his hearing was "not too good". (R. 78,80-82)

Private Hogland testified for the defense that he was a member of the group with accused on the night of the alleged offense and did not enter the farmhouse but remained outside with accused so witness could keep his "eye on the jeep", and that less than three minutes after they arrived witness saw accused talking with an Italian civilian near the "jeep". Accused asked the Italian "something about vino" and the civilian appeared to be angry, "was jabbering quite smart" and struck accused. Witness testified further that accused then struck the civilian with his fist or open hand and the civilian "fell" down, then jumped up and ran upstairs and witness "believed" the same one came back down the stairs with a rifle "between port arms and on guard" in a "menacing manner". Accused said "Look out, he's got a gun", and witness "took off" and ran about 25 or 30 yards "down the main road". Witness testified further that as the Italian civilian came down the stairs with the rifle he said "Dove Americano" meaning "Where is the American" and that he did not hear any shots fired either while he was on the scene or after he ran down the road. (R. 84-89, 93,95-97) On cross-examination witness testified that without glasses his eyesight was "not so good", and that he did not have his glasses "that night"; that he returned to "the company" in the "jeep" with accused and the other three soldiers. Witness did not know if anything was said about "keeping this matter quiet" and did not recall if accused said anything "about it" on the way back to camp, and although he saw a man come down the stairway armed with a rifle and "took off" he did not have any conversation with accused after he got back in the vehicle as to "what happened to this man". (R. 89-92)

Accused's former platoon commander and a sergeant of accused's battalion testified for the defense that accused was a good soldier, that his character was excellent and that his efficiency rating would be classified as excellent (R. 98-100).

Accused testified that about 2215 hours on 18 August 1944 he, with the four above-named soldiers, stopped at a farmhouse about a mile north of Vicarello, Italy, because it was raining, the light conditions were bad, and there was a convoy of trucks on the road which made it hard to drive. Three of the soldiers entered the house but accused and Hogland remained with the "jeep". Accused saw an Italian civilian standing 15 or 20 feet

in front of the "jeep" and walked over and asked him for "vino". The Italian said "Niento vino", "appeared to be angry" and "was talking fast like". Accused and the civilian talked for a minute or a minute and a half, then the civilian struck accused on the right side of the head. Accused then struck the civilian with his fist and the civilian "staggered back to the door and fell inside the door". Accused testified he did not hit the civilian with a pistol or other blunt instrument. After he fell, the Italian "jumped up and ran upstairs", and "very shortly" the "same Italian; at least it looked" to accused "like the same one", but he couldn't "be sure—he was running down the stairway and he had an Italian carbine". He was carrying the rifle "mostly at port arms" as he came down the stairs "fast like" and was bending over in "kind of a little crouch". Accused testified, "I moved back. I kind of went out even with the door as Aldo was coming down the stairs". Accused was sure it was an Italian carbine because he had seen "about a million" and had owned one himself. Accused said to Hogland "Watch out, Hogland, he has got a gun". Accused stepped back and heard the Italian say "Dove Americano?" (R. 101-104,106). Accused testified further that the Italian advanced to within six feet of him and pointed the rifle directly at his head and he shot "the man" and "I shot that man to save my life and the lives of my friends" (R. 104,110,111). Accused testified further that he "wasn't scared" and that he made no effort to get away except that he stepped "back from the door" (R. 107). Accused testified further that when he fired "the man" was "standing up" and "fell straight forward and fell on the weapon" (R. 106,108). Accused also testified that "the man" was "bent down in a crouch" when he shot him (R. 110). Accused testified further:

"Immediately after I shot the man, I backed up to the jeep and found Sgt Collins, Cole, and Beardon there but missed Hogland. Somebody said, 'Where's Hogland?', and, I think it was Cole, hollered for Hogland and Hogland answered from out on the road. We backed up to the road and picked Hogland up and went on to camp",

and that on "the way home" he said "not a word" about this, his reason being,

"Well, sir, one reason was, when we got to camp somebody said, 'Let's don't say anything about it on account of trouble for stopping at the house and keeping the jeep out so long.' It was used for going after clothes and others were waiting for it, so we decided not to say anything" (R. 105).

Accused testified that "the man" may have been angry because he and his companions "stopped there" (R. 106,111). Accused testified further that there was "not over 30 to 45 seconds" between the "first fight" and the time the Italian reappeared with the rifle and that he made no effort to "leave the place" or "get away" or get "out of there" other than he "stepped back" because he "didn't think there was time enough to get out and get on the road". Accused was asked if he "could have gotten out of there as fast as

Hogland", and testified he "probably could have". Accused testified further that when he "pulled" his pistol, the Italian "had the drop" on him, and if he had "retreated, he would have shot me" (R. 106-108). Accused testified further:

"When he was coming down the stairs I stepped back straight out from the door, but if I would have run I would have been worse off. I would have been worse than a man deserting his outfit in the front lines, leaving three of my friends in the house. They didn't know this man was out there with a gun and he could have killed all of them" (R. 108).

Accused testified that within his organization it was common practice to enter civilian homes in the combat zone and that within 5000 yards of the enemy it was not customary to ask permission of Italian civilians to enter their homes (R. 111).

Accused's company commander was recalled as a witness by the defense and testified that "around the front lines" and "from six to ten thousand yards" back "from the front", including, on 18 August 1944, the area between "Vicarello and the river", the rights of privacy of Italian civilians were not recognized and

"The policy has been that any man in the company can go in any Italian house he may want to go in" (R. 112, 113).

Witness testified further the farmhouse where the alleged offense occurred was four to five thousand yards "from the German lines", and under the common practice prevailing in witness' battalion, accused "could freely enter this house without expecting to have to account for it" (R. 113). Witness testified further that about two days before the alleged offense occurred he issued an order that any man leaving the "immediate vicinity of his TD would carry a weapon with him at all times" (R. 114).

4. It thus appears from the evidence that about 2215 hours on the date alleged accused, driving a "jeep" carrying four other soldiers, all members of Company B, 894th Tank Destroyer Battalion, stopped at a farmhouse about a mile north of Vicarello, Italy, where three of the soldiers entered the house while accused and another soldier remained with the vehicle. It further appears from the testimony and the pretrial statement of accused as well as from the prosecution's evidence that shortly after his arrival accused and an Italian civilian became engaged in an altercation, following which the Italian ran up a stairway, entered a room on the second floor of the house, and almost immediately the same or another Italian reappeared, descended the stairway and was shot by accused with a .45 caliber United States Army service automatic pistol. It further appears that near the place and at the time alleged Aldo Dini, the person named in the Specification, was shot by an American soldier, the bullet entering the right and exiting from the left side of the head, causing almost instantaneous death. The evidence warrants the conclusion that the Italian civilian shot and killed by accused was Aldo Dini, the person named in the Specification.

It was the contention of the defense that the homicide was justifiable. Accused testified that following the "first fight" the Italian ran up the stairway, entered the room at the top thereof, and "very shortly" he, or another Italian, appeared with an Italian rifle, descended the stairs "fast like" with the rifle "mostly at port arms" and advanced to within six feet of accused and pointed the rifle directly at accused's head before accused shot him. Accused testified he did not in his opinion have time to "get out of there" and that he shot the Italian to save his own life and the lives of his friends. Sergeant Hogland corroborated the testimony of accused to the effect that the Italian was armed. This testimony was sharply contradicted by the testimony of the mother and sister of deceased, both of whom were eyewitnesses to the homicide and testified that Aldo was not armed. Aldo's brother also testified Aldo was not armed when he left the room at the top of the stairway immediately preceding the shooting. Aldo's sister testified further that at the time there were no arms in the house or in the possession of the family. She testified further that Aldo was "on the ground" when he was shot. Accused testified that the Italian after he was shot fell forward and "fell on the weapon". There is no suggestion anywhere in the evidence that a weapon was found near the body following the homicide. The court was justified in accepting as true the recital of facts by the Italian witnesses.

Although accused testified that in his opinion he did not have time to escape after discovering the Italian descending the stairway with a rifle, he also testified that he "wasn't scared" and that he made no effort to escape other than to step back. When asked if he thought he "could have gotten out of there as fast as Hogland", accused testified he "probably could have". It further appears from accused's own testimony that after he observed the Italian was armed he had sufficient time to shout a warning to Hogland who thereafter had sufficient time to, and did, effect an escape.

To justify or excuse a homicide on the ground of self-defense, it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor, and that the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or to prevent great bodily harm to himself. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (MCM, 1928, par. 148a; 26 Am. Jur., Homicide, sec. 126, p. 242; NATO 3850, Davis). Aside from the sharp contradiction of accused's and Hogland's testimony that the Italian was armed, accused's testimony not only fails to establish that there was no convenient or reasonable mode of escaping, retreating or declining combat but clearly indicates that he "probably" could have escaped as Hogland did.

As an additional justification for the homicide accused testified that he shot the Italian to save the lives of his friends as well as his own life. The doctrine of self-defense may sometimes be extended to the protection of certain persons occupying a particular relationship to an accused, such as parent and child, husband and wife, or master and servant, and excusable homicide includes this as well as cases wherein a homicide is committed to

prevent the commission of a known felony by violence or surprise (40 C.J.S., Homicide, secs 108a, 108b, pp. 968-970; NATO 3906, Ray). In such cases the circumstances must be such that the person defended would be justified in committing the homicide in his own defense (40 C.J.S., Homicide, sec. 108a, p. 968). To have availed himself of such defense in the instant case it was incumbent upon accused to show that at the time of the homicide his companions were in imminent danger of suffering death or great bodily harm; that they had retreated as far as they safely could and that they could not have averted the apparent danger by any reasonably safe means other than the killing of deceased. The only companion of accused shown to have been in any real or apparent danger immediately preceding the killing was Hogland and he, according to his own uncontroverted testimony, after being warned by accused "took off" and was so far from the scene of the homicide by the time the fatal shot was fired that he did not hear it. Under such circumstances established by uncontroverted testimony, it cannot be said that at the time of the homicide Hogland was in imminent danger of being killed or suffering great bodily harm. In the light of the entire record the court was warranted in concluding there was no legal excuse or justification for the killing.

Malice aforethought may properly be inferred from the use of a dangerous weapon and the attendant facts and circumstances surrounding the homicide. The court was warranted in finding accused guilty of murder as charged (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672, 673).

5. The pretrial statement of accused was admitted in evidence over the objection that its admission might result in great damage to accused. The statement did not concede murder but even considering it to have been a confession and according this objection the widest latitude without confining it to the grounds stated, still the admission of the pretrial statement in evidence was not error. There is ample evidence in the record showing that after accused was fully informed of his rights under Article of War 24 he voluntarily gave the statement introduced in evidence. Moreover, should the admission of the pretrial statement in evidence be considered error, its admission could not, in the light of the entire record, be said to have injuriously affected the substantial rights of accused for the reason that after having been fully informed of his rights as a witness, accused, under oath, corroborated the facts contained in his pretrial statement. Furthermore, aside the statement and testimony of accused the record contains ample evidence warranting the court in finding accused guilty of murder as charged.

6. The Specification alleges that the homicide was committed "at Vicarello, Italy", whereas the evidence discloses that it occurred at a farmhouse about a mile north of Vicarello. There is no suggestion anywhere in the record that accused was misled or surprised by this slight variance, and, the locus not being of the essence of the offense charged, and the jurisdiction of the court not depending upon the geographical location of the situs, the variance was immaterial (Dig. Op. JAG., 1912-40, sec. 416 (10); Winthrop's, reprint, p. 138; NATO 1715, Kinlow).

7. The charge sheet shows that accused is 25 years of age, enlisted in the Army 2 November 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 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.

Walter R. Rhin Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Cluial, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
26 December 1944.

Board of Review

MTO 4164

UNITED STATES)

v.)

Corporal ALBERT MORANDI)
(31 096 830), 736th Bombard-)
ment Squadron (Heavy), 454th)
Bombardment Group (Heavy).)

FIFTEENTH AIR FORCE

Trial by G.C.M., convened at
APO 520, U. S. Army, 24
September 1944.

Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

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

Specification: In that Corporal Albert Morandi, 736th
Bombardment Squadron (Heavy), 454th Bombardment Group
(Heavy), did, acting in conjunction with Private First
Class Charles Delibertis, 736th Bombardment Squadron
(Heavy), 454th Bombardment Group (Heavy), near Canosa,
Italy, on or about 11 June 1944, forcibly and feloniously,
against her will, have carnal knowledge of Rosa Mongelli.

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

Specification 1: (Finding of guilty disapproved by reviewing
authority.)

Specification 2: (Motion by the defense for a finding of not
guilty sustained by the court.)

Accused pleaded not guilty to the Charges and Specifications and was found guilty of Charge I and its Specification and Specification 1, Charge II, and Charge II. At the close of the case for the prosecution a motion by the defense for a finding of not guilty of Specification 2, Charge II, was sustained by the court. Evidence of two previous convictions by summary courts-martial, one for absence without leave in violation of Article of War 61, and one for disobedience of an order of a noncommissioned officer and using insulting language to 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 confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority disapproved the findings of guilty of Specification 1, Charge II, and of Charge II, 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 50 $\frac{1}{2}$.

3. The evidence shows that about 1800 hours on 11 June 1944 accused and Private First Class Charles Delibertis, both members of the 736th Bombardment Squadron (Heavy), 454th Bombardment Group (Heavy), were proceeding along a street in Cerignola (Italy) in a truck driven by accused when they noticed Rosa Mongelli, a 20-year-old Italian girl, and her 16-year-old brother, Giuseppe Mongelli, standing on a corner apparently seeking a ride (R. 5,6,33,56,57,61). Accused, who spoke Italian, stopped the truck and upon ascertaining from Rosa, whom he had never seen before, that she and her brother desired to go to Bari (Italy), told her that if she would wait until he changed his clothes he would return and take them (R. 6,18,33,57). Delibertis remained with Rosa and her brother and in about ten minutes accused returned for them. Rosa sat in the front seat between accused and Delibertis, who was driving, and Giuseppe rode in the rear of the truck. (R. 6,18,33,34)

As they drove along accused told Rosa in Italian that he was in love with her and wanted to marry her (R. 58). After proceeding a short distance along the Bari highway they turned off onto the road to Canosa (Italy), whereupon Rosa remarked that was not the "direction to go", to which accused replied it was "the shortest way" (R. 7,34). After proceeding about 100 meters along the Canosa road they turned off on a side road and stopped (R. 7,19). Accused said "ficki-ficki" and Rosa replied she did not understand what he said. Accused repeated the proposal and Rosa answered that she could not "do what you want", got out of the truck and walked away. Accused caught her, took her arm and told her "'If you don't want, I have you to do something. If I can't alone, we're two persons'" (R. 8,9,20). She did not call for help (R. 21) but about ten minutes after Rosa left the truck her brother heard her crying and, with Delibertis, went about 20 meters and saw Rosa on the ground and accused over her holding her arms. The brother testified he saw Delibertis kick Rosa with his knee and that this caused her to fall. The brother pushed accused and Delibertis then took Giuseppe by the neck and returned him to the truck (R. 11,22,34,35,37,53). Rosa testified that accused and Delibertis then pushed her to the ground and

"Two times they pushed me and it was possible for me to stand up, but the third time Delibertis, he kicked me with his knee and I fall down" (R. 9).

And:

"When I was pushed on the ground, both soldiers, they were holding me and they held their hands in my mouth. Delibertis, he took off my drawers" (R. 10).

Rosa testified further that accused was holding her arms and hands so she could not move and that after Delibertis removed her drawers he "got over" her with his pants open but did not have intercourse with her, and after talking with accused he and accused changed positions and accused "came over" her while Delibertis held her arms "very, very strong", and that she "was violated" and "It was at that time" accused "had the intercourse", that accused put "his privates" into her "privates" and that "it" was not with her consent' (R. 10,11,22,28).

Giuseppe testified that his sister was always crying and "tried to defend herself with her legs, with her fists and every fashion" (R. 35).

After the intercourse accused helped Rosa to stand up, cleaned her dress, and told her he would marry her (R. 13). Accused then took Giuseppe to Barletta in the truck while Delibertis remained with Rosa (R. 13,61). When accused returned he and Delibertis took Rosa to their camp where she spent the night with them in their tent (R. 13,14,61). The following morning Rosa showed accused blood stains on her dress and underwear which he assisted her in removing (R. 15,72). Rosa remained with accused and Delibertis in their tent for three days and the second and third nights slept with accused (R. 13,23,24). Rosa testified that she never thought to leave the tent because she was afraid, that she did not scream for help and that all the time she was there either accused or Delibertis was present (R. 13,24,27). After three days accused took Rosa to Cerignola where he procured a room for her and visited and slept with her and gave her money with which she purchased clothes and food (R. 14,25,62). While in Cerignola a member of the military police told Rosa accused was married and had a child. Accused told Rosa "always" he intended to marry her and she wrote a letter to her mother stating she desired to get married. (R. 26)

A civilian doctor who examined Rosa on 3 July (1944), testified that he found a tear on the bottom of the hymen and that:

"the hymen is a ring. Before this ring was closed and now this ring is open".

And:

"both side of the ring which was broken was recovered with fresh skin, where it was possible to see that it was few time since the hymen was broken". (R. 30)

Witness testified further that in his opinion it was a recent tear but he could not tell the exact day the hymen was broken but that it did occur about 20 or 25 days prior to his examination (R. 30-32).

An investigator with the 1051st Military Police Company testified that in the course of investigating a complaint in regard to a missing Italian girl at Molfetta he showed accused a "picture of the girl" and accused said "he never, positively saw this girl before" (R. 40,41).

A member of accused's Squadron testified that in a conversation with accused about 15 June 1944, accused told witness he had "copped a cherry" (R. 45,46).

Captain Fenton H. Sink, Jr., 736th Bombardment Squadron, 454th Bombardment Group, the investigating officer, testified for the defense that in the course of the investigation Giuseppe stated to witness that he did not see Delibertis kick Rosa in the side with his knee and that he saw Rosa only on the ground and did not see her pushed to the ground. Witness testified further that accused asked Giuseppe if Rosa was forced out of the truck and the brother replied "when they stopped the car I heard Morandi say to my sister that he wanted to talk to her and to come down the road and she went willingly". (R. 51-53)

It was stipulated in behalf of the defense that if Maria Parisi, a seamstress of Cerignola, were present she would testify that Rosa "came to live" in her house and that she saw Rosa on the balcony with accused; that Rosa lived in the house ten or eleven days and accused stayed with her "one night yes and one night no, when he didn't have permission"; that she saw Rosa's "pants", underwear and dress and that they were not torn; that Rosa told witness she hoped accused would marry her but did not know whether he was married; and that accused had bought her some white shoes, a black skirt and a jacket or blouse (R. 54,55).

Accused testified that after he and Delibertis picked up Rosa and her brother in the truck, they turned off the Cerignola road onto the Canosa road, then into another road and:

"We stopped there with the truck sir, and told the girl to get out. She got out of the truck. We walked up in front of the truck, then I asked her, I asked if she wanted to make 'ficki-ficki'. I asked her before coming up the road and she said, 'No.'. When we were coming up the road, I was making advances towards her, and she wasn't putting up any resistance at all. We walked down in front of the truck there and I started to talk there, and she said, no that her brother would see us. I said something, 'Let's walk down the road farther.'. I told her to sit down on the side of the road. We sat down at the side of the road and I started making advances towards her again. She still didn't put up any resistance.

She said, the only thing she said, that her brother would come down and see her. All this time I was saying that I love her and wanted to marry her. We were sitting down there talking, sir. I laid her back without any force at all and still making passes at her. After I laid her back, I got on top of her, pulled her dress up, sir. I moved her panties over on the side, kissing and loving her up. I laid her back and started to have intercourse with her. I didn't take any clothes off of her, sir. At the time, when I was there, her brother had come down. She saw her brother come. I didn't see him. She started to cry and she said, 'My brother saw me.'" (R. 60).

Accused testified further that after taking Giuseppe to Barletta he returned for Rosa and Delibertis and knowing it was too late to secure a room in Cerignola, he and Delibertis took Rosa, who went willingly, to their camp and,

"I let the girl sleep on Rocky's bed. I laid down on another bed, that was on the side there, and Rocky slept on the floor. I was lying in bed until four in the morning, and the girl called me. I said, 'What do you want.'. She said she wanted me to go over and stay with her. Rocky was awake at the time the girl had said that, and I got up and went over and got in bed with the girl. There, I had intercourse with her again sir. Then we fell asleep until the morning" (R. 61).

Accused testified further that Rosa was not forcibly detained at any time, that she did not desire to return to her home and remained with him and Delibertis in their hut for two nights after which he procured a room for her at a hotel in Cerignola where she remained until the investigators found her (R. 61,62). While Rosa was staying in the hotel he stayed "with her nights", gave her money with which she bought clothes and food and had intercourse with her and told her he was going to try to "arrange" to marry her (R. 62).

Accused testified further that after Captain Sink had explained Article of War 24 to him, he made a voluntary sworn written statement. The statement, which was introduced in evidence by defense over objection of prosecution, substantially reiterated accused's testimony on the trial (Def. Ex. 2; E. 63,64). When one of the investigators asked him if he knew anything about "an Italian girl that was away from home" he replied that he did not, and that at the time Rosa was in Cerignola. When shown a picture of Rosa he said he "didn't know her" but later the same day he admitted knowing her and took the investigators to Cerignola where she was (R. 66,67). Accused had never seen Rosa before the night of the alleged offense. He was married and his wife was living in the United States (R. 68,72). In answer to the question "Did at any time the girl consent to intercourse with you", accused replied "The only thing she said that she didn't want to do it because her brother would see us and I told her that he wouldn't see you",

and that he did not "remember" whether Rosa did or did not "consent" (R. 69). Accused testified further that the next morning Rosa showed him blood on her dress and underskirt and he helped her to remove it and that after seeing "what I had done and seeing the girl went over that way, I was sending to get a divorce and marry the girl" (R. 72).

4. It thus appears from uncontroverted evidence corroborated by the sworn testimony of accused that at the place and time alleged accused engaged in sexual intercourse with Rosa Mongelli, the person named in the Specification. The only issue presented by the testimony was whether or not the intercourse was with the consent of prosecutrix. Accused testified he had never seen prosecutrix before the night of the alleged offense. Prosecutrix testified that she rejected accused's suggestion of sexual relations whereupon he told her that if she would not consent he would have her "do something" and "if I can't alone, we're two persons", implying that if he were unable to accomplish his lustful purpose alone Delibertis would assist him. Except for her young brother prosecutrix was alone on a dark night on a side road with the two soldiers. Accused's remark was clearly calculated to induce fear and influence prosecutrix to submit to his sexual desires. It further appears that prosecutrix got out of the truck and tried to walk away from accused and that he followed and overtook her and with Delibertis pushed her to the ground three times. The first two times prosecutrix was able to regain her feet but the third time Delibertis kicked her in the side with his knee and she was unable to arise. Delibertis then removed her drawers, opened his pants, and while accused held prosecutrix, got over her, but for some reason desisted and did not have intercourse. After some conversation between them accused and Delibertis changed places and while Delibertis held prosecutrix, accused had intercourse with her. Prosecutrix' brother heard Rosa crying, went to her aid and was forcibly returned to the truck. Both accused and prosecutrix testified to the fact there was blood on her underwear the following morning. A civilian doctor who examined prosecutrix 23 days after the alleged offense testified that the hymen had been ruptured about 20 or 25 days prior to the date he saw her. A few days following the night of the alleged offense accused told a fellow member of his organization he had "copped a cherry". Accused testified that prosecutrix "kept" telling him "not to do it" but her reason was that she was afraid her brother would see them. When asked specifically whether prosecutrix consented to the act accused testified he could not remember. He admitted that when first interviewed he denied any knowledge of a missing Italian girl from Molfetta and when shown a picture of prosecutrix denied knowing her but the same day took investigators to where she was in Cerignola. The evidence warrants the conclusion that the intercourse was accomplished by force and without the woman's consent. The court was warranted in finding accused guilty of rape in violation of Article of War 92 as charged.

Defense introduced evidence of condonation and forgiveness on the part of prosecutrix. It is well established that condonation and forgiveness by the injured party after the consummation of the offense does not constitute a defense to the charge of rape. Furthermore an intended marriage with the victim constitutes no ground of defense and although accused was permitted to introduce such evidence in this case, the general rule is that evidence

that an accused intends to procure a divorce from his wife and marry the prosecutrix is not admissible either as a matter of defense or in mitigation (Wharton's Crim. Law, 12th Ed., Vol. I, sec. 753, p. 1031).

5. This is a companion case to MTO 4165, Delibertis.

6. The charge sheet shows that accused is about 24 years of age. He was inducted into the Army 15 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 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 2801, Title 22, Code of the District of Columbia.

Walter R. Lewis, Judge Advocate.
George O. Wilson, Judge Advocate.
(absent, T.D.), Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
19 December 1944.

Board of Review

ETO 4270

U N I T E D S T A T E S)

v.)

Private First Class WALLACE)
SPRINGS (42 022 010), Head-)
quarters and Service Company,)
812th Engineer Aviation)
Battalion.)

ARMY AIR FORCE ENGINEER COMMAND)
MEDITERRANEAN THEATER OF OPERATIONS)
(PROVISIONAL))

Trial by G.C.M., convened at)
Borgo, Corsica, 4 November 1944.)
Dishonorable discharge and)
confinement for 20 years.)
U. S. Penitentiary, Lewisburg,)
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private First Class Wallace Springs, Headquarters and Service Company, 812th Engineer Aviation Battalion, did, at Borgo, Corsica, on or about 12 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Lee R. Reed, Headquarters and Service Company, 812th Engineer Aviation Battalion, by shooting at the said Private Lee R. Reed with a U. S. Rifle, Calibre .30, M1.

He 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 and entering an off-limits 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 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 50 $\frac{1}{2}$.

3. The evidence shows that in the afternoon of 12 October 1944 accused, a member of Headquarters and Service Company, 812th Engineer Aviation Battalion, stationed near Borgo, Corsica, and a number of other soldiers from his organization including Private Lee R. Reed, were in a bar near their company area "having a little fun" (R. 5-8,10,13,22,26,28,31,32,34,46). Accused borrowed 100 francs from Reed and with Reed and other soldiers engaged in a "crap game" (R. 6,9,28,35). A member of accused's organization testified that both accused and Reed were "full", and "they weren't drunk enough not to stand it, but they were pretty high" (R. 29). After the game, Reed asked accused for either "two hundred" or "three hundred" francs which Reed testified accused owed him (R. 9,27,29,32). Reed asked "What will this make, do you know what this will make?", and shortly thereafter Reed and accused "started to cuss one another" and began fighting, but were separated "before they did any damage to each other" (R. 27-29,32,34). A few minutes later accused and Reed went outside and "tied up again" (R. 27,29,32). They were again separated, apparently before any blows were struck, and while some of the soldiers held accused, Reed, accompanied by two other soldiers, "walked up the road" (R. 29,30,32). Accused "broke loose", overtook Reed and "grabbed" him from the rear, around the body and arms. Accused was "up on" Reed "before he knowed it". (R. 30) Reed "spun around and started kicking" accused who then got on "top of Reed" (R. 29,30,32,34). At one time during this "scuffle" Reed had accused "to the ground" (R. 27).

Accused and Reed were separated and accused ran to his company area at "about a double time" (R. 29;31,32). As Reed "walked up the street", a soldier from "C" Company told him that accused was "going to get a gun" but Reed said "he didn't think it was that serious" and, with another soldier, walked to his company area (R. 6,32). As they crossed the company area Reed's companion said, "There's a fellow with a gun" (R. 6). Reed testified he

"knowed that was him and he seemed to be putting his arm through the sling. I said 'I better try to take cover' and I turned toward him to see if he was coming my way and I seen him point the gun toward me and I didn't move back any more and I started running around one side of the mess building to another trying to keep out of sight of him" (R. 6,7).

Accused fired at Reed at least three times with an M1 .30 caliber rifle, the second shot striking him under the right shoulder blade and the third striking him in the small of the back (R. 7,8,11,13,17-19,23-25,28,32).

The evidence shows further that Reed attempted to elude accused by running around the company mess hall and into the kitchen. Accused shot through the kitchen door then opened the door and shot through the kitchen. As Reed went out of the kitchen accused fired again. Reed stumbled and fell to the ground. (R. 17,23,32,35). Accused went up to where Reed was lying, pointed the rifle at him and said, "You are an old god damn soldier and if you take my money I'll kill anybody" (R. 11,17,36).

Lieutenant Colonel James O. Johnson, 812th Engineer Aviation Battalion, testified he heard shots fired in the camp area, saw enlisted men "scattering" and:

"rushed to the rail at the head of the stairs and as I approached there, just as I reached the landing I heard other shots fired, and just after the shots I noticed a body stumble from the south door of the mess hall, and immediately Springs came around the mess hall and approached the body with an M1 rifle and pointed the rifle at the body, and then turned away and took about two steps back working the bolt and turned back around and pointed the rifle at the body again. During this time I called to Springs, I called him by name telling him not to fire again" (R. 17).

Witness testified further that accused appeared "very calm and collected", his speech was "clear but very low" and he walked "straight" (R. 17). Another witness testified he "couldn't say" accused was under the influence of intoxicating liquor, "but he wasn't acting normal" (R. 25).

Major John W. Scott, 812th Engineer Aviation Battalion, testified that he heard several shots and

"As I cleared the orderly tent I could see a man lying on the ground and another man with a rifle pointed at him and just as I got sight of him I saw him put his finger around the trigger and saw him pull the trigger and I heard the firing pin snap. He then pulled the rifle down and worked the bolt, put the rifle up to his shoulder again and all the time I was walking toward him. I called, I just called 'Soldier'. He dropped the rifle and stepped back from the man as I came up to the man. The only thing he said was 'He took my money'" (R. 10,11).

And:

"The first thing I said was 'You are under arrest' and I reached for the rifle. He moved the rifle slightly out of the way and as soon as he did that I spoke again, I said 'Do you know who I am' and he said 'Yes sir' and I said 'You are under arrest'. Just when I repeated that the second time, Sergeant Harris came from one direction,

(144)

Master Sergeant Harris, and another soldier I don't know who, came from the opposite direction. Sergeant Harris said 'Let the major have your rifle' and he and the other man reached for the rifle at the same time and accused released the rifle without any struggle or motion whatsoever" (R. 11).

When taken from accused the rifle contained a clip and two cartridges; the barrel was warm and had "powder burns and had just been fired" and was "very dirty, the bolt was dirty, dirt in the bore and firing pin" and in the opinion of one witness it was "a miracle that it shot as many times as it did" (R. 19). Shortly after the shooting three .30 caliber cartridges with dented caps were found five or ten feet from where Reed was lying (R. 16,19-21). Three ".30 caliber, S & L 19 $\frac{1}{2}$ " cartridges, "similar" to those found were introduced in evidence (R. 14,15,20; Exs. A,B,C).

A witness familiar with the M1 rifle testified that when the bolt is operated the weapon will eject a live cartridge "anywhere from five to eight feet" and sometimes farther (R. 19).

It was stipulated that if Captain Lloyd L. Thompson, Medical Corps, 15th Field Hospital, were present and sworn as a witness he would testify that he examined Reed at the 15th Field Hospital on 12 October 1944 and diagnosed his injuries as

"multiple superficial gun shot wounds of the posterior thorax and lumbar region. It was not evident that the patient was under the influence of alcohol or drugs. No permanent or partial disabilities is expected at this time" (Ex. D; R. 22).

A member of Company C, 812th Engineer Aviation Battalion, testified for the defense that preceding the shooting "they were all drinking" and accused and Reed were drunk, accused was "high" and both accused and Reed were "staggering". He also testified that when accused left the bar Reed ran up and "overtook" accused and after a "tussle", they were separated (R. 39-43).

It was stipulated, in behalf of the defense, that if Technician Fourth Grade Wallace C. Worth, Jr., Battery C, 73d Antiaircraft Gun Battalion, were present and sworn as a witness he would testify that accused was brought to the Northern Base Section Stockade, where witness was sergeant of the guard, about 1530 hours on 12 October 1944 "in a drunken condition" and "didn't know his own serial number", "didn't answer many of the questions the officers asked him" and "was very sullen" and "didn't seem to have his full mental abilities functioning"; and that witness would testify further that accused "didn't stagger but he was in a stupor" and while in the stockade became "very friendly and one of the best workers in the stockade" (R. 43,44).

It was further stipulated, in behalf of the defense, that if Captain

John A. Withrow, Chief of the Neuro-Psychiatric Section, 40th Station Hospital, were present and sworn as a witness he would testify that on 24 October 1944 he made a psychiatric examination of accused and "submitted" the following report:

"Present illness: Patient has been frequently intoxicated during his sixteen months of Army service. The last time he was intoxicated he quarreled and shot a man. Patient was often arrested for drunkenness in civil life.

"Family history: His father and mother are living and well. His mother has been nervous and high-tempered for years. Three other children by his parents are dead.

"Birth and Early Childhood: Usual childhood diseases. When he was a small boy he fell off(f) a railing and landed upon the back of his head. He was unconscious three and one-half hours. Before and since that time he has often suffered from headaches. As a child he had a series of fainting spells, the last of which, he says, occurred about the age of twelve.

"Education: Patient finished the seventh grade and was an average student.

"Occupation: In civil life the patient was a foundry worker, steadily employed.

"Army career: Drafted sixteen months ago, he has been overseas for nine months. He has had one court-martial for being off limits.

"Sex and Marital: Patient is married and has one child. These have been a source of worry to him. For four months prior to his present trouble he did not get a letter from his wife.

"Alcohol and Drugs: Admits that he has been drunk often in the past.

"Previous Serious Illnesses: See above under early childhood. The record strongly suggests an old Cerebro-spinal syndrome.

"Mental Status: Cooperative. Under obvious tension.

"Physical and Neurological: Essentially negative.

"Impression: This patient is a chronic alcoholic. He appears to have inherited a nervous temperament and to

be prone to quarrelsomeness. There is, in addition, a history of trauma and resultant concussion and cerebro-spinal syndrome in his early youth, and the patient declares that ever since the trauma he has had one or two headaches every week on an average" (R. 44,45).

Accused testified that at 1100 hours on the date alleged he went to a bar near his company area where there were other soldiers and "bought some drinks"; that he bought another soldier five "drinks" and the soldier then bought him five and accused then bought "three Cap Corse", had a "few drinks of vino" and

"when they was gambling I had 1300 francs. I started to gamble and I went back and forth and had drinks and gambled at the table. About that time Reed comes there and he says how are you getting along. And he started gambling and I faded him, and he told me how much do you owe me and I says 300 francs. I got more drinks, the man brought me five more Eau-de-Vies and when I am drinking I never stagger at no time" (R. 46,48).

And:

"When he (Reed) got hold of the dice he was passing and everyone around was fading him and I said can I fade him and he said okay and he got 800 francs in the middle, that's when the argument came up, I asked him for the other 100 francs" and "I asked him if he recalled another 100 francs and he didn't give me change and he started to cuss" (R. 47,48).

Accused testified further that Reed then struck him and he returned the blow and they were separated; accused left the bar and Reed followed him and they "clinched" and were again separated and while another soldier was holding accused Reed kicked him "on" his "privates" which hurt him "very bad" and he became "really angry" and "lost control" of himself (R. 47). Accused was drunk. He and Reed began fighting again and Reed bit him three times and then he went and got a "gun" (R. 47). Accused testified further that Reed was not armed and did not have a knife, stick, or "gun". Accused was "bigger" than Reed and believed he could "whip" Reed in a "fair fist fight". After Reed bit him he went toward camp at a very fast walk to get his "gun". He secured one but did not remember whose weapon it was. He remembered loading the gun, putting a "full clip" in it (R. 47, 49,51,52). Accused testified further that he saw Reed near the mess hall and shot at him while extremely angry; that his "rifle went off two or three times". He did not remember seeing Reed fall near the kitchen, but saw him lying on the ground and as accused stood over him Reed said "Don't kill me Shadow", whereupon accused said "you took my money", backed away and "was trying to get the ammunition out of the gun". Accused testified further that when he was standing over Reed he had the rifle "straight out", not pointed at Reed, and did not pull the trigger. If he had wanted to kill Reed he could have done so with the butt of the rifle. (R. 49-52).

4. It thus appears from uncontroverted evidence that at the time and near the place alleged, accused assaulted Private Lee R. Reed, of the organization alleged, the person named in the Specification, by shooting at him with a caliber .30 M1 rifle. Reed was running from accused when he was shot from the rear.

There is evidence that preceding the assault accused and Reed, at a bar near their company area, had engaged in altercations over a small amount of money. Immediately following a fight accused returned to his company area, procured the rifle and ammunition, placed a full clip of cartridges in the rifle, found Reed near the company mess hall and began shooting at him. Reed, unarmed, endeavored to escape. Accused fired at him at least three times, two of the bullets striking him. After being shot the first time, Reed continued to run, but when the second bullet struck him he fell to the ground. There is evidence that after Reed fell accused tried to fire upon him further and that he uttered a threat to kill anyone who might take his money as he had accused Reed of doing.

The evidence sufficiently shows that the assault was committed with intent to murder. There was no legal excuse or justification and under the circumstances, if death had ensued, the homicide would have constituted murder. That accused entertained the requisite specific intent to murder may be inferred from the use of a deadly weapon, the manner in which it was employed, the character of the injuries inflicted and the other circumstances (Winthrop's, reprint, p. 688; MCM, 1928, par. 1491; NATO 1031, Howlett; NATO 1707, Faircloth). Although accused had been drinking prior to the shooting, there is substantial evidence warranting the conclusion that he was in sufficient possession of his mental faculties to entertain the specific intent involved.

5. The Specification alleges that the assault was committed "at Borgo, Corsica", whereas the evidence discloses that it occurred near Borgo. There is no suggestion in the record that accused was misled or surprised by this slight variance, and, the locus not being of the essence of the offense charged, and the jurisdiction of the court not depending upon the geographical location of the situs, the variance was immaterial (Dig. Op. JAG, 1912-40, sec. 416 (10); Winthrop's, reprint, p. 138; NATO 1715, Kinlow; MTO 4061, Jones).

6. The charge sheet shows that accused is about 28 years of age. He was inducted into the Army 9 August 1943. 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 sentence. Penitentiary confinement is authorized for the offense of assault with intent to commit murder, 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.

Arthur P. Quinn, Judge Advocate.

George O. Wilson, Judge Advocate.

- 7 - *Henry C. Keenish*, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
13 December 1944.

Board of Review

MTO 4331

U N I T E D S T A T E S)

v.)

Private JESSIE W. THOMAS)
(33 453 570), attached to)
403d Replacement Company,)
18th Replacement Battalion,)
2d Replacement Depot.)

PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Naples, Italy, 19 August 1944.
Dishonorable discharge and
confinement for 20 years.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Jessie W. Thomas attached to 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, did, without proper leave, absent himself from his station at 2nd Replacement Depot, Italy from about 22 February 1944 to about 12 June 1944.

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

Specification 1: In that Private Jessie W. Thomas attached to 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, did, at Marcianese, Italy, on or about 11 June 1944, knowingly and willfully apply to his own use and benefit a 1½ ton, 6 x 6 Weapons Carrier, #3333327, of

the value of about \$1800., property of the United States furnished and intended for the military service thereof.

Specification 2: In that Private Jessie W. Thomas attached to 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, did, at Marcianese, Italy, on or about 11 June 1944, knowingly and willfully apply to his own use and benefit a 1½ ton, 6 x 6 Weapons Carrier, #3334434, of the value of about \$1800., property of the United States furnished and intended for the military service thereof.

Specification 3: In that Private Jessie W. Thomas attached to 403rd Replacement Company, 18th Replacement Battalion, 2nd Replacement Depot, did, at Marcianese, Italy, on or about 11 June 1944, feloniously take, steal, and carry away a quantity of food stuffs, including among other items 45-6 lb. cans corned beef, and 1 case whole wheat biscuits (16-21 lb packages) of the value of about \$176.31, property, of the United States furnished and intended for the military service thereof.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification; guilty of Specification 1, Charge II, except the numerals "#3333327", of the excepted numerals not guilty; guilty of Specification 2, Charge II, except the numerals "#3334434", of the excepted numerals not guilty; guilty of Specification 3, Charge II, except the words and figures "and 1 case whole wheat biscuits (16-21 lb packages) of the value of about \$176.31", substituting therefor the words and figures "of the value in excess of \$50.00", 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 20 years, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the finding of guilty of the Specification, Charge I, "as finds the accused guilty of absenting himself without leave from his station at the place alleged from about 22 February 1944 to 1 May 1944", approved the sentence, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that "accused is a member of the 2nd Replacement Depot, Italy" (R. 21). Extract copies of the morning reports of Headquarters and Headquarters Detachment, 10th Replacement Battalion, and of Headquarters and Headquarters Detachment, 3d Replacement Battalion, both of the 2d Replacement Depot, were admitted in evidence without objection and contain entries relating to accused as follows:

"22 February 1944
33453570 Thomas, Jessie W. (unasgd) Pvt Dy to AWOL 0600

17 March 1944

33453570 Thomas, Jessie W. (unasgd) Pvt (AWOL) Trfd to Hq Det 3rd Bn pp 44 SO 77 Hq 2nd"

"18 March 1944

33453570 Thomas, Jessie W. Pvt AWOL atchd unasgd fr Hq Det 10th Bn pp 44 SO 77 Hq 2nd RD

1 May 1944

33453570 Thomas, Jessie W. Pvt AWOL unasgd trfd to 2645th Repl Co pp 42 SO 121 Hq 2nd RD" (R. 7; Exs. 1,2).

On 11 June 1944 ration dump Q-575 (of the United States Army) was located at Marcianise, Italy (R. 8,22). The drivers there, who were "all Italian", included Vito Perrini and Mario Zurlo, who were the regularly assigned drivers of "one and one-half ton 6 x 6 weapons carriers" (R. 12, 14-16,22). At about 2000 or 2030 hours (R. 18), 11 June, accused came to the place in the dump "where all the vehicles were halted" and, Perrini testified, after attempting to take "our sergeant's vehicle" accused

"took my vehicle. And the accused got in the drivers seat and he took us in a sort of shed where these cans were. Then he says to me, 'Take the beef'. I got down and took one can. Then he says, 'No, no. take them all'. I took another one, then he himself got off the truck" and "took" the cans "from where they were and put them on the truck" (R. 15).

The cans were large, weighed two or three kilos--"but they could have been more than 3 kilos"--and contained beef or other meat; "either 54 or 56" were put on the truck (R. 15,16). "After the stuff was loaded" accused drove the truck outside and Perrini "went with him because I couldn't leave the vehicle alone in his hands". Then, accused

"just went outside and I said, 'Where you going?' He said, 'No place'. And I had never been in Naples before and I didn't know the road. He said, 'Naples'. And he made a turn. It was dark. I don't know what road it was and we went to a town called Otto and he says, 'Naples'." "Then he took a narrow street and I saw we entered into a doorway. And when we entered into the doorway he left the stuff and went to a civilians."

The beef was unloaded from the truck and accused and the Italian returned "to the same shed", at the "575 dump", and accused "took 15 cans" more and "brought it to the same town", where accused "went into the house" and "left the stuff inside". (R. 16,17) Perrini was unable to state what was in the cans, as he could not "read or write American", but testified he thought "it must have been something contraband" inasmuch as accused was "bringing stuff to civilians". Upon returning to dump Q-575, from the second trip, accused was told by Perrini that the truck was out of gasoline,

and accused then "got on the truck of the other driver", Mario Zurlo. (R. 17).

Mario Zurlo, as noted, was the assigned driver of a truck at ration dump Q-575 on 11 June 1944 (R. 12,14). At 2330 or 2400 hours, while Zurlo was on his truck inside the dump, accused "came in a hurry and climbed on my truck" and, over Zurlo's protest, insisted on driving it (R. 12). They "went over to what was like a shed. There was all these boxes there and", Zurlo testified, "he said to help load and I helped load". About 50 or 60 "three kilo cases of corned beef and some pieces of bacon" were loaded on the truck. (R. 13,14) While they were loading, a guard "came over and says no loading" and accused told him that he was taking the meat to "officers in Naples". While "the guard was away" accused "said, 'Let's go, let's go'. So he got in the drivers seat and I got in and we drove off". They went to the east gate where they were halted. After some discussion among the guards, accused put the truck in reverse and "said, 'We are going to the other gate, this one is no good'". At "the other gate" accused was halted by a guard armed with a rifle and accused "said again, 'I got to bring meat to the officers in Naples'".

"And the guard said where is your ticket and the accused opened up the little door in the vehicle and took out some paper and handed it through the window. Then the guard looked at this piece of paper and let go out".

Accused "got the vehicle toward Aversa", driving very fast, and after they had travelled about six or seven kilometers "the police got behind us and stopped us, firing with a rifle". (R. 13)

Master Sergeants Joe W. Esch and Cecil Y. Bradley, 334th Quartermaster Depot, having received a call during the night of 11 June 1944, at dump Q-575 where they were working at the time, "jumped in a truck and started after him" and overtook accused at a point about three miles from the dump (R. 8,19). When apprehended accused, who was not on duty at the dump, was driving "a six wheel weapons carrier", a truck that operated at dump Q-575 and was property of the United States (R. 8-10,19,20). An Italian soldier was with him. In the truck were 50 to 75 six-pound cans of corned beef and some bacon rations which both Esch and Bradley testified were property of the United States and had come from the dump. The corned beef was in six-pound cans. The truck, the corned beef and the accused were turned over to the military police at Marcianise. (R. 9,10,20)

Perrini, Zurlo and Master Sergeants Esch and Bradley all identified accused (R. 9,10,14,17,18,21).

The court took judicial notice of "War Department Supply Bulletin 9-12, dated 2/7/44, wherein a 1½ ton, 6 x 6 weapons carrier is listed without a winch at \$2426.00, and with a winch at \$2598.00", and of Quartermaster monthly Subsistence Price List for June 1944, wherein corned beef in "six pound cans is listed at \$1.04 per can" (R. 21).

Accused elected to remain silent (R. 23).

4. It thus appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge I, accused absented himself from his station without authority and remained absent until 1 May 1944.

It further appears from uncontradicted evidence that at the place and time alleged in Specifications 1 and 2, Charge II, accused knowingly and willfully applied to his own use and benefit two "1½ ton, 6 x 6 Weapons Carrier(s)", property of the United States furnished and intended for the military service thereof. The vehicles were regularly assigned to Quartermaster ration dump Q-575 and were regularly driven by Italian drivers assigned to each truck. Accused was not on duty at the dump. On each occasion he boarded the truck, displaced the Italian driver thereof over his protests, caused the truck to be loaded with rations and drove the loaded truck from the dump. The rations thus loaded on the first truck were delivered to the home of a civilian in Otto, Italy. Accused was apprehended in the act of driving the second truck about three miles from the ration dump. The Specifications alleged the numbers of the vehicles in question, but the proof did not supply these descriptive details and the court properly excepted the numbers from the findings of guilty. It does sufficiently appear, however, that accused wrongfully took and used vehicles of the type alleged. That the vehicles were property of the United States and furnished and intended for the military service was shown by the testimony that they had been assigned to and were being employed at Quartermaster ration dump Q-575. The value of the vehicles was shown to be in excess of the amounts alleged. All material elements necessary to establish accused's guilt were sufficiently proven (MCM, 1928, par. 150i).

It also appears from uncontradicted evidence that at the place and time alleged in Specification 3, Charge II, accused took and carried away a quantity of foodstuff, including cans of bacon and at least 45 cans of corned beef or similar canned meat. The circumstances justify an inference that the meat was the property of the United States, furnished and intended for military service and, as found, was of a value in excess of \$50.00. The corned beef was shown to have had a value of \$46.80 and the court could have taken judicial notice of the value of 14-pound cans of bacon as shown on the Quartermaster Monthly Subsistence Price List for June 1944 (\$3.63). Intent to steal was also inferable from the circumstances. Violation of Article of War 94 as alleged was established.

5. After the prosecution had rested, defense moved "for a continuance in order to get statements or depositions from Ernest Hopkins, Company B, 530th Quartermaster; and James Aram, Company C, 530th Quartermaster." In support thereof the defense stated that "a number of the witnesses***are moved out of the 530th Quartermaster or even out of Italy" and "accused states that these witnesses will prove that he was with the 530th Quartermaster all evening and in the presence of these witnesses" and again that "their testimony would settle his location up to a certain hour that evening which would cover fully a certain period of his activities testified to in this case". Defense stated further "The accused tells the defense he was picked

(154)

up by the Italian truck driver very shortly before being picked up by the group of American soldiers". The president of the court, who was also law member, denied the motion, "subject to objection by any other member of the court, and in view of the fact that the testimony indicates that accused was actually in possession of the truck at the time he was apprehended". There was no objection by any member of the court. (R. 22,23)

The charges were served on accused on 1 August 1944 and trial was held on 19 August 1944.

Article of War 20 leaves to the discretion of the court the granting of continuance for a reasonable cause. An examination of the report of the investigating officer accompanying the record of trial discloses that the sworn statements of Master Sergeants Bradley and Esch and of the Italians Ferrini and Zurlo were identical with their testimony at the trial. The names of these four, as witnesses against the accused, were listed on the charge sheet. Presumably this information was available to accused and defense counsel prior to the trial.

"The proper time for making an application (for continuance) to the court is after the accused is arraigned and before he pleads***.

"Reasonable cause for the application must be alleged. For instance, when a continuance is desired because of the absence of a witness, the application should show that the witness is material, that due diligence has been used to procure his testimony or attendance, that the party applying for the continuance has reasonable ground to believe that he will be able to procure such testimony or attendance within the period stated in the application, the facts which he expects to be able to prove by such witness, and that he can not safely proceed with the trial without such witness" (MCM, 1928, par. 52c).

The defense had 18 days in which to prepare its defense after the charges were served on accused. In so far as appears no effort was made during this period to procure the testimony of the witnesses. Under the circumstances there was no showing of due diligence in attempting to secure the testimony of the proffered witnesses. No adequate showing was made that the defense would have been able to procure such testimony. Furthermore it was not contended that the proffered testimony would contradict the evidence showing that accused was in one of the trucks involved when he was apprehended. In cases where the Board of Review has held that the courts abused their discretion in refusing continuances, it has appeared that accused had been deprived of the fundamental right to prepare and present a defense made in good faith (CM 231119, Lockwood; CM 236323, McClain). In the opinion of the Board of Review the record in this case discloses no abuse of the court's discretion in denying the motion for a continuance.

6. The charge sheet shows that accused is 21 years of age, was inducted into the Army 12 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 of guilty and the sentence. Penitentiary confinement is authorized by Article of War 42 for the offenses of misapplication and larceny of property furnished and intended for the military service, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by Section 87, Title 18, United States Code, as amended 22 November 1943.

Mortimer R. Lewis, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Reisch, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
30 December 1944.

Board of Review

MTO 4372

UNITED STATES)

PENINSULAR BASE SECTION

v.)

Trial by G.C.M., convened at
Naples, Italy, 8 August 1944.

Private GENERAL ROBINSON
(38 206 018), 4067th Quarter-
master Service Company.)

Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private General (NMI) Robinson, 4067th Quartermaster Service Company, did, at or near Fuorigrotta (Naples), Italy, on or about 1230 hours, 28 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Thomas (NMI) Jenkins, 4067th Quartermaster Service Company, a human being, by striking the aforesaid Private Thomas (NMI) Jenkins on the back of the head with a portion of a brick.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for failure to repair in violation of Article of War '61 and being drunk in camp in violation of Article of War 96 was introduced. He was sentenced to dishonorable

276902

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 about 1100 hours, 28 June 1944, accused and Private Thomas Jenkins, both colored and members of the 4067th Quartermaster Service Company, stationed near Fuorigrotta, Italy, a suburb of Naples, Italy, had an altercation near a ration dump located about three-quarters of a mile from Fuorigrotta, during which they threw rocks at each other (R. 10,11,16,17, 29). Jenkins "hit" accused in the face and accused pulled out a knife (R. 12). Some soldiers separated them and took accused to a near-by fountain and washed his face which was bleeding. After the fight, Jenkins approached accused, "stuck out his hand and he even wanted to give" accused "a kiss". (R. 12) Jenkins then left laughing and accused, who appeared to be angry, went to the company area of the 305th Quartermaster Railhead Company in the vicinity of Fuorigrotta (R. 10,17). During the mess hour accused asked a soldier of that company if he had a gun and told the soldier that he had had a fight with a "white" soldier (R. 18). Accused then approached another soldier of the company and told him that he had had some trouble with a white soldier and asked this soldier if he had a knife (R. 19).

An eyewitness, an Italian civilian, testified that at about 1230 hours accused came upon Jenkins who was walking down the stairs of a near-by building not far from the railroad station of Fuorigrotta. Accused ran after Jenkins, who, upon seeing accused, put one hand in his left pants pocket and the other in his watch pocket and started to go back into a company bivouac area. (R. 13, 15) Accused threw a "half brick" at Jenkins' head. The missile struck Jenkins in the back of the head, a little back of his left ear and he fell to the ground. Accused then ran away, after walking slowly past a guard. (R. 8, 13-15) Jenkins was found bleeding from a wound in the back of his head and from the mouth (R. 10,13). A medical officer arrived at the scene and pronounced Jenkins dead (R. 16,17).

A medical officer of the 15th General Laboratory who examined Jenkins' body at 1600 hours, 28 June 1944, testified that when he made the examination Jenkins' "body was still warm and rigor mortis had not set in" which indicated that "death had probably been within the past four or five hours" (R. 6,7). Witness testified further that Jenkins had "a laceration at the back of the head approximately two and a half inches long, a jagged laceration and this smashing wound in the skull as if something jagged had caused this wound"; that he considered death to have been caused by this wound in the back of the head, and in his opinion "it could have been possible that that particular wound was caused by a blow from a brick". He testified:

"I found the cause of death to be due to a depressed, comminuted fracture at the back of the head with a large amount of intercranial hemorrhage from that".
(R. 7)

276902

During the latter part of June 1944, Rudolph Sturm, an agent of the Criminal Investigations Division, North African Theater of Operations, explained Article of War 24 to accused, told him he was not required to make any statement whatsoever and exhibited to accused a written, signed and sworn statement which had purportedly been given by accused to Agent (William C.) Adler of the Criminal Investigations Division 30 June 1944. Accused acknowledged it as his own. (R. 19,21) The defense objected to the introduction of this statement

"on the grounds that it does not appear that before the information given in said statement was taken from the accused he was apprised of his rights under the 24th Article of War". (R. 21)

The statement of accused, as follows, was received in evidence:

*STATEMENT OF Pvt. General Robinson, 38206018, 4067 Q.M. Serv Co, APO 782 in the case of Death of Pvt. Thomas Jenkins given at 0930 30 June 1944 C.I.D. Office, Naples, Italy in the presence of William C. Adler, Agent, CID

*Officer taking statement: Pvt Robinson, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used for you or against you should this investigation result in a trial. Do you understand what I have just said?

*(Answer) Yes.

*The day before yesterday, Wednesday 28 June, 1944, I got a pass and left camp between 1000 and 1100 hours with Charlie T. Young. We got a ride on a truck around to the station. We went downstairs together and on the platform we got a shoeshine. I was waiting for the train to Naples when I first saw the soldier named Jenkins. He was talking to an Italian girl. I saw her a few times before around near the camp and passed the time of day with her, nothing more. They were sitting there together when I walked by. I spoke to her. She was eating peanuts and I sort of asked her for some. Jenkins said I shouldn't talk to her because she was his girl. I said I never seen her but maybe once or twice before. After we talked back and forth for a while he got mad and we started tussling. Charlie Johnson and Judge Houston separated us. After the fellows

separated us, one of them, it must have been Houston, walked along the platform with me. We stopped and I looked back. Jenkins was picking up some rocks and a bolt like they use on the tracks. I picked up some rocks too because I figured he was going to hit me. He may have said something but I don't remember now just what he said. He started chucking rocks and so did I but neither of us hit the other. We was quite a distance apart. He was closing in and when he got close he hit at me and he must have had something sharp in his hand, a rock maybe, and scraped my right cheek. Some of the fellows came along and stopped us. I don't remember who they were. I stayed there for a few minutes and then went up to the street where the ticket window is. Charlie Johnson was with me. I left him there and went back down on the platform. Then I went over to a sort of water hole on the other side of the tracks. Jenkins and Charlie Young were there. I washed off my face. Jenkins was washing up too. When I got through I asked this other boy if he had something I could wipe my face off with. Jenkins said I could use his handkerchief, an army colored one. I used his handkerchief to wipe off my face. That's the last place I seen the man Jenkins. I said to him 'Let's forget about it' and I walked on off. I went over to the stair way. I was by myself. I probably run up the stairs. I got the train at the Fuorigrotta station. Charlie Young caught me alongside the hospital tents outside the barbed wire fence. We caught the train into Naples together. We were together all afternoon. I went back to camp in the evening. I don't remember what time it was. Young and Lonnie Bail and Banks were with me when I got back. We went right on to the dump and saw Sgt. Wiggins. He told me they wanted to see me up to the office. He said the Jenkins fellow got hurt.

"Q. Did you hit Jenkins with a rock at any time on the day we have been talking about?

A. No sir, I didn't.

"Q. Can you say how long you were in the area of QM Dump 584 and the railway yards while the incident you described above took place?

A. I couldn't rightly say but it wasn't more than an hour.

"Q. Did you go into the Dump area alongside the big building or up into the 305th Q.M. Railhead tent area at any time on the day in question.

A. No". (R. 21; Ex. 2)

Sturm testified further that on 2 July 1944, after he had explained Article of War 24 to accused he had another conversation with him at which time accused made the following statement:

"To my first statement I wish to add that shortly after 1200 hours 28 June, 1944 I walked toward the building where our office is located. I saw the guy Jenkins, so I picked up a rock and threw it at him. I did not see him fall because I turned and ran off immediately. Then I went to Naples and later on returned to camp.

"Q. How big was the rock with which you hit Jenkins?

A. It was about the size of a baseball.

"Q. Could you recognize the rock if I showed it to you?

A. I don't know.

"Q. Is this the rock?

A. I don't know, maybe it is". (R. 21; Ex. 3)

Accused testified that at 1100 hours 28 June 1944 he and Jenkins had a fight over a "white" Italian girl. During the fight accused's face was scratched. He left and went to the station to catch a train but his face kept bleeding and he returned to a point near the scene of the fight and washed the blood off his face. (R. 24,27) Jenkins gave him a handkerchief to use in wiping the blood away but Jenkins was not "talking friendly" and told accused that if he "stayed there until he got back" he would kill accused (R. 22,24-27). Jenkins then left and accused went to his camp to have his face dressed. He met the two soldiers (R. 28) and asked one for a knife and the other for a pistol. He intended "just to carry" the pistol, and asked for the knife so he could have a "tool" to carry while on pass and to protect himself if attacked. (R. 23,24,28) After leaving the two soldiers shortly after noon and at a point about a half a mile from camp, accused saw Jenkins coming out of a door of a building. Accused believed that Jenkins habitually carried a pistol. (R. 22,23,27) When Jenkins saw accused Jenkins started "to fumble with his bosom like he had a gun" (R. 24), and accused thought that Jenkins "was going to get a gun and take a shot at" him and that Jenkins "might carry out his threat" (R. 23). Jenkins was facing accused (R. 25). Accused testified further:

"There was a rock lying there and I picks up the rock to throw it at him from behind a brick wall so I would have a chance to get away" (R. 23);

that he was about 15 feet from Jenkins, that he "threw the rock and ducked behind the brick wall and then was gone", and that he did not throw the rock "awful hard" (R. 24). It did not occur to him that he might kill Jenkins (R. 23). He did not see the rock hit Jenkins and believed that Jenkins "must have ducked" if the missile struck him in the back of the head (R. 24,25). After throwing the stone accused went up the stairway to the station for a

train, caught the train and went to Naples on pass (R. 24). He did not know he hit Jenkins until he got back to camp (R. 27). He did not tell the two soldiers from whom he requested weapons that he had had trouble with a "white" soldier, but told them "it was about a white girl" (R. 26).

4. It thus appears from the evidence that at the place and time alleged accused struck Private Thomas Jenkins, the person named in the Specification, and a member of the organization alleged, on the back of the head with a portion of a brick with such force as to inflict a laceration approximately two and a half inches long and a depressed comminuted fracture which resulted in a large amount of intercranial hemorrhage thereby causing his death.

There is evidence that preceding the fatal assault accused and Jenkins in the same general vicinity had engaged in an altercation over an Italian girl, in the course of which accused was struck by a stone thrown by Jenkins. Accused then went to a near-by camp and sought to secure a firearm from one soldier and a knife from another, returned to a point near the scene of the first difficulty, and about an hour and a half after the altercation found Jenkins entering a street from a stairway, ran after him, picked up a "half-brick" and from behind Jenkins threw it, striking him in the back of the head. The court was justified in concluding that sufficient cooling time elapsed between the provocation of Jenkins' assault and the fatal blow by accused to remove the homicide from the category of voluntary manslaughter (MCM, 1928, par. 149a).

Accused testified that he believed Jenkins had a pistol, that Jenkins threatened to kill him and that just before accused threw the brick Jenkins, while facing accused, put his hand in his jacket as if reaching for a weapon and as if intending to fire upon accused. The Italian testified that Jenkins put his hand in his pocket. The court was justified, however, in concluding that the fatal assault was made from the rear and without immediate threat of danger from Jenkins. To justify or excuse a homicide on the ground of self-defense, it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor, and that the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or to prevent great bodily harm to himself. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (MCM, 1928, par. 148a; NATO 3850, Davis; MTO 4061, Jones). There is evidence from which the court might conclude that accused became the aggressor, that there was no reasonable basis of a fear on his part of imminent danger, and that he did not avail himself of the opportunity for retreat.

In the light of the entire record the court was warranted in concluding there was no legal excuse or justification for the killing and that the homicide was committed deliberately and with malice aforethought. The court was warranted in finding accused guilty of murder as charged (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672 et seq; NATO 951, Chastain).

5. The pretrial statement of accused dated 30 June 1944 (Ex. 2) was admitted in evidence over the objection that accused was not "apprised" of his rights under Article of War 24 before it was given. The statement did not concede murder and was not a confession but even considering it to have been a confession and according to this objection the widest latitude without confining it to the grounds stated, still the admission of the pretrial statement in evidence was not error. The statement shows on its face that before it was given accused was warned that whatever he said might be used against him. Voluntariness was sufficiently established. Further there is evidence in the record that after he made the statement his rights under Article of War 24 were again fully explained to him and he was again presented with the statement which he voluntarily "acknowledged" to be "his own" and then voluntarily supplemented it by another written statement (Ex. 3).

6. The charge sheet shows that accused is 25 years of age. He was inducted into the Army 8 August 1942. 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 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.

William R. Egan, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Sewell, Judge Advocate.

276902



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
15 December 1944.

Board of Review

MTO 4373

UNITED STATES)

v.)

Private GOLDIE R. ASHBY)
(35 486 419), Headquarters)
Company, 2d Battalion,)
350th Infantry.)

88TH INFANTRY DIVISION)

Trial by G.C.M., convened at)
Montecatini, Italy, 16 November)
1944.)

Dishonorable discharge and)
confinement for 30 years.)
Eastern Branch, United States)
Disciplinary Barracks,)
Greenhaven, New York.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Goldie R. Ashby Headquarters Company, 2nd Battalion, 350th Infantry, did, near San Stefano, Italy, on or about 18 July 1944 desert the service of the UNITED STATES and did remain absent in desertion until he was apprehended at Rome, Italy, on or about 2 October 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 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

(166)

Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that about 0900 hours on 18 July 1944, accused, a member of Headquarters Company, 2d Battalion, 350th Infantry, with six other soldiers was "placed on a mine clearing detail" moving at the head of their battalion which was near "S. Stefano", Italy, marching toward Montaione (Italy). The members of the detail moved out ahead of the battalion column and began sweeping the road of mines. (R. 4,5)

A first lieutenant of accused's company testified that accused

"was placed on a mine clearing detail with six other men and one man was in charge of the detail. The man in charge of the detail was Private Alley. The detail was at the head of the column and when they started out, Private Ashby was there, but when we reached Montaione and I checked to see if the detail was through, he wasn't with them" (R. 4).

Witness testified further that he last saw accused at "about eleven o'clock in the morning" at which time accused was "walking in front of the battalion", and was "sweeping the road of mines", but that when the battalion reached Montaione at "about three or four o'clock in the afternoon" accused was not present and that he did not have permission to be absent (R. 4,5). Witness testified further that during the march from "S. Stefano", Italy, to Montaione, the battalion moved "parallel with the front lines", and "near an area that hadn't been cleared of the enemy" and that "the enemy had withdrawn the night before" but that during the entire march the battalion was within range of enemy artillery and mortar fire. (R. 5)

A member of accused's company who was in charge of the mine clearing detail testified:

"We were sent out ahead of the battalion to look for mines. The battalion was on the march and there were six or seven in the detail. We were placed ahead of the battalion area in the morning about nine o'clock. As we left the battalion, the mine sweeping detail formed to go ahead of the battalion. When we got up there I called for Private Ashby and he wasn't there. During the route of march I called back several times for him, but he wasn't there" (R. 5,6).

An extract copy of the morning report of accused's company, received in evidence without objection, contained the following entry: "Fr duty to AWOL, as of 1200, 18 July 1944" (R. 6; Ex. A). It was stipulated that accused was apprehended at Rome, Italy, on or about 2 October 1944 (R. 6; Ex. B).

Accused elected to remain silent.

4. It thus appears from the evidence that at the place and time alleged accused absented himself without leave and remained absent until he was apprehended at Rome, Italy, on or about 2 October 1944. Accused absented himself without proper authority while he was engaged in clearing enemy mines in front of his battalion which was then on the march and within range of enemy artillery and mortar fire, and remained unauthorizedly absent until apprehended about two and a half months later in a rear area. An intention to remain permanently absent was inferable from accused's unexplained prolonged absence, his failure to surrender to military authorities while absent and in the neighborhood of numerous military posts and stations in this active theater of operations, and from other circumstances in evidence (MCM, 1928, par. 130a). The circumstances of his initial absence moreover were such that an intention to avoid hazardous duty was also inferable. The court was warranted in finding accused guilty as charged.

The Specification alleges that accused deserted the service of the United States "near San Stefano, Italy", whereas the evidence discloses that the desertion occurred "near S. Stefano, Italy". Undoubtedly "S." is an abbreviation for "San" and since there is no suggestion anywhere in the record that accused was misled or surprised thereby it cannot be said that accused's substantial rights were injuriously affected by this slight variance.

5. The charge sheet shows that accused is about 24 years of age. He was inducted into the Army 27 July 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.

Martin R. Lewis, Judge Advocate.
George O. Wilson, Judge Advocate.
Mary C. Kline, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
9 January 1945.

Board of Review

MTO 4419

UNITED STATES

v.

Private HYBART LEE (34 745 816)
and Private First Class WILLIE
L. MONTGOMERY (34 628 162), both
of Company L, 371st Infantry.

92D INFANTRY DIVISION

Trial by G.C.M., convened at
APO 92, U. S. Army, 20
November 1944.

LEE: Dishonorable discharge
and confinement for 20 years.
MONTGOMERY: Dishonorable dis-
charge and confinement for five
years (sentence suspended).
U. S. Penitentiary, Lewisburg,
Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

2. Accused were jointly tried (in common) upon separate Charges and Specifications as follows:

LEE

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

Specification: In that Private Hybart Lee, Company "L", 371st Infantry, did, in conjunction with Private First Class Willie L. Montgomery, at Pisa, Italy, on or about 27 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant Harry H. Short, by willfully and feloniously shooting the said Staff Sergeant Harry H. Short in the foot with a rifle.

276869

(170)

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

Specification: In that Private Hybart Lee, Company "L", 371st Infantry, did, at or near Pisa, Italy, on or about 27 October 1944, violate a certain standing order, in substance, to wit, that no personnel of the 92d Infantry Division, except the military police, would lawfully be in possession of ball ammunition at any time, by wrongfully having in his possession two rounds of Caliber .30 ball ammunition.

CHARGE III: Violation of the 65th Article of War.

Specification: In that Private Hybart Lee, Company "L", 371st Infantry, having received a lawful order from Staff Sergeant Harry H. Short, a non-commissioned officer, who was then in the execution of his office, to turn in his rifle to Military Police Headquarters, did, at Pisa, Italy, on or about 27 October 1944, willfully disobey the same.

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

Specification: In that Private Hybart Lee, Company "L", 371st Infantry, did, without proper leave, absent himself from his organization at Staging Area, 92d Infantry Division, from about 1800 27 October 1944 to about 2030 27 October 1944.

MONTGOMERY

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

Specification: In that Private First Class Willie L. Montgomery, Company "L", 371st Infantry, did, in conjunction with Private Hybart Lee, at Pisa, Italy, on or about 27 October 1944, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant Harry H. Short, by willfully and feloniously shooting the said Staff Sergeant Harry H. Short in the foot with a rifle.

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

Specification: In that Private First Class Willie L. Montgomery, Company "L", 371st Infantry, did, at or near Pisa, Italy, on or about 27 October 1944, violate a certain standing order, in substance, to wit, that no personnel of the 92d Infantry Division, except the military police, would lawfully be in possession of ball ammunition at any time, by wrongfully having in his possession one round of Caliber .30 ball ammunition.

CHARGE III: Violation of the 65th Article of War.

276869

Specification: In that Private First Class Willie L. Montgomery, Company "L", 371st Infantry, having received a lawful order from Staff Sergeant Harry H. Short, a non-commissioned officer, who was then in the execution of his office, to turn in his rifle to Military Police Headquarters, did, at Pisa, Italy, on or about 27 October 1944, willfully disobey the same.

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

Specification: In that Private First Class Willie L. Montgomery, Company "L", 371st Infantry, did, without proper leave, absent himself from his organization at Staging Area, 92d Infantry Division, from about 1800 27 October 1944 to about 2030 27 October 1944.

Each accused pleaded not guilty to the Charges and Specifications pertaining to him. Accused Lee was found guilty of Charge I and its Specification, except the words, "in conjunction with Private First Class Willie L. Montgomery", of the excepted words, not guilty, and guilty of the other Charges and Specifications pertaining to him. Accused Montgomery was found not guilty of Charge I and its Specification and guilty of the other Charges and Specifications pertaining to him. 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, Lee for 100 years, and Montgomery for 25 years, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the findings of guilty of Charge IV and its Specification in each case "as finds the accused guilty of absence without proper leave for some considerable time, with exactness not determinable, but otherwise in manner and form as charged therein", approved the sentences, reduced the period of confinement to 20 years in the case of Lee and to five years in the case of Montgomery, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement in the case of Lee, and forwarded the record of trial for action in his case under Article of War 50½. In the case of Montgomery, the reviewing authority ordered the sentence executed but suspended execution of the "unexecuted portion" thereof. The proceedings as to Montgomery were published in General Court-Martial Orders No. 190, Headquarters 92d Infantry Division, 5 December 1944.

3. Inasmuch as the sentence to dishonorable discharge in the case of accused Montgomery was suspended and the general court-martial order in his case published, the Board of Review makes no holding and expresses no opinion in his case.

4. The evidence shows that on 27 October 1944, Company L, 371st Infantry Regiment, of which accused were members, was stationed in the 92d Infantry Division Staging Area near Pisa (Italy), which city was off-limits to all members of the organization. Sometime after retreat on the above date accused armed themselves with M1 rifles and without permission went to

Pisa (R. 10,11,20-22; Exs. A,B). Accused were walking along the main street of Pisa carrying their rifles at sling arms when they were stopped by two military policemen, Staff Sergeant Harry (H.) Short and Corporal Ralph Leroy Bare, both of whom were wearing white headgear and "MP" brassards (R. 14-16,23-25). Sergeant Short was armed with a pistol and Bare had a nightstick (R. 16). Sergeant Short told accused that they could not carry firearms in Pisa. Accused replied that they had been told by their company commander to carry firearms wherever they went. Short and Bare had orders that no one was to carry firearms in Pisa except on official duty. (R. 15,17) Short then said to accused:

"If you want to stay in Pisa, you will have to get rid of the firearms" and "when you leave Pisa, you can pick them up at the MP station" (R. 15).

Accused refused to surrender their rifles and Short then said "You can't stay in Pisa" and "hop in the jeep and we'll take you out of town in the jeep". Accused refused, "hit their M1's, and put their safeties off" (R. 16) and pointed the rifles directly at Short and Bare from about hip level. Short and Bare pleaded with the two soldiers, who split up one going to one side of the street and one to the other, but to no avail. Several Air Corps officers came up and attempted to persuade accused to surrender their weapons explaining that they could not carry arms in Pisa. Accused continued holding their rifles pointed at Short and his companion as they backed slowly down the street toward a dark alley. Montgomery appeared to be breaking down and wanted to go with the military police but Lee was adamant and Montgomery would not go without Lee. Short told Bare to go after assistance and as he was leaving Lee and Montgomery went down the dark alley. Short then drew his pistol and entered the alley saying "I will stop them" or "I will get them". Four or five shots were heard and immediately thereafter Short was found in the alley shot in the legs. (R. 15,16,19,23-25) It was light enough for accused to see the "MP" brassards on the arms of the military policemen. At no time did the policemen threaten accused. (R. 16,25)

The evidence shows further that accused's company held retreat every afternoon and on several occasions prior to 27 October 1944 it had been announced at retreat that members of the organization were not to have ball ammunition in their possession while in the staging area and were to store their arms in the supply room each afternoon immediately following retreat. After retreat the company was marched, by platoons, to the supply room where the rifles were left. Inspections of the tents and barracks bags were made by the platoon sergeants to see that no members of the organization had arms or ammunition in their possession. (R. 11,12,20,21)

After an affirmative announcement by defense that it had no objection, the following sworn written statement of accused Lee, made after he had been advised that he did not have to make a statement and that anything he said might be used against him, was introduced in evidence:

"Montgomery and I are tent-mates. We took our rifles, and went to Pisa 27 October 1944. No one told us we

might not carry our rifles. On the way, Montgomery had found 3 rounds of Cal. 30 ball ammunition and gave two to me. I loaded it into my rifle. We got to Pisa about 1930, without a pass or permission to leave the Staging Area.

"We stood by a fire for awhile. An officer and an MP asked us how come we had our rifles with us in town. We told them we were just back from the front. They seemed satisfied and went on.

"Later, two MP's in a jeep came up (Sgt Short was one) and told us we had to turn our rifles in at MP Headquarters or leave town. We refused to do this and the argument lasted about ten minutes. I backed off and ran down an alley. It was dark. As I turned the corner I heard someone cock a pistol. I fired my rifle towards him to stop him from following me. Three shots came after us. Montgomery and I ran and hid and took our rifles apart to hide them under our jackets. Then we were caught. Montgomery didn't shoot. If the MP's had come barehanded I would have given them my rifle" (R. 8-10; Ex. B).

Accused Lee testified that on the night of the date alleged he left his company area without a pass and went to Pisa with Montgomery and took a weapon to protect himself and that the previous day Montgomery had found "three balls" and had given him two (R. 29,30). He had never been told that he could not take his rifle to "town" but had been told and understood that he was to store his rifle in the supply tent every afternoon after retreat, and also he had heard the order to turn in all ammunition but that he did not turn his in (R. 30,33). Accused testified further that two "MP's" stopped him and Montgomery, told them they were "MP's", and that they were not to carry "guns" in Pisa but that he did not turn his "gun" over to them because he was going out of town to see where he could get a drink (R. 36). Accused testified further that the military policemen offered to take him and Montgomery to the edge of "town" but he did not go with them and that he fired his weapon at one of the military policemen after three shots had been fired (R. 31). After being shown his written statement wherein he said "As I turned the corner I heard someone cock a pistol. I fired my rifle towards him to stop him from following me", accused testified "that's right in the statement" (R. 31). Accused testified further that "this MP" was armed with a pistol and that he also had a club in his hand in an upraised threatening position and although he did not attempt to strike accused, accused kept backing away and was afraid the military policeman was going to "get up to" him but he never got "close enough" (R. 33).

5. It thus appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge I, pertaining to Lee, this accused assaulted Staff Sergeant Harry (H.) Short, the person named in the Specification, by shooting him in the legs with a rifle. It further appears from the evidence that at the time he committed the assault Lee

(274)

Lee's victim was a military policeman. Accused admitted in his statement and also testified that he fired first and that he fired at the military policeman. The evidence warrants the conclusion that the assault was committed with intent to murder. No legal excuse or justification for the assault was shown. Under the circumstances, if death had ensued, the homicide would have constituted murder. That accused entertained the requisite specific intent to murder may be inferred from the use of a deadly weapon, the manner in which it was employed, the character of the injuries inflicted and other circumstances in evidence (Winthrop's, reprint, p. 688; MCM, 1928, par. 1481; NATO 1031, Howlett; NATO 1707, Faircloth; MTO 4270, Springs).

It was alleged that Lee committed an assault upon Sergeant Short by shooting him "in the foot" whereas the evidence discloses that the victim was shot in the legs. The gravamen of the offense charged was the perpetration of the assault. The exact point of entry of the missile fired by accused is of no material consequence. In the absence of any showing that accused was misled or surprised it cannot be said that this slight variance injuriously affected his substantial rights (Winthrop's, reprint, p. 138).

It further appears from prosecution's evidence corroborated by the testimony of accused that at the place and time alleged in the Specification, Charge II, accused had in his possession two rounds of caliber .30 ball ammunition in violation of a standing order of his organization.

It further appears from the evidence that at the place and time alleged in the Specification, Charge III, Lee was in possession of an M1 rifle and received an order from Staff Sergeant Harry (H.) Short that if he wanted to stay in Pisa he would have to get rid of his firearm and that he could pick it up at the military police station when he left Pisa. In his statement accused said he and Montgomery were told they would have to turn in their rifles at "MP" Headquarters or leave town. Accused refused to either surrender his weapon or leave Pisa. On the contrary he removed the safety on his rifle, lowered the weapon to hip level and pointed it directly at Sergeant Short. It is clear that the order was lawful and that it was given by a noncommissioned officer who at the time was in the execution of his office. In view of accused's unequivocal refusal to either surrender his weapon or leave Pisa, it is of no moment that the order given originally embraced an alternative course of action. Having refused to leave, there can be no doubt that he received, and knew he received, a direct and unequivocal order to give up his weapon. He was properly found guilty as charged.

The Specification, Charge III, alleged a willful disobedience of an order given by Staff Sergeant "Harry H. Short", whereas the evidence does not establish the middle initial of the noncommissioned officer who gave the command. This was immaterial (Bull. JAG, June 1944, p. 234).

It further appears from the evidence that at the place and time alleged in the Specification, Charge IV, accused absented himself from his organization without leave and remained unauthorizedly absent for a period

276869

of time not disclosed by the evidence. Accused himself testified he left his company area without authority. The court found accused guilty as charged. The reviewing authority approved only so much of the finding as finds the accused guilty of absence without proper leave for some considerable time, with exactness not determinable, but otherwise in the manner and form as charged. This action was not legally improper. The offense was committed when accused absented himself and a determination as to the duration of the unauthorized absence was unnecessary (Bull. JAG, January 1944, p. 9; NATO 3047, Coffey).

6. A voluntary statement made by Montgomery involving accused Lee was admitted in evidence without qualification after an affirmative announcement by defense that it had no objection. The statement was practically identical with the statement of accused which was introduced in evidence following an affirmative announcement by defense that there was no objection. Proper procedure would have been to qualify the tender and admission of each statement as evidence against the maker only. However, inasmuch as the defense affirmatively announced it had no objection to the admission of Montgomery's statement in evidence and the statement was practically identical with accused's statement and all material facts recited therein in so far as they relate to accused Lee were corroborated by him in his sworn testimony, it cannot be said that accused's substantial rights were injuriously affected by the absence of a proper instruction as indicated.

7. Inasmuch as this case was tried upon separate charges, accused should have been asked if they consented to a joint, or common, trial. Each should have been expressly extended the right to one peremptory challenge. In view of the absence of objection to common trial and the waiver of all challenges, it cannot be said that the rights of the accused persons were injuriously affected (Dig. Op. JAG., 1912-40, sec. 395 (33); CM 195294, Fernandez, et al, II B.R., 205).

8. The charge sheet shows that accused is 21 years of age. He was inducted into the Army 26 March 1943 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 as approved and the sentence as to accused Lee. Penitentiary confinement is authorized for the offense of assault with intent to commit murder, 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.

William B. Smith, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Keen, Judge Advocate.

276869

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
7 February 1945.

Board of Review

MTO 4431

UNITED STATES)

v.)

Privates JOHN H. BARNES)
(34 747 014), AUGUSTUS J. GARCIA)
(33 134 233), JOHN McCALL, JR.)
(33 456 119), ALFRED A. PETERSON)
(33 723 154), ALBERT TAYLOR)
(34 746 445), JOHN WHITNEY)
(34 615 993) and JOHN A. CLARK)
(12 184 524), all of 405th Port)
Company.)

PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Naples, Italy, 22 August 1944.
BARNES, CLARK and TAYLOR:
Dishonorable discharge and
confinement for life.
McCALL, WHITNEY and PETERSON:
Dishonorable discharge and
confinement for 20 years.
GARCIA: Acquittal.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 89th Article of War.

Specification 1: In that Private John A. Clark, Private John (NMI) McCall, Jr., Private Albert (NMI) Taylor, Private John (NMI) Whitney, and Private Alfred A. Peterson, all of 405th Port Company (then the 6415th Port Company), being with 6415th Port Company in quarters at Naples, Italy, did, at Naples, Italy, on or about 25 April 1944, commit a riot, in that they, together with certain other soldiers to the number of about fifteen (15), whose names

are unknown, did with force and arms unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the inhabitants of Naples, Italy, and having so assembled, did unlawfully and riotously assault Piccoli Lino and Bagnardi Francesco, by striking and kicking them, to the terror and disturbance of the said inhabitants of Naples, Italy.

Specification 2: In that Private John A. Clark, Private John (NMI) McCall, Jr., Private Albert (NMI) Taylor, Private John (NMI) Whitney, Private Alfred A. Peterson, Private Augustus J. Garcia, and Private John H. Barnes, all of 405th Port Company (then the 6415th Port Company), being with 6415th Port Company in quarters at Naples, Italy, did at Naples, Italy, on or about 25 April 1944, commit a riot, in that they, together with certain other soldiers to the number of about fifteen (15), whose names are unknown, did with force and arms unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the inhabitants of Naples, Italy, and having so assembled, did unlawfully and riotously assault Mastrini Euclide and Donini Silvio, members of the Italian Carabinieri, by shooting them with firearms, a further description of which is unknown, to the terror and disturbance of the said inhabitants of Naples, Italy.

Each accused pleaded not guilty to the Charge and Specifications pertaining to him. Garcia was found not guilty of Specification 2 and the Charge. All other accused were found guilty of the Charge; Clark, McCall, Taylor, Whitney and Peterson, guilty of Specification 1 except the words "and Bagnardi Francesco", of the excepted words not guilty; and Clark, Taylor and Barnes, guilty of Specification 2; McCall, Whitney and Peterson not guilty of Specification 2. No evidence of previous convictions was introduced except as to Taylor, as to whom evidence of one previous conviction by summary court-martial for willful disobedience of a lawful order given him by a noncommissioned officer in violation of Article of War 65, was introduced. Each accused found guilty 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 sentences but as to McCall, Whitney and Peterson reduced the period of confinement for each to 20 years; and as to Clark, Taylor and Barnes approved "only so much of the findings of guilty of Specification 2 of the Charge *** as involves findings that said accused, being with 6415th Port Company in quarters at the place alleged, did, at the place and time alleged, commit a riot, in that they, together with certain other soldiers to the number of about fifteen (15), whose names are unknown, did with force and arms unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the inhabitants of Naples, Italy, and having so assembled, did unlawfully and riotously assault a member of the Italian Carabinieri, by shooting him with firearms, a further description

of which is unknown, to the terror and disturbance of the said inhabitants of Naples, Italy"; designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for all accused found guilty, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 25 April 1944 the 405th Port Company (then the 6415th Port Company), of which accused were members, was quartered in the Granelli barracks on the Port Road in Naples, Italy (Exs. 6,7,8; R. 6,12,16,24). The barracks were enclosed by a barbed wire fence with a guard posted at the gate (R. 10,12,19,20). At about 2000 hours on the date mentioned a group of 18 or 20 colored American soldiers, including accused Clark, McCall, Taylor, Whitney and Peterson, were gathered around the guard at the gate in front of the barracks when an unidentified informant reported that "the Italians killed a couple of colored soldiers" (R. 10,24,25,28; Exs. 6,7). The soldiers were engaged in discussing the reported homicides when some Italian soldiers came along (R. 12,13). The colored soldiers, including the five above-named accused, went out the gate and engaged in a fight with the Italian soldiers (R. 12,13,24). The five accused named were seen "beating up on the Italians" (R. 28).

At about the same time an Italian soldier, Private Piccoli Lino, wearing an Italian Army uniform, who, with an Italian companion, Mario Emilio, was walking along the port road, noticed about 50 colored American soldiers on the opposite side of the street near the Granelli barracks. Piccoli and his companion were about 50 meters from the barracks when three colored American soldiers came over and grabbed Piccoli by the collar, knocked him down and dragged him across the street where other colored soldiers beat and kicked him. Piccoli's companion escaped. Piccoli could not identify his assailants. Prior to the assault he had said nothing to them and had given them no provocation for assaulting him. (R. 7-9)

The American soldiers, including accused Taylor and Clark, returned and entered the barracks. While they were in the barracks two armed Italian soldiers arrived in a truck, got out and "went up the road". (R. 12,15,16) Shortly thereafter ten or fifteen colored soldiers armed with carbines emerged from the barracks and gathered inside the fence in front of the barracks (R. 14,15). Accused Taylor and Clark were seen coming out of their upstairs room in the barracks armed with carbines (R. 24,25,27-29). About five minutes after the Italian soldiers "went up the road" the colored soldiers began firing their weapons (R. 10,12). At the time of the shooting the five above-named accused were inside the fence near the gate (R. 25-27). Following the shooting 50 empty carbine shell casings and a full clip of carbine ammunition were found inside the fence where the soldiers had been (R. 18-20). The bodies of two members of the (Italian) carabinieri, dressed in regular uniforms of dark blue with red striped trousers, and riding boots, were found lying in the street in front of the barracks. One whose "whole stomach was torn completely open" as though "a whole clip of machine gun bullets had caught him" died before being removed from the scene. (R. 18,19) He had stopped breathing and had no pulse (R. 20).

About 2100 hours six military policemen arrived and found a mixed crowd of more than 50 Italian soldiers and civilians in front of the barracks facing the colored soldiers who were standing inside the fenced inclosure, about 25 yards away, with fixed rifles (R. 22). As the military policemen detrucked a colored soldier raised a rifle and hollered "Don't move". The military police "took cover" then ran up the street, stopped a passing truck, and went to district headquarters where they reported the incident. (R. 22)

Two voluntary sworn statements made by accused Taylor after he had been advised that it was his privilege to make a statement or not as he desired, and in the event he did make one anything he said could be used for or against him if the investigation resulted in a trial, were tendered and admitted in evidence solely as against the author (R. 30-33). In his statements Taylor related that about 1700 hours on 25 April 1944 he and 40 or 50 other soldiers were standing on a corner near his barracks drinking and about 2000 hours someone said "Some of our boys got shot and we ought to do something about it". They then told the Italian women and "kids" to leave and all of them left except an Italian man. One of the soldiers then slapped him and made him leave. A few minutes later eight or ten Italian soldiers came to the gate and the "boys" made them leave. Somebody said "Let's go get our carbines" and several of the soldiers, including accused Taylor, entered their barracks and secured their carbines. Accused Taylor also secured three or four carbine cartridges and loaded his carbine while going downstairs. Accused Taylor saw four or five other soldiers going downstairs with carbines and when he reached the gate he saw six or seven other soldiers with carbines going out the gate and toward Gate Number 1. Accused related that he had his carbine for the purpose of using it if he "had to" when he reached the place "where the boys got killed". When he was about a block from Gate Number 1 he "just decided to turn back", nothing had happened, and after he had gone about half a block he heard rifle shots. The shooting lasted about four or five minutes. Accused Taylor then ran another block and saw a guard at a gate, had a short conversation with him and left to return to his "camp", went about 100 yards and fired his carbine. He was just "fingering" his carbine and it went off. About a block from the gate he saw a group of men standing around an Italian carabinieri lying in the street and asked if he were dead. When a soldier replied "No", accused Taylor said "Well if he isn't he ought to be". Accused related further that he also saw Private Barnes, "Garcea" and Robinson with carbines. (Exs. 6,7)

A voluntary sworn statement made by accused Barnes after he had been advised that he did not have to make a statement and that if he did make one anything he said could be used for or against him in the event of a trial was, without objection, admitted in evidence (R. 34). In this statement accused Barnes related that he was a member of the 6415th Port Company and about 2015 hours on the date alleged he was with a few of the "boys" upstairs in the Caserma Bianchine when a tall soldier whose name he did not know came in and told them to get their rifles because "some of our boys were shot". Barnes secured his carbine and went downstairs and asked the guard at the gate what "it was all about". The guard said there was "nothing

to it". The excitement was all over and Barnes did not "shoot that night" but shot 12 rounds the preceding night during an air raid. He just wanted to see "what it fired like". (Ex. 8)

Each accused elected to remain silent (R. 35).

4. It thus appears from the evidence that on the date alleged the 6415th Port Company, of which accused were members, was quartered in the Granelli barracks in Naples, Italy. About 2000 hours accused Clark, McCall, Taylor, Whitney and Peterson were members of a group of 18 or 20 colored soldiers gathered near the gate in front of the barracks. As the result of a report by an unidentified informant that the Italians had killed two colored soldiers, members of the group became enraged and shortly thereafter without provocation assaulted and severely injured Piccoli Lino, a uniformed private soldier of the Italian Army who happened to be walking along the street in front of the barracks. Other Italian soldiers were then assaulted by members of the group without apparent provocation. The five named accused were seen "beating up on the Italians". Following these assaults members of the group, including accused Taylor and Clark, entered the barracks and shortly thereafter emerged armed with carbines. In his statement accused Taylor admitted arming himself with a carbine and procuring ammunition for the weapon. Accused Barnes, in his statement, admitted that he secured a carbine and went out to the gate in front of the barracks pursuant to the suggestion of a soldier that he get his rifle because "some of our boys were shot". A group of ten or fifteen colored soldiers, armed with carbines, then congregated inside the barbed wire fence in front of the barracks. Accused Clark, McCall, Taylor, Whitney and Peterson, as well as Barnes, were shown to have been members of this group. Two armed Italian soldiers (probably uniformed members of the Italian carabinieri) walked past the barracks and shortly thereafter the colored soldiers began firing their weapons. Following the firing 50 empty carbine shell casings and a full clip of carbine ammunition were found on the ground inside the fence where the colored soldiers had been and the bodies of two members of the Italian carabinieri were found in the street opposite the barracks. One of the carabinieri, whose stomach was torn open as if by machine gun bullets, died before being removed from the scene. When a detachment of military police arrived at about 2100 hours they found a crowd of more than 50 Italian civilians and soldiers gathered in front of the barracks facing the colored soldiers who were standing inside the fence with fixed rifles. As the military policemen detrucked one of the colored soldiers raised a rifle and yelled "Don't move", thereby compelling representatives of the law enforcement branch of the Army to take cover and then leave the scene.

It was not affirmatively shown that any of the accused other than Taylor fired their weapons or actually participated physically in the assaults alleged. Such proof was not necessary. Each accused was charged jointly with having committed a riot in violation of Article of War 89. A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute

the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful (MCM, 1928, par. 147c; Wharton's Crim. Law, 12th Ed., Vol. II, sec. 1860). It was shown that each accused found guilty was voluntarily present during some part of the disturbances and was a member of the group which participated in the assaults alleged. In addition accused Taylor, Clark and Barnes were shown to have voluntarily armed themselves with carbines and joined the group in front of the barracks, members of which, it may be inferred, committed the assault alleged in Specification 2 of the Charge. In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and where it tends to the encouragement of the rioters, be prima facie deemed to be participants (Wharton's Crim. Law, Vol. II, sec. 1865).

To constitute a riot it is not necessary that there should be actual fright in the public generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened (Wharton's Crim. Law, 12th Ed., Vol. II, sec. 1867). That the assembling alleged in each Specification was accompanied with such acts of violence as were calculated to instill terror in the Italians present was clearly established by the evidence.

The record contains ample competent evidence to sustain the findings as modified by the reviewing authority.

5. The voluntary statement of accused Barnes was tendered and admitted in evidence without qualification. The document should have been proffered and admitted in evidence with the qualification that it was offered and received as evidence against the author only. The statement was devoid of incrimination of other accused and was admitted in evidence following an affirmative announcement by defense that there was no objection to its admission. All the facts recited therein except the extent to which the author participated in the alleged offenses were established by other competent evidence prior to the admission of the statement in evidence. Under these circumstances it cannot be said that the unqualified admission of the statement in evidence injuriously affected any of the substantial rights of any accused.

6. The charge sheets show that: accused Barnes is about 22 years of age, was inducted into the Army 6 April 1943 and had no prior service; McCall is about 23 years of age, was inducted into the Army 3 March 1943 and had no prior service; Peterson is 21 years of age, was inducted into the Army 27 April 1943 and had no prior service; Taylor is 38 years of age, was inducted into the Army 31 March 1943 and had no prior service; Whitney is 35 years of age, entered the Army 12 January 1943 and had no prior service; and Clark is 20 years of age, enlisted in the Army 9 November 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, as modified, and the sentences.

Walter C. Smith, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Reevick, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
28 January 1945.

Board of Review

MTO 4434

U N I T E D S T A T E S	)	85TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	APO 85, U. S. Army, 2 December
Private RUBEN H. ELIZONDO	)	1944.
(6 289 044), 85th Signal	)	Dishonorable discharge and
Company, 85th Infantry	)	confinement for life.
Division.	)	U. S. Penitentiary, Lewisburg,
	)	Pennsylvania.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Ruben H. Elizondo, 85th Signal Company, did, at Mondragone, Italy, on or about 26 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Piedemonte, Italy, on or about 7 August 1944.

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

Specification 1: In that Private Ruben H. Elizondo, 85th Signal Company, did, at Pied(i)monte, Italy, on or about 6 July 1944, draw a weapon, to wit a German Luger, against Major Ralph M. Burns, 110th Quartermaster Battalion, Mobile, his superior officer, who was then in the execution of his office.

(186)

Specification 2: In that Private Ruben H. Elizondo, 85th Signal Company, did, at Pied(i)monte, Italy, on or about 6 July 1944, draw a weapon, to wit a German Luger, against 1st Lieutenant Harry T. Salyer, 3329th Quartermaster Truck Company, his superior officer, who was then in the execution of his office.

CHARGE III: Violation of the 65th Article of War.

Specification: In that Private Ruben H. Elizondo, 85th Signal Company, did, at Pied(i)monte, Italy, on or about 6 July 1944, assault Corporal William R. Alexander, 3329th Quartermaster Truck Company, a non-commissioned officer, who was then in the execution of his office, by drawing a weapon, to wit, a German Luger on him.

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

Specification: In that Private Ruben H. Elizondo, did at Arunco Railhead, Italy, on or about 5 July 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Corporal William R. Alexander, about 144 sacks of flour, the property of the United States Government, value about \$288.00.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions, one by special court-martial for failure to obey a superior officer in violation of Article of War 96 and absence without leave in violation of Article of War 61, and the other 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 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 50 $\frac{1}{2}$.

3. As to Charge I and its Specification, the evidence shows that on 25 April 1944, accused, a member of the 85th Signal Company, 85th Infantry Division, assigned to the radio set team, and stationed approximately nine miles east of Mondragone, Italy, was with his team when the night schedule for the operators was announced. Accused's tour of duty on the radio set was to begin at 0400 hours 26 April 1944 (R. 6,7,9,12). The team chief, who was also sergeant of the guard, testified that shortly after 0400 hours on the night of 25-26 April 1944 he went to the radio truck and found that accused was not on duty. Witness made a search for accused but did not find him in the area. Accused did not have permission from witness to be absent. Witness testified further that on 26 April 1944 the Division was engaged in combat. (R. 7,8)

A member of the accused's radio team testified that he was on duty at the radio set from 0200 hours to 0400 hours on 26 April (1944) and that accused was scheduled to, but did not, relieve him at 0400 hours. Witness testified further that he searched for accused but did not find him and that accused did not ask his permission to be absent. (R. 9,10)

Accused's radio section chief testified that on the morning of 26 April (1944) he made a check of the company area and found accused had not slept in his tent the previous night and that his blankets and clothes were outside the tent. Witness testified further he then searched the entire Signal area but did not find accused and that accused did not have his permission to be absent. (R. 10,11)

An extract copy of the morning report of accused's company, received in evidence without objection, contained the following entries:

"27 Apr 1944/ 6289044 Elizondo Pvt
Fr dy to AWOL 0400 April 26 ***

15 June 1944/ 6289044 Elizondo, Ruben H. Pvt.
Fr AWOL to dropped fr Roll as Absentee

2 Sept 1944/ 6289044 Elizondo, Ruben H. Pvt.
Reasgd and jd Co fr Det of Pat 5th Army MOS 521
Duty 521 /6289044 Elizondo, Ruben H. Pvt.
Fr Conf in Co to Conf in 5th Army Stockade"
(R. 13; Ex. 1).

It was stipulated that if Private Richard J. Niblock, 32642309, 62d Military Police Company, were present and sworn as a witness he would testify as follows:

"Having been informed that an American Soldier frequented a house on the outskirts of Piedemonte, Italy, I went to this house on 7 August 1944. There I found Private Ruben H. Elizondo, 6289044, 85th Signal Company, and placed him under arrest. He was dressed in an U. S. Army uniform. Upon search of the house, I found a German Luger pistol, No. 2142-2758, Model 1940, and 22 cartridges under the blankets where Pvt Elizondo slept. The pistol was fully loaded. I returned to my organization with the prisoner and turned him over to the Provost Sergeant" (R. 13; Ex. 2).

As to Charges II, III and IV and their Specifications, the evidence shows that on 5 July (1944) at Arunco Railhead (Italy), a convoy of trucks was lining up preparatory to proceeding to Rome. Accused got into the last truck and told the driver, Corporal William R. Alexander, 3329th Quartermaster Truck Company, that he was the "MP" assigned to go with the convoy. Alexander's truck was loaded with 144 fifty-pound sacks of "AMG" flour. After the convoy had proceeded some distance accused asked Alexander to stop the truck and when he did, accused drew a "P-38 or German Luger" and told

(188)

Alexander to turn around and he "wouldn't get hurt". Pursuant to accused's directions Alexander turned the truck around and proceeded along Highway 7 toward Sessa (Italy) about a mile and then turned off on another road and proceeded until accused told him to stop. Alexander was then blindfolded, some Italians got into the truck and accused drove the truck about two miles, stopped, and with the Italians unloaded part of the flour. They then proceeded along the same road, with Alexander blindfolded, and after several right and left turns the truck was stopped and about 15 or 20 bags of flour were unloaded. (R. 15-17,21) Alexander testified that after the last stop accused told him to count to 100 and then he could take off the blindfold and would be on the same road he started out on (R. 15).

The following day Alexander, Major Ralph M. Burns, 110th Quartermaster Battalion, and Captain (then Lieutenant) Harry T. Salyer of 3329th Quartermaster Truck Company, proceeded to the scene where Alexander had been blindfolded and attempted to locate the places where the flour had been unloaded. They drove up to an apparently deserted farm building and found some Italians in a front room. Accused was found asleep on a pile of hay in a shed attached to the rear of the building. He was armed with a carbine and a "German Luger" or "P-38" and also had a knife. Accused awoke and at Major Burns' request surrendered his carbine. He was ordered outside and as they reached the door accused drew his pistol, stepped back, aimed it directly at the major and pulled at the top of the slide. Major Burns grabbed him but accused twisted and freed himself. Lieutenant Salyer appeared and also tried unsuccessfully to apprehend accused who backed up in a crouching manner, aiming the pistol directly at the major and the lieutenant and fumbling with the top of the slide as if he were trying to release the safety or cock the weapon. Accused escaped in a near-by vineyard. One hundred five or 106 sacks of "the flour" were found under the hay upon which accused had been sleeping. (R. 16,19-21)

Captain Salyer testified that accused pointed the pistol at Burns and himself and that "either" of them would have been shot if the weapon had fired (R. 21). Witness testified further that the flour found in the room with accused was of "the type" and packed in the same manner as that which the 3329th Quartermaster Truck Company had been hauling for the "AMG" (R. 22).

It was stipulated that the value of flour, per 50-pound sack, on 5 July 1944, was two dollars per sack (R. 23; Ex. 3).

Accused elected to remain silent (R. 25).

4. It thus appears from uncontradicted evidence that near the place and at the time alleged in the Specification, Charge I, accused absented himself without leave and remained unauthorizedly absent until he was apprehended at Piedimonte, Italy, on or about 7 August 1944. At the time accused absented himself his division was engaged in combat. An intention to remain permanently absent was inferable from accused's unexplained, prolonged absence, the nature of its termination, his failure to surrender to military authorities while absent and in the neighborhood of numerous military posts and stations in this active theater of operations,

and from other circumstances in evidence (MCM, 1928, par. 130a). The circumstances surrounding accused's absence were such that an intention to avoid hazardous duty was also inferable. The court was warranted in finding accused guilty of desertion as charged.

It further appears from uncontradicted evidence that in the vicinity of the place and at the time alleged in Specifications 1 and 2, Charge II, accused drew a "German Luger" or "P-38" pistol against Major Ralph M. Burns, 110th Quartermaster Battalion, and First Lieutenant Harry T. Salyer, 3329th Quartermaster Truck Company, his superior officers. At the time of the assaults Major Burns and Lieutenant Salyer were searching for "AMG" flour which had been stolen and discovered accused in a room of a farmhouse sleeping on hay under which part of the stolen flour was hidden. The officers were clearly acting in the execution of their office. The court was warranted in finding accused guilty of each Specification in violation of Article of War 64 as charged (MCM, 1928, par. 134a).

It further appears from uncontradicted evidence that in the vicinity of the place and at the time alleged in the Specification, Charge III, accused assaulted Corporal William R. Alexander, 3329th Quartermaster Truck Company, while he was in the execution of his office, by drawing a "German Luger" or "P-38" pistol on him as alleged.

Accused was charged under the Specifications, Charge II, with having drawn a "German Luger" against the officers named, and under the Specification, Charge III, with having assaulted a noncommissioned officer by drawing a "German Luger" on him, whereas the evidence shows that the pistol employed by accused was either a "German Luger" or a "P-38". This slight inconclusiveness and possible variance in the evidence was immaterial (AW 37; NATO 696, Pokorney).

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge IV, accused by force and violence and by putting Corporal Alexander in fear, took and carried away from his presence more than 100 sacks of "AMG" flour, which had a value of two dollars (\$2.00) per sack. The Specification alleges that accused stole and carried away from the presence of Corporal Alexander, about 144 sacks of flour, "the property of the United States". The circumstances support an inference of property interest in the United States as alleged. In any case, strict proof of ownership is immaterial. The gist of the offense alleged is the taking by force and violence, or by putting in fear, of property not belonging to accused. Proof of legal ownership of the property involved is not necessary to sustain a conviction. The court was warranted in finding accused guilty of robbery as charged.

5. Attached to the record of trial is a psychiatric report of an examination of accused dated 2 September 1944 containing the following:

"A 23 year old white male well developed and nourished who shows no particular anxiety, depression or other abnormal mental states. His speech is coherent and relevant as he tells of the constant clashes with his

(190)

superior officers, the fact that he was not treated right, that he was the object of persecution and that he 'couldn't stand being in the outfit'. Soldier claims that he is 'nervous' but by this is meant temper outbursts. He states that he knew it was wrong to go AWOL but he didn't care about consequences. Soldier denies hallucinations, delusions or other abnormal thought content. He is well oriented and intelligence is at least average.

"Past history is of a harsh, tyrannical father, separation of parents when he was a young child, much conflict with the father and many unsuccessful attempts to run away from home.

"In my opinion he is suffering from: Constitutional Psychopathic State - emotional instability.

"This soldier is emotionally unstable and readily yields to any pleasurable impulses regardless of consequences. It is difficult for him to consistently conform to any rigid environment. The soldier is not insane in any sense and there is no physical disability. It is purely a matter of traits of character.

"Recommendation: That soldier be eliminated from military service."

6. The charge sheet shows that accused is about 23 years of age. He enlisted in the Army 31 March 1939. 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 offenses of desertion in time of war and of robbery, robbery being 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.

Walter R. Brown, Judge Advocate.
George O. Wilson, Judge Advocate.
Nancy C. Smith, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
21 December 1944.

Board of Review

MTO 4444

UNITED STATES)

v.)

Private CHARLES F. AMMERMAN)
(35 789 453), Company B,)
168th Infantry Regiment.)

34TH INFANTRY DIVISION

) Trial by G.C.M., convened at
) APO 34, U. S. Army, 13 October
) 1944.

) Dishonorable discharge and
) confinement for 20 years.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Charles F. Ammerman, Company "B", 168th Infantry, did, without proper leave, absent himself from his organization near Pietradefusi, Italy from on or about 18 March 1944, to on or about 1 October 1944.

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

Specification: In that Private Charles F. Ammerman, Company "B", 168th Infantry (then of Company D, 168th Infantry), did, near San Pietro, Italy on or about 7 January 1944, run away from his organization which was then engaged with

the enemy, to wit: the German Forces, and did not return thereto until on or about 3 February 1944.

Following arraignment the Specification, Charge II, was amended by order of the court by the insertion of the words and figures in parentheses as appear above. Accused 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 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 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 50 $\frac{1}{2}$.

3. With respect to the Specification, Charge I, it was stipulated by the accused, his defense counsel and the prosecution

"that the extract of the morning report entry made from the original morning report records of Company B, 168th Infantry Regiment for the date 19 March 1944, in so far as it pertains to the accused, is for all purposes exactly the same as the original entry and may be received and read into the record. That entry reads:

19 March 1944 35789453 AMMERMAN, Charles F. Pvt.
Fr dy to AWOL at 0700 hrs 18 Mar 44.

and wherein it is further stipulated and agreed by and between the same parties that the accused returned to his organization 1 October 1944" (R. 9).

First Sergeant Peter De Augustine, Company B, 168th Infantry Regiment, testified that on 18 March 1944 he was platoon sergeant of the third platoon of Company B, which was then located near Pietradefusi (Italy), and that accused "was assigned as a rifleman in my platoon" (R. 7,8). On 17 March witness took accused "to the supply room and got him his equipment" and "told him we were going to move the next morning and to sleep the same place he slept the night before". On 18 March witness made a check of the personnel of the platoon and accused was not present. He had no permission to be absent at that time. Accused was not with his organization from that date until on or about 1 October 1944 and had no permission to be absent for any portion of that time. (R. 8)

With respect to the Specification, Charge II, it was

"orally stipulated and agreed by and between the accused, his defense counsel and the prosecution, that the extract copy of the morning report entries taken from the original

morning report records of Company D, 168th Infantry Regiment for the dates 10 and 12 January 1944, in so far as they pertain to the accused are exactly the same as the original entries and may be received and read into the record. Those entries read as follows:

10 January 1944 35789453 AMMERMAN, Charles F. Pfc.
Fr dy to MIA 7 Jan 44 & drpd fr
rolls per Cir 187 Hq NATOUSA.

12 January 1944 To Correct M/R of 10 Jan. 44.
35789453 AMMERMAN, Charles F. Pfc.
Erroneously reported MIA 7 Jan 44
& drpd fr rolls. Should have read:
Fr dy to AWOL.

and wherein it is further stipulated and agreed by and between the same parties that the accused returned to his organization on 3 February 1944" (R. 8,9).

First Lieutenant Owen P. Tetley, First Battalion Headquarters, 168th Infantry Regiment, testified that on or about 7 January 1944 he was platoon leader of the first platoon, Company D, 168th Infantry, which was then located near San Pietro (Italy) and that accused was an "ammunition carrier in my platoon". On that date witness' organization was "in a fire fight near San Pietro. We had moved off hill 392 and were getting ready to make an attack on hill 596". Witness saw accused "the night we moved into the draw" and accused was present "in the morning early when we moved out on the 7th of January". Witness made another check of the personnel of his platoon "after we reached our positions. We set up on the hill to support C Company". At that time accused was absent without permission. Between the time witness last saw accused and the time he checked the platoon and discovered him absent, the organization had received enemy mortar fire and artillery fire. Witness did not see accused with his organization between 7 January and 3 February 1944 and accused had no permission to be absent during that period. (R. 5-7).

Accused did not testify or make an unsworn statement.

4. It thus appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge I, accused absented himself from his organization without authority and remained absent until 1 October 1944.

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge II, while his organization was engaged with the enemy, accused absented himself without leave and remained unauthorizedly absent from his organization until 3 February 1944. Accused was an ammunition carrier in a rifle platoon. His organization had been in "a fire fight", had moved from one hill and was preparing to make

(194)

an attack upon another position. At about the time accused left, his organization was receiving mortar and artillery fire. The evidence is clear that accused's company was actively and hazardously before the enemy at the time accused absented himself. From these and other facts and circumstances appearing in proof, the court was justified in finding that accused "ran away" from his organization while engaged with the enemy, and that his conduct constituted an offense before the enemy in violation of Article of War 75.

5. A psychiatric report relating to accused, attached to the record of trial, contains the following:

"No evidence of psychiatric disease either at present or at the time of alleged offenses. Soldier was and is completely responsible, able to distinguish right from wrong and adhere to the right."

6. The charge sheet states that accused is 21 years of age and gives no further information.

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.

Martinez A. Iron, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Leitch, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
26 December 1944.

Board of Review

MTO 4446

UNITED STATES)

v.)

Private HARLAN BOWERS
(35 055 617), Company E,
168th Infantry Regiment.)

34TH INFANTRY DIVISION)

Trial by G.C.M., convened at
APO 34, U. S. Army, 11 October
1944.)

Dishonorable discharge and
confinement for 20 years.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Harlan A. Bowers, Company "E", 168th Infantry, did, without proper leave, absent himself from his organization near S. Angelo, Italy from on or about 28 December 1943, to on or about 28 February 1944.

Specification 2: In that Private Harlan A. Bowers, Company "E", 168th Infantry, did, without proper leave, absent himself from his organization near Bagnoli, Italy from on or about 20 March 1944, to on or about 4 April 1944.

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

(196)

Specification: In that Private Harlan A. Bowers, Company "E", 168th Infantry, did, near Isolabella, Italy, on or about 29 April 1944, run away from his organization which was then engaged with the enemy, to wit: the German Forces, and did not return thereto until on or about 5 September 1944.

Accused 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 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 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 50 $\frac{1}{2}$.

3. With regard to Specification 1, Charge I, the evidence shows that on 28 December 1943 accused was an ammunition carrier in a mortar squad of Company E, 168th Infantry Regiment, which was located at S. Angelo, Italy (R. 5,6). At about 0900 hours on the date mentioned a company formation was held and a check made of personnel by the platoon sergeants. At that time there were about 32 men in the fourth platoon and accused's acting squad leader saw all other members of the platoon present but did not see accused. The squad leader was with the organization continuously from that date until about 28 February 1944 but did not see accused at any time between those dates and as far as he personally knew accused had no permission to be absent. (R. 6) It was stipulated that an extract copy of the morning report of accused's company containing the following entry be received and read into the record:

"31 December 1943 35055617 BOWERS, Harlan A. Pvt.
Fr duty to AWOL 2100 hours 28 Dec 43."

It was further stipulated that accused returned to military control 28 February 1944. (R. 11)

With respect to Specification 2, Charge I, the evidence shows that on the morning of 20 March 1944 accused, then an ammunition carrier in the fourth platoon of Company E, 168th Infantry Regiment, was with his organization at the embarkation point for Anzio (Italy) at Bagnoli (R. 6,7,10). As the organization embarked on the boats another check was made and accused was absent. The section sergeant of accused's section was present and did not see accused get on the boat and as far as he knew accused had no permission to be absent. The section sergeant was with accused's organization continuously from 20 March 1944 to 4 April 1944 and did not see accused with the organization at any time during that period. (R. 6-8)

It was stipulated that an extract copy of the morning report of accused's company containing the following entries be received and read into the record:

"20 March 1944 35055617 BOWERS, Harlan A. Pvt.
Fr Dy to AWOL 0900 hours.

4 April 1944 35055617 BOWERS, Harlan A. Pvt.
Fr AWOL to dy" (R. 11).

With respect to the Specification, Charge II, the evidence shows that on 29 April 1944 accused was again an ammunition carrier in the mortar section, fourth platoon of Company E, 168th Infantry Regiment, which was "in defense" against the German forces at Isolabella, Italy. The mortar section was immediately in the rear of the rifle platoons which were on the line with no friendly forces between them and the Germans. Enemy rifle and heavy artillery fire was falling in the area occupied by accused's company. Accused's section leader received a report concerning accused and, with another noncommissioned officer, "checked around the area" but could not locate accused. Accused had no permission to be absent. Accused's section leader was with accused's organization continuously from 29 April to 5 September 1944 but did not see accused with the organization doing this period. (R. 8,9)

It was stipulated that an extract copy of the morning report of accused's company containing the following entry be received and read into the record:

"2 May 1944 35055617 BOWERS, Harlan A. Pvt.
Fr dy to AWOL 2000 hours 29 Apr 44."

It was further stipulated that accused returned to his organization on 5 September 1944 (R. 11).

Accused elected to remain silent (R. 12).

4. It thus appears from uncontradicted evidence that at the place and time alleged in Specification 1, Charge I, accused absented himself from his organization without authority and remained absent until 28 February 1944, and further that at the place and time alleged in Specification 2, Charge I, accused absented himself from his organization without authority and remained absent until 4 April 1944.

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge II, while his organization was engaged with the enemy accused absented himself without leave and remained absent without authority until 5 September 1944. At the time he absented himself accused was an ammunition carrier in the mortar section of his organization which was in defense against the German forces. The mortar section was directly behind the rifle platoons which were in combat with the enemy. No friendly forces separated them from the Germans. Enemy rifle and heavy artillery fire was falling in the company area. The evidence is clear that while accused's organization was before the enemy he absented himself without authority and remained unauthorizedly absent from his

organization more than four months. From these and other facts and circumstances in evidence the court was warranted in finding that accused "ran away" from his organization while engaged with the enemy and that his conduct constituted misbehavior before the enemy in violation of Article of War 75 as alleged.

5. The psychiatric report relating to accused, attached to the record of trial, contains the following:

"The soldier is in good contact, well oriented, of average intelligence. There is no evidence of psychosis. In my opinion he is responsible for his acts, can distinguish right from wrong and is able to adhere to the right."

6. The charge sheet shows that accused is 21 years of age and was inducted into the Army of the United States 21 March 1942. No previous 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 sentence.

Walter R. Smith, Judge Advocate.
George O. Wilson, Judge Advocate.
(absent, T.D.), Judge Advocate.

(200)

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 50 $\frac{1}{2}$.

3. The evidence shows that at Villa Crocetta, Italy, on or about 30 May 1944, Company A, 168th Infantry, of which accused was a member, and assigned as a rifleman to the first squad, third platoon, was engaged in combat with the German forces (R. 5-7). Accused's squad leader testified that the company started an attack at 0530 hours on that date and tried to reach "the Villa", but they were pinned down by mortar and machine gun fire and withdrew to a small ditch to wait further orders, and accused was present at that time. Subsequently orders were received to attack the "Villa" again and witness made a check of accused's squad and found accused was missing. He had no permission to be absent. Witness was with accused's organization continuously from 30 May (1944) to on or about 30 August 1944 and he did not see accused with the organization at any time during that period. Accused had no permission to be absent for any part of that time. (R. 6-8)

It was stipulated that an extract copy of the morning report of accused's company for the date of 31 May 1944 as it pertains to accused contained the following entry:

"31 May 1944 34739532 HOWELL, Dewey D. Pvt.
Fr duty to AWOL 1500 hrs May 30/44" (R. 8,9).

It was further stipulated that accused "was returned to his regiment on 30 August 1944" (R. 9).

Accused elected to remain silent (R. 10).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused, without authority, left his organization while it was engaged in combat with the German forces and did not return thereto until 30 August 1944. From the facts and circumstances appearing in proof the court was warranted in finding that accused ran away from his organization while it was engaged with the enemy, the German forces, as charged (MCM, 1928, par. 111a).

5. Attached to the record of trial is a report of a psychiatric examination of accused made on 15 September 1944, stating that at the time of the commission of the alleged offense accused was not suffering from a defect of reason resulting from disorder of the mind or any emotional or physical disorder which might have affected his behavior.

6. The charge sheet shows that accused is 19 years of age. He was inducted into the Army 9 July 1943. 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 sentence.

Martinez R. Lewis, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Heisch, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
21 December 1944.

Board of Review

MTO 4450

U N I T E D S T A T E S

v.

Private EDMUND P. KOZAK
(36 643 562), Company I,
168th Infantry Regiment.

) 34TH INFANTRY DIVISION

) Trial by G.C.M., convened at
) APO 34, U. S. Army, 13
) October 1944.

) Dishonorable discharge and
) confinement for 15 years.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Edmund P. Kozak, Company "L", 168th Infantry, did, without proper leave, absent himself from his organization near S. Angelo, Italy from on or about 30 December 1943, to on or about 16 March 1944.

Specification 2: In that Private Edmund P. Kozak, Company "L", 168th Infantry, did, without proper leave, absent himself from his organization near Nettuno, Italy from on or about 24 April 1944, to on or about 4 October 1944.

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

(204)

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, 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 50 $\frac{1}{2}$.

3. As to Specification 1 of the Charge, the evidence shows that at reveille formation at 0700 hours on 30 December 1943, accused, a rifleman in the first platoon of Company L, 168th Infantry, then at S. Angelo, Italy, was absent without authority. The first sergeant of accused's company made a search of the area but accused was "nowhere to be found". (R. 6,8) The sergeant was with accused's company continuously from 30 December 1943 until 16 March 1944 except for 20 days and did not see accused with his organization at any time during that period (R. 6).

It was stipulated that an extract copy of the morning report of accused's company contained the following entry: "30 December 1943 36643562 KOZAK, Edmund P. Pvt. Fr dy to AWOL 0700 hrs". It was also stipulated that accused returned to his company 16 March 1944. (R. 8)

As to Specification 2 of the Charge, the evidence shows that on the night of 23 April 1944, accused, then an ammunition bearer in the fourth platoon of Company L, 168th Infantry, was with his organization in the vicinity of Nettuno, Italy (on the Anzio beachhead), and at about 0700 hours the following morning was absent without authority and his squad leader, after a search, was unable to find him. Accused's squad leader was with accused's organization continuously from 24 April (1944) until about 4 October (1944) except for about 13 days, and did not see accused with the organization at any time during that period. (R. 7)

It was stipulated that an extract copy of the morning report of accused's company contained the following entry: "25 April 1944 36643562 KOZAK, Edmund P. Pvt. Fr dy to AWOL 0800 hrs 24 Apr 44". It was further stipulated that accused returned to his organization 4 October 1944. (R. 8)

Accused in an unsworn statement said he was 21 years of age, was inducted into the Army 1 March 1943 and joined the 34th Division sometime in August 1943. He stated further that he had seen action in Italy, had "crossed the Volturno River twice", had been injured and had received the Purple Heart. (R. 8,9)

4. It thus appears from the uncontradicted evidence that at the place and time alleged in Specification 1 accused absented himself without proper leave from his organization and remained unauthorizedly absent until he returned to his company on 16 March 1944.

It further appears from the uncontradicted evidence that at the place and time alleged in Specification 2 accused absented himself without proper leave from his organization and remained unauthorizedly absent until he returned to his organization on 4 October 1944.

Accused was absent without leave as alleged in each Specification. The court properly found accused guilty as charged (MCM, 1928, par. 132).

5. The charge sheet shows that accused is 21 years of age. He was inducted into the Army 22 February 1943. 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.

Walter R. Smith, Judge Advocate.
George O. Williams, Judge Advocate.
Henry C. Kewick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
23 December 1944.

Board of Review

WFO 4452

UNITED STATES

v.

Private HARRY R. WILLIAMSON
(33 720 870), Company E,
168th Infantry Regiment.

) 34TH INFANTRY DIVISION

) Trial by G.C.M., convened at
) APO 34, U. S. Army, 9 October
) 1944.

) Dishonorable discharge and
) confinement for 20 years.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Harry R. Williamson, Company "E", 168th Infantry, did, near San Vittore, Italy on or about 7 January 1944, run away from his organization which was then engaged with the enemy, to wit: the German Forces, and did not return thereto until on or about 20 March 1944.

Specification 2: In that Private Harry R. Williamson, Company "E", 168th Infantry, did, near Isobella, Italy on or about 29 April 1944, run away from his organization which was then engaged with the enemy, to wit: the German Forces, and did not return thereto until on or about 5 September 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 "period" 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 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 50 $\frac{1}{2}$.

3. As to Specification 1 of the Charge, the evidence shows that at San Vittore, Italy, on or about 7 January 1944, the fourth platoon, Company E, 168th Infantry, of which accused was a member, and assigned to the mortar section, was engaged in combat, attacking the German forces (R. 6,8).

A staff sergeant of accused's platoon testified that the company was moving a short distance from one position to the other, that accused was present during the morning at the first position but when the new position was reached accused was not there and accused did not have permission to be absent (R. 6). The sergeant was with accused's company continuously from 7 January 1944 to about the first week in April 1944 and he did not see accused with the company during that period (R. 6,7).

It was stipulated that extract copies of the morning report of accused's company contained the following entries:

"27 March 1944 33720870 WILLIAMSON, Harry R. Pfc
Erron reprd fr dy to MIA 7 Jan 44 and drpd fr rolls
10 Jan 44 - SHOULD HAVE READ Fr dy to AWOL 7 Jan 44.

"27 March 1944 33720870 WILLIAMSON, Harry R. Pfc
Fr AWOL to ab in arr 5th Army Rest Center Caserta,
1700 hours 20 Mar 44" (R. 12,13).

As to Specification 2 of the Charge, the evidence shows that at Isobella (Italy), on or about 29 April 1944, Company E, 168th Infantry, of which accused was a member and assigned to the mortar section was engaged in combat against the German forces, and was receiving enemy small arms, artillery and mortar fire (R. 9). Accused was present with his company on 28 April 1944 but was absent on 29 April 1944, on which date a search was made of the mortar section area by all of the noncommissioned officers in the mortar section and they were unable to find accused (R. 9-11).

A sergeant who was the squad leader, second squad of accused's platoon, testified that he and the section sergeant of the mortar section on 29 April 1944 made a search for accused throughout the mortar section area which had been occupied for three or four days and that they went to each dugout and they were unable to find accused, but did find accused's pack and pistol belt in his dugout (R. 11,12). The sergeant was with accused's company continuously from 29 April 1944 until 5 September 1944 and did not see

accused with his company at any time during that period, and accused did not have permission to be absent (R. 9,10).

It was stipulated that extract copies of the morning report of accused's company contained the following entries:

"24 June 1944 33720870 WILLIAMSON, Harry R. Pfc
Reduced to Pvt.

"6 September 1944 33720870 WILLIAMSON, Harry R. Pvt.
Fr drpd fr rolls as absentee per Cir #36, Hq, NATOUSA,
to reasgd and not jd and placed ab in conf Regtl
Stockade, eff 1600 hrs 5 Sept" (R. 13).

Accused elected to remain silent (R. 14).

4. It thus appears from the uncontradicted evidence that at the place and time alleged in Specification 1, accused left his organization while it was in combat with and attacking the German forces and did not return thereto until 20 March 1944.

It further appears from the uncontradicted evidence that at the place and time alleged in Specification 2, accused again left his organization while it was engaged with the German forces and did not return thereto until 5 September 1944.

From the facts and circumstances appearing in proof the court was justified in finding as to each Specification that accused ran away from his organization while it was engaged with the enemy, the German forces, as charged (MCM, 1928, par. 141a).

5. There is attached to the record of trial a report of psychiatric examination of accused on 16 September 1944. That report states that there was "no evidence of anxiety or psychosis" and that accused "knows the difference between right and wrong" and that at the time of the commission of the alleged offenses he was not suffering from a defect of reason resulting from disorder of the mind or any emotional or physical disorder which might have affected his behavior.

6. The charge sheet shows that accused is 21 years of age. He was inducted into the Army 13 April 1943. 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.

William R. [Signature], Judge Advocate.

George O. Wilson, Judge Advocate.

(absent, T.D.), Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
16 February 1945.

Board of Review

MTO 4463

UNITED STATES)

v.)

Privates WILLARD ANDERSON
(38 063 261), ELLSWORTH B.
MATTHEWS (42 038 955), SAMUEL
M. CHARLES, JR. (12 187 741),
RICHARD E. MILES (33 801 548),
ROBERT PARROTT (33 735 902) and
ROBERT J. HALL (32 987 743), all
of Company I, 371st Infantry.)

92D INFANTRY DIVISION)

Trial by G.C.M., convened at
Staging Area, 92d Infantry
Division, 8 November 1944.
ANDERSON, MATTHEWS, CHARLES
and MILES: Dishonorable
discharge and confinement for
life.
PARROTT and HALL: Motion for
severance granted.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

2. Accused Anderson, Matthews, Charles and Miles were tried jointly upon the following Charges and Specifications, as amended:

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

Specification: In that Private Willard Anderson, Private First Class Ellsworth B. Matthews, Private Samuel M. Charles, and Private Richard E. Miles, all of Company "I", 371st Infantry, acting jointly, and in pursuance of a common intent, did, near Pisa, Italy, on or about 25 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation, kill one Galli Mareo, a human being, by

(212)

beating him with their fists and a pick handle, and stabbing him with a sharp instrument.

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: In that Private Willard Anderson, Private First Class Ellsworth B. Matthews, Private Samuel M. Charles, and Private Richard E. Miles, all of Company "I", 371st Infantry, acting jointly, and in pursuance of a common intent, did, near Pisa, Italy, on or about 25 October 1944, with intent to do her bodily harm, commit an assault upon Paolicchi Bruna, by willfully and feloniously striking the said Paolicchi Bruna in the face with their fists.

Immediately after arraignment the court granted a defense motion to sever as to accused Parrott and Hall and amended the Specifications to delete their names, whereupon the trial was had as to accused Anderson, Matthews, Charles and Miles only and this review is so limited (R. 7-10).

Each accused pleaded not guilty to the Charges and Specifications and each was found guilty of Charge I and its Specification, guilty of Specification 3, Charge II, and of Charge II, and not guilty of Specifications 1 and 2, Charge II. Evidence of one previous conviction by summary court-martial was introduced as to accused Miles for failure to repair for fatigue duty, disobeying the order of a noncommissioned officer, and appearing without identification tags, in violation of Articles of War 61, 65 and 96, respectively. No evidence of previous convictions was introduced as to accused Anderson, Matthews and Charles. 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 "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement in the case of each accused and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that at about 2030 hours, 25 October 1944, accused, together with two other soldiers, all members of Company I, 371st Infantry, went to a civilian dwelling near Pisa, Italy. One of the group knocked on the door of the dwelling and asked for wine and was told that there was no wine, whereupon the six soldiers entered the house "by force". (R. 28,40,42,49) There were six Italian civilians in the house when the soldiers entered, namely Galli Mareo (the deceased), Paolicchi Bruna, Paolicchi Marina, Galli Franco, Bertoincii Lucia and an unnamed nine year old girl (R. 12,13,28-30,39,48,49,51,53). Four of the soldiers sat down at a table while two of them stood. They took a bottle of wine which contained about two "glassfuls" and "among the whole lot of them" they

drank the wine. After talking "a little" they produced an English phrase book and made Franco read from the book but he did not understand what they wanted. Then they exhibited cigarettes to the occupants and by making signs as if they were washing with soap, told them they would give them the cigarettes if they would wash their clothes. They then wanted to know all of the names of the occupants and repeated the names "all together" after each name was given. They also showed a piece of chocolate to Marina's small sister and then put the cigarettes and chocolate back into their pockets. (R. 29,40) One of the soldiers wrote his name and told the occupants to go to his camp and get the washing and "other things" to which the occupants replied "all right" because they were "very frightened" as they "had these colored troops in the house" (R. 29). Matthews had a stick in his hand and was continually going in and out of the house. Charles produced an American knife, bearing the inscription "US", and stroked it to and fro across the palm of his hand as they arose to leave and said "Good". (R. 34,35,40,52) The accused then made signs that they were going to sleep, wished the occupants of the house "a good night" and "went away" (R. 29,40,49). They went to a house next door, knocked on the door and "cried" out "Girls, Girls." Outside they met a cousin of Marina's, gave him "digs in the stomach" and asked him for "girls" (R. 29,49).

The occupants of the first house prepared to leave it to go to a near-by dwelling in which they had their sleeping quarters, to retire for the evening. Bruna said to her daughter Marina, "Come on, Marina, we will go to bed" to which Marina replied "no let us wait a little, wait until my father comes, I am afraid", whereupon Mareo said "Come on, I will accompany you". Marina's mother, Bruna, who held Marina's small sister by one hand and a cup of coffee in the other, stepped out of the door followed by Mareo who had a small oil lamp in his hand, and the other occupants. Marina's sister ran back into the house crying out "There is a colored man outside, a colored man outside". Bruna said to the child "Come on they will not harm us at all" (R. 29,40). Franco, who saw the accused and their two companions at the door, two of whom were in front, two behind, one a little to the right, and the sixth a little to the left of the door, said to them "Paeson, let us go to sleep". The soldiers made signs "as if going to sleep", blew out the light Mareo was carrying and began to strike the Italians. (R. 29,40,45,46)

Franco testified that when the light was blown out the soldiers struck him on the forehead, that Marina caught him from behind and that he and she went behind a door. Bruna "fell on the ground" and witness heard "something hit amongst the rubble" outside. One of the soldiers was in the room "calling his friends who were outside" and then everything was silent. (R. 40) Following the silence Marina screamed and another cousin of the witness, a civil policeman, "fired a shot in the air". When the shot was fired the soldier on the inside "who was crying for his friends, stopped crying, and run away and when everything was finished"

"we all got together, and I saw that my father (Galli Mareo) was missing. At first, I returned in the house and looked around. Then, I went on the road. Then, my mother had

(214)

found him. He was in the entry. My mother had found him outside the door, just in front of the door, and he had groaned. As he was giving no signs of life, we thought to take him to the hospital. We took him to the hospital in a small hand cart, with a mattress on the hand cart. When we reached the hospital, they gave him last communion, as he gave no signs of life-- as he was giving no signs of life. I stayed with him all night, but in the morning, at seven o'clock, he (Galli Mareo) died". (R. 35,41)

At some time during the altercation Franco saw one man with a stick "lifted up" and "also "a knife with the arm uplifting it." (R. 45). Witness testified further that his father, Galli Mareo, was 54 years of age and that when found after the assault he had a wound on his forehead, a wound on the right side of his head and a cut at the "butt" of his ear. Deceased was bleeding from the mouth, his teeth were "all ruined" and he was covered with blood (R. 46).

Marina testified that as they started to leave their house to go to bed, Franco asked the soldiers at the door "what are you doing?", whereupon the soldiers gave him a "couple of slaps and a punch" on the forehead. Witness managed to hide behind the "wall", screamed and commenced to cry. One of the soldiers put his hand over her mouth and started pulling her away in an attempt to separate her from Franco. (R. 30-32)

Marina saw six soldiers. One, who was outside, struck her mother, Bruna, twice with "the stick" and the woman fell "senseless". The soldiers "gave" two blows to her aunt and one of them struck her uncle (Mareo) "very hard" with a stick. (R. 30,32,35,38) Witness and Franco left the house and ran to a family next door. She could not find Mareo but recalled having stepped on something near the door upon leaving their house. She returned and found Mareo groaning on the ground. He had a "knife slit that passed right through his cheek", was "twisting his mouth in every way, because he couldn't breathe" and his head was "all cut up". Mareo was taken to the hospital and died the following morning. (R. 31,33,36)

Paolicchi Bruna testified that as she was walking out of the house holding the hand of the small girl, the soldiers struck her twice with a stick, and she fell "senseless" to the ground (R. 48-50).

Major Harry S. Beckwith, Medical Corps, Regimental Surgeon, 371st Infantry, Pietresanta, Italy, testified that he examined the body which was identified to him as being that of Galli Mareo by Mareo's son.

"I examined the head of the deceased, and found three areas which appeared to have been caused by a blow of a blunt instrument. I found one incised wound behind the left ear, which was caused by a sharp instrument" (R. 15).

In witness' opinion death had "resulted from the blows the man had received",

and the blows could have been made with a "pick handle" (R. 15). The "incised wound" was approximately one inch in length and witness did not believe that the wound inflicted by the sharp instrument was the sole cause of death (R. 15,16).

It was stipulated that if Doctor Antonio Cannelli of Pisa, Italy, were present he would testify as follows:

"I am a practicing physician in the city of Pisa, Italy, and the director of RR Spedali Ruinti Di S. Chiara in Pisa, and as such, am authorized to make the annexed certificate of death, which is incorporated as part of this statement.

"Basing my opinion upon my professional experience, and my examination of the body of Galli Mario, the deceased, he died as the result of blows upon the head with a blunt instrument, which could have been an axe or a pick handle" (R. 11; Ex. A).

On 27 October 1944 accused Charles was advised of his rights under Article of War 24 by the investigating officer, Major Harry B. Lane, 599th Field Artillery Battalion. Accused was also informed that he did not have to answer any question that the investigating officer asked him, and that any answer he gave to any question might be used against him "later on". Charles then made a sworn statement. The defense objected to the introduction of this statement on the ground that the statement was obtained under duress and that accused Charles was "threatened" prior to making and signing the statement. (R. 55,56)

In support of the motion Private Robert Hall, Company I, 371st Infantry, testified for the defense that he was present at an investigation which was being conducted by the investigating officer, a "Lt. Logan", and that a major and another lieutenant were present. They were interrogating accused Charles. The major was doing the writing and questioning while Lieutenant Logan was also questioning Charles. (R. 58,59,63,64) During the questioning "Pvt Charles wasn't so clear on giving his statement" and Lieutenant Logan called Hall to the room, told him "to refresh his remembrance" and "to refresh some of Charles' remembrance of the crime". Hall "reminded him (Charles) of some of the things" (R. 60,64,65). Witness said to Charles "you might as well tell the statement" because "the rest of the fellows had already made the statement, and some of the points he (Lieutenant Logan) (had) already asked Charles, Charles wasn't sure I had made those statements on those points" (R. 64). Lieutenant Logan said to Charles, "You'll remember when they put the noose around your neck, and you're dangling from a truck' and he hoped the five of us see him go first" (R. 59,60). During the questioning of Charles, several of Hall's answers to the queries were incorporated in Charles' statement (R. 61,62). "The major" and Lieutenant Logan, by the expression on their faces and the way they were talking, were "angry" and the major used a few curse words (R. 61, 63,65). Witness testified further that Charles was not threatened in any

(216)

way during the questioning by the officers (R. 63) and that when he (witness) "refreshed" accused Charles' "memory" Charles agreed with witness (R. 66).

Major Harry B. Lane, 599th Field Artillery Battalion, the investigating officer (R. 69), testified as a witness for the court that Lieutenant Logan, Lieutenant Pierce and Pat Hall were present during the taking of accused Charles' statement (R. 67,71), that Lieutenant Logan did say to Charles, "God damn it" a couple of times but that so far as witness knew Lieutenant Logan did not "personally" threaten Charles in any way. Charles had first stated that he had not been out of the "Camp at all on a particular night" and that Lieutenant Logan raised his voice from a "considerable" distance away, and with no showing of physical violence said to Charles "God damn it, Charles, we have the statements of the other men. You might as well own up" or "words to that effect". (R. 67,69,72) Witness did not hear Lieutenant Logan make a statement to Charles in effect "you'll be glad to see a noose around his neck" or "When the noose is around your neck, and they drive the truck out from under you, I hope the other five are watching you" (R. 67,68,72). The reason Hall was kept in the presence of Charles during the period Charles was being questioned was because

"originally, the Camp Provost Marshal questioned the four accused, or six accused, however you want to look at it, got statements from all six, and they all were the general tenor that none of the six had left Camp that night, and so forth. Later, he got statements, the Camp Provost Marshal got statements from three or four of the men, which completely reversed their original statements given to the Camp Provost Marshal. This man Charles was another man that they were requestioning, and they probably wanted Hall there, because Hall had changed his story on being questioned, and they wanted to show Charles that it was no use sticking to his original story" (R. 72).

Charles read his statement before he affixed his signature thereto and witness

"handed him the statement in the presence of four witnesses, and asked him, when I handed it to him, to read it over, see if it was correct. If it was, to sign; if it wasn't, to let me know what he wanted added or deleted. He read it over, and signed it" (R. 83).

First Lieutenant John W. Logan, Corps of Military Police, 370 Combat Team, a witness for the court, testified that he was present during the interrogation of accused Charles, together with Lieutenant Pierce and the investigating officer, Major Lane, who was taking a statement from Charles (R. 73). It appeared from other statements that had been obtained from five other "men" that Charles was not giving any "true statements". Therefore witness called Private (Robert) Hall back into the tent during the questioning of Charles "to refresh Charles's memory". Witness believed "from the other statements" which had been obtained that Charles' "memory

needed refreshing" and he "only wanted him to tell the truth of it". Hall did "refresh" Charles' memory. Witness may have said to Charles "God damn it, Charles, we've got statements from five other men" and "you might as well tell the truth", but he was not angry with Charles, did not threaten him or make a statement that he "would be glad to see a noose around his neck, and have a truck drive out from under him". Neither did he hear anyone make any such statement to this accused during the investigation. (R. 73-77)

Second Lieutenant James E. Pierce, Military Police Platoon, 92d Infantry Division, as the court's witness, testified that he also was present during the questioning of Charles and that no threatening statement was made to Charles by "any of the investigating officers". Witness did not make any statement to Charles to the effect that he "would be glad to see a noose around his neck, and have a truck drive out from underneath him" nor did he hear anyone else make any such statement. (R. 78,79,82) Lieutenant Logan did say "Oh, God damn it, Charles, why don't you go ahead and admit that you were doing this", that he (Logan) had statements from "other of the accused", but witness did not "recall" hearing Lieutenant Logan state that "there would be a noose around his neck, Charles's neck, and the other five would be there to see him first" (R. 79,80). After Charles had been questioned for about 15 minutes, he was having a little difficulty in remembering where he was at certain times, "so we brought Pvt (Robert) Hall in to refresh his memory" and to "clear him up on a few points that were hazy in his mind". After Hall entered, Charles "remembered a few things he had forgot". (R. 80,81)

The following statement of Charles was identified at the trial by Major Lane and was received in evidence solely as against this accused.

"I played poker evening of 25 October 1944 for 30-45 minutes after supper. About 1900, Parrot, Hall, Anderson, Matthews and Miles and I decided to go get some wine and women. We went NE from camp towards Pisa. We went to several houses, got wine at most of the houses, and repaid the people by giving them cigarettes. We six all decided to go back to the last house. In this last house, there was an elderly woman, about two men, two ladies, and a little girl. We went back to the house after wine and cock. We got in a fight. I struck a woman with my right fist. She fell down in the doorway. I don't remember hitting anyone else. Then a woman screamed in the house. There was some scrapping going on outside the house. On the inside, I heard someone say, 'You're hitting me'.

"Someone hit one of the men-civilians and that started the whole fight. Parrott and Matthews each had an Italian language book. Matthews wrote a note in Italian telling the girl to come to camp tomorrow.

Miles, Anderson ahead of me; Parrott and Hall behind me. A woman, man and little girl came out of the house, just as we came up to it. Hall said, 'Let's go', so we took off for camp.

"The old woman was standing in the doorway, blocking my path. I threw my right fist out and struck the woman. She fell down in the doorway. I stood in the doorway until someone yelled 'Let's go.'

"We ran around an adjoining house and jumped the fence. I was almost up on the highway when I heard a shot fired. Anderson and Miles had lost their helmet liners in the scuffle. The fact that I had struck the old lady gave me a strange feeling. Miles carried a big stick back to the house. I went back to the house after a piece of ass, but didn't get any. All six were agreed that we went back after cock. On the way back, we all agreed that we wouldn't say anything about what happened during the evening. Anderson left his helmet liner in the house, remembered it on the way to camp, wanted to return for it, but we persuaded him to forget it. It was about ten or ten-thirty when we reached camp" (R. 82,83; Ex. B).

Major Lane also identified a sworn statement made by accused Anderson, after the latter was advised of his rights as in the case of Charles. The statement, admitted in evidence solely as against this accused, was as follows:

"Right after dark on 25 October 1944, Robert Hall, Ellsworth Matthews, Samuel Charles, Richard Miles, Robert Parrott and I decided to go out and get some women and wine. We went to go down road to Pisa. We went to several houses, got wine at most of the houses. We all sat down in the house. Hall and I each had an Italian language book. Three women, little girl, and 2 men. One old woman with gray hair; one about 29-30 and one about 19-20; girl about 7-8. We went next door to get some wine and see if there were any women there. Then we went on down highway. Then we went back to the house with the women inside to get some cock. Young man standing in the doorway didn't try to stop me. He didn't say anything. I went past him. The best I can remember it was Miles that carried a large board back to the house. When I heard a shot fired, I bent over low and ran out the door. I said, 'This is me'. The Italians outside were jabbering and talking. I saw a woman lying in the doorway. I jumped over her on my way out. Next door, we asked for women. civilian said 'Women in Pisa.' Charles shook a man. We were going to talk to them about cock by saying 'figi' and by showing them.

"On the road back, Miles said he believed he hurt the old man. We all agreed not to say anything about what we had done during the evening.

"We ran up the road, several hundred yards. Hall told me not to go back after the helmet-liner, when I mentioned leaving it in the house. I can identify note and the helmet-liner.

"Later that night I was in tent and someone said, 'Here is a helmet-liner'. I didn't know who it was" (R. 83-85; Ex. C).

A sworn statement made by accused Miles, after he had been advised of his rights, as in the case of Charles, was identified by Major Lane and admitted in evidence solely as against Miles. It was as follows:

"On the 25th day of October 1944, at about 2000, I Pvt Richard E Miles, Williard Anderson, Robert Parrott, Samuel Charles, Ellsworth Matthews and Robert Hall of Co I, 371st Inf Reg decided to look for some wine and women. We left the Company Area and started in the direction of Pisa. We stopped at several houses and got wine at two of them. We proceeded on up the road and stopped at another house. We asked the residents for some wine. The man said he had some wine, so all of us went into the house. There were two men, three women and a small girl of about 8 years old.

"We sat down and drank about a quart of wine. We talked for a while and Pvt Matthews wrote a note in Italian using an Army Language book to phrase the note. The note was for the girl to come by our camp and pick up some clothing, the following day.

"We then left the house and walked up the road a piece, headed back to camp. We decided to go back and see if we couldn't make a date with the girls in the house. We all agreed to go back and get a 'piece of ass'. As we went up to the house the people were coming out. Pvt Anderson started to go inside when one of the men said something to Pvt Anderson. Pvt Anderson pushed the man back and one of the girls started screaming. I saw Pvt Matthews hit another man with his fist. I, Pvt Richard E Miles, picked up a large stick, several hundred yards from the house and carried it to the house, and struck the man Matthews had hit, about three times. The man fell to the ground and Pvt Hall yelled, 'Let's go.' As we ran someone fired a shot at us. We then went back to our company area. Pvt Anderson left his helmet-liner in the civilian's house so when we got back to camp, I

got him another one. We all agreed not to say anything to anyone about what had happened. We then went to bed. It was about midnight when we went to bed, to the best of my knowledge.

"I have been warned of my rights and I swear that the above statements are true and correct to the best of my knowledge" (R. 85,86; Ex. D).

Accused Matthews also made a sworn statement after he had been advised of his rights as in the case of Charles, and such statement was identified by Major Lane and admitted in evidence solely as against Matthews. It was as follows:

"On 25 October 1944, about 1900, Hall, Miles, Charles, Anderson, Parrott and I went to some houses NE of Staging Camp on Pisa Road. We went into 7 or 8 houses in the village. In some of them, we were given wine, in others we gave them cigarettes for wine, and in a few we couldn't get any wine.

"In one house, there were 2 men, 2 girls, a mother, and a little girl. We received wine at this house. Here I wrote a note to one of the girls in Italian telling her to come to camp the next day to pick up my laundry.

"Miles, Hall and I got in an argument with one of the men. I hit one of the men in the mouth with my right fist. We all started to fight with the men there. Miles had an axe or pick handle which he used to strike one of the men with. Anderson and Charles were in trying to get the two girls. (Lacerated 2nd knuckles on right hand).

"Started to go to another house, but got into an argument on the road about the girls. There were 2 nice looking girls there. One was Marina, one Lucille. Mother Pauline. Men talked about them, decided to go back after a piece of ass. When we got back 2 men were outside. Mother got little girl away. Two girls evidently inside house.

"First time I hit him, he went down. He got up again, and I hit him again and Miles hit him with the club. The man was cowering and covering up, but Miles continued to hit him.

"Then I heard a shot. We six ran like hell. On the way back we were scared about the note, decided we would try to lie our way out. Miles and Anderson both lost their helmet-liners. We all agreed not to say anything about what had happened that evening. Anderson and Charles said they had their hands on the 2 girls and were bringing

them out when the shot was fired. Anderson said they almost had them outside" (R. 86,87; Ex. E).

Each accused was positively identified at the trial (R. 28,34,39,51).

Each accused elected to remain silent (R. 87,88).

4. It thus was indicated by the evidence that at the place and time alleged in the Specification, Charge I, Matthews struck Galli Mareo, the deceased, with his fist, that Miles struck him several blows with a stick, that deceased was cut behind the left ear with a "sharp instrument", and that he died as the result of the vicious attack upon him. It must be concluded that the homicide was committed deliberately, without provocation, justification or excuse and with malice aforethought. The evidence sustains the finding of guilty of murder as to each accused (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673).

It further appears from uncontradicted evidence that at the place and time alleged in Specification 3, Charge II, that Charles struck Paolicchi Bruna, the person named in the Specification, in the face with his fist with such force and violence that she was knocked to the ground "senseless". From the suddenness and violence of the assault the court was justified in inferring an intent by accused to do bodily harm as charged.

It further appears from uncontradicted evidence that shortly before the fatal assault upon Mareo, accused, together with the two other soldiers, Hall and Parrott, forcibly entered a dwelling occupied by Mareo and other Italian civilians, in search of women and wine and after partaking of a small amount of wine, left the house for a short interval to seek "girls" in the immediate neighborhood. When they found no girls they returned together to Mareo's house where they found the occupants about to retire. The attacks upon the Italian civilians immediately ensued. The questions as to which one of the accused cut Mareo with a sharp instrument and as to whether each accused delivered a blow, are of no consequence. Neither is it of any consequence as to which one struck Paolicchi Bruna. The circumstances show that the assaults against both Mareo and Bruna were accomplished in the course of a wrongful joint venture in which each accused aided and encouraged the other in their attempts to secure wine and women, by violence if necessary. Each was responsible in law for the acts of the other and all of them were guilty as principals (18 U.S.C. 550; CM NATO 385, Speed).

It is alleged in the Specification, Charge I, that accused employed a "pick handle" as one of the instruments in committing the offense. The proof showed only that the victim named in the Specification was struck with a "stick" with the fists and with a sharp instrument. The variance in this respect is not substantial and accused were in no wise injured or misled (AW 37).

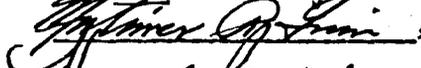
5. The pretrial statement of accused Charles was admitted in evidence solely as against the author over the objection that the statement was given under duress and that he was "threatened" prior to the making and

(222)

signing. The statement did not concede murder, but considering it to have been a confession and according this objection the widest latitude without confining it to the grounds stated, the admission of the pretrial statement in evidence was not error. There is ample evidence in the record showing that after accused was fully informed of his rights under Article of War 24 and otherwise he voluntarily gave the statement introduced in evidence. He was offered an opportunity to make any changes in the document before he signed it. Moreover, should the admission of the pre-trial statement in evidence be considered error, its admission could not, in the light of the entire record, be said to have injuriously affected the substantial rights of accused, and aliunde the statement, the record contains ample evidence warranting the court in finding accused guilty of murder as charged.

6. The charge sheets show that accused Anderson is 24 years of age and was inducted 14 January 1942; that Matthews is 19 years of age and was inducted 14 September 1943; that Charles is 22 years of age and enlisted 21 November 1942; and that Miles is 19 years of age and was inducted 8 October 1943. None of accused had any 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 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.


_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
30 December 1944.

Board of Review

MTO 4511

UNITED STATES)

1ST ARMORED DIVISION

v.)

Trial by G.C.M., convened at
APO 251, U. S. Army, 17
November 1944.

Private JOHN J. CRISMOND
(32 957 491), Company B,
6th Armored Infantry
Battalion.)

Dishonorable discharge and
confinement for 20 years.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Pvt. John J. Crismond, Company "B", 6th Armored Infantry Battalion, did, near Castel del Rio, Italy on or about 1 October 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with an armed enemy, and did remain absent in desertion until he surrendered himself at Service Company, 6th Armored Infantry Battalion on or about 4 October 1944.

Specification 2: In that Private John J. Crismond, Company "B", 6th Armored Infantry Battalion, did, near Castel del Rio, Italy on or about 5 October 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with an armed enemy.

enemy, and did remain absent in desertion until he surrendered himself at Service Company, 6th Armored Infantry Battalion on or about 7 October 1944.

Specification 3: In that Private John J. Crismond, Company "B", 6th Armored Infantry Battalion, did, near Gabbiano, Italy on or about 10 October 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with an armed enemy, and did remain absent in desertion until he was apprehended at Prato, Italy on or about 18 October 1944.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence of two previous convictions by special courts-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 50 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 50 $\frac{1}{2}$.

3. The evidence shows that on 1 October 1944 and on 5 October 1944 Company B, 6th Armored Infantry Battalion, of which accused was a member, was in contact with the enemy south of Mt. Serra, near Castel del Rio, Italy. The halftracks of the Service Company of the regiment were about five miles in the rear (R. 5,7-9). On 30 September 1944 accused was found by the Service Company commander in the halftrack area where he had no reason to be and the following day he was turned over to the battalion adjutant who told accused where his company was located and the tactical position in relation to the enemy, took him up to "battalion rear" to the Headquarters Company supply sergeant and told accused he was being returned to his company and was to remain with the supply sergeant and go forward with him when he took the rations (R. 5,6,9). About 1530 hours accused told the sergeant he was going to the latrine and at 1600 hours the sergeant called, could not find him and left without him (R. 9).

On 4 October 1944 accused was again found in the halftrack area by the Service Company commander who again turned him over to the battalion adjutant the following day (R. 5). The adjutant took accused forward to Major J. M. O'Brien, Jr., 6th Armored Infantry Battalion, who told accused his company was in contact with the enemy and that he was being sent to the first sergeant who would return accused to his company. Accused appeared to be in good health and said he understood what Major O'Brien "meant". Major O'Brien told accused that if for any reason he did not go to his company he would be court-martialed. (R. 8) Accused was told his company was in the same position as it was on 1 October 1944 and was then turned over to the first sergeant of "A" Company. (R. 7) Accused and the sergeant were en route to

accused's company when the sergeant stopped "to take care of some business" and when he returned to the vehicle accused was missing. The sergeant searched the area for accused but did not find him. (R. 10)

On 7 October 1944 accused was found in the "chow line" in the half-track area, placed under guard and turned over to the adjutant on 10 October 1944 who took him to his company which had moved to Gabbiano, Italy, and was in a forward assembly area preparing to take over front line positions (R. 5,7,11-13). Accused was taken to his company and turned over to the executive officer who told him to join his platoon as they were ready to "move out" (R. 11-13). On 18 October 1944 accused was apprehended at a Red Cross establishment in Prato (R. 5).

An extract copy of the morning report of accused's company, received in evidence pursuant to a stipulation, contained the following entries:

5 October 1944

32957491 Crismond, John J. 745 Pvt
Above EM dy to AWOL as of Oct 1/44 0700 hrs
s/ H. R. Collier

6 October 1944

32957491 Crismond, John J. 745 Pvt
Above EM AWOL to dy as of 1625 hrs Oct 4/44
& dy to AWOL 2100 hrs Oct 5/44.
s/ H. R. Collier

9 October 1944

32957491 Crismond, John J. 745 Pvt
Above EM fr AWOL to ar in qrts as of 1730 hrs
Oct 7/44.
s/ H. R. Collier

11 October 1944

32957491 Crismond, John J. 745 Pvt
Above EM fr ar in qrts to dy as of Oct 10/44.
s/ H. R. Collier

14 October 1944

32957491 Crismond, John J. 745 Pvt
Above EM dy to AWOL as of 1700 hrs Oct 10/44.
s/ H. R. Collier

22 October 1944

32957491 Crismond, John J. 745 Pvt
Above EM AWOL to Arrest in Quarters as of
1300 hrs, 18 October 1944
s/ H. R. Collier" (R. 13, Ex. A).

Accused elected to remain silent (R. 13).

4. It thus appears from the evidence that at the place and time alleged in Specification 1 accused absented himself from his organization without proper leave and remained unauthorizedly absent until 4 October 1944 when he reappeared in a halftrack area some five miles in the rear of his company. It further appears that at the time accused absented himself he had been informed that his company was in contact with the enemy and told he was being returned to his company with the supply sergeant. Accused, under the pretense of going to the latrine, absented himself without authority and was again found in the halftrack area four days later.

It further appears from the evidence that at the place and time alleged in Specification 2 accused, after having been informed by a superior officer that he was being returned to his company and that his company was then engaged with the enemy, again absented himself without authority and remained unauthorizedly absent until 7 October 1944 when he was found in the "chow line" in the halftrack area.

It further appears from the evidence that at the place and time alleged in Specification 3 accused, after having been returned to his organization which was in a forward assembly area and preparing to take up positions in the front line, was told by a superior officer to join his platoon as they were ready to "move out" and again absented himself without proper authority and remained unauthorizedly absent until he was apprehended 18 October 1944 at Prato, Italy.

The court was warranted in concluding that on the dates alleged accused absented himself with the intention of avoiding the hazardous duty of combat with the enemy in violation of Article of War 58 as alleged (MCM, 1928, par. 130a).

5. A psychiatric report pertaining to accused and attached to the record contains the following:

"A mildly tense apprehensive white private who relates his story clearly and concisely. Patient never saw his real father and was brought up by his mother. He had a stepfather at the age of 12 and relationship was satisfactory. In civilian life he adjusted fairly well. However he was arrested 2 times for stealing. In the army he has been CMs twice. In combat he is tense and nervous and complains of exertional dyspnea. He has not been wounded in action; no loss of consciousness; closest shell approx. 5 yards away."

And:

"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."

6. The charge sheet shows that accused is 19 years of age and was inducted into the Army 6 September 1943. 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.

Arthur R. Lewis Judge Advocate.
George O. Wier, Judge Advocate.
Henry C. Henrich, Judge Advocate.



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 50 $\frac{1}{2}$.

3. The evidence shows that on 6 October (1944) accused was a member of Service Company, 349th Infantry Regiment, which was then "in the line" and stationed near San Pellegrino, Italy. He reported in the afternoon of 6 October to the replacement pool of that organization, which was within artillery range of the German forces. It was announced to all the men that they were to move up the next morning; that they were not to carry packs but would carry shelter halves and blankets. It was common knowledge that they were going to the front. Accused was placed in a tent with six other men and was awakened by a noncommissioned officer the following morning at 0300 hours. He was directed to report for roll call held across the creek between the kitchen and the orderly room but when roll call was held accused did not answer to his name. He had no permission to be absent from 6 October to 25 October. (R. 6-8)

The morning report of Service Company, 349th Infantry Regiment, contains the following entries relating to accused:

"7 October 1944: Pvt Campione, Leo C fr dy to AWOL
0800 hrs 6 October 1944.

28 October 1944: Pvt Campione, Leo fr AWOL to abs conf
630 MP Co., Florence, Italy 1300 hrs
25 October 1944. Fr abs conf 630 MP
Co., Florence, Italy to conf 88th Inf
Div Stockade 28 Oct 44" (R. 8; Ex. A).

It was stipulated that accused was apprehended at Florence, Italy, on or about 25 October 1944 (Ex. B).

Accused elected to remain silent (R. 9).

4. It thus appears from uncontradicted evidence that at the place and about the time alleged in the Specification accused absented himself from his organization without authority and remained absent until 25 October 1944. His organization was within artillery range of enemy forces and accused was among those ordered to move to the front. It is clear therefore that at the time he absented himself he intended to avoid hazardous duty. In view of the fact that he absented himself for a period of almost three weeks and that he failed to surrender to any of the numerous military authorities within this active theater of operations in time of war, the court was warranted in finding that accused intended not to return to his organization. Accused was properly found guilty of desertion (MCM, 1928, par. 130a).

5. A psychiatric report pertaining to accused and attached to the record of trial contains the following:

"Psychiatric examination reveals a 24 year-old soldier with a superior level of performance on the Wechsler Intelligence Scale who had been a professional boxer in civilian life. He has an immature emotional level of adaptation with some deficiency in moral restraint characteristic of Constitutional Psychopathy. He has no motivation for fighting and committed his offense in a display of irresponsibility for personal interest."

6. The charge sheet shows that accused is 24 years of age and was inducted into the Army 3 December 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.

Matthew R. Irons, Judge Advocate.

George O. Wilson, Judge Advocate.

Henry C. Reerial, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
29 December 1944.

Board of Review

MTO 4513

UNITED STATES

v.

Private ALTON L. PAUL
(34 814 734), Company F,
350th Infantry.

) 88TH INFANTRY DIVISION

) Trial by G.C.M., convened at
) Montecatini, Italy, 16
) November 1944.

) Dishonorable discharge and
) confinement for 30 years.
) Eastern Branch, United States
) Disciplinary Barracks,
) Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Alton L. Paul, Company F, 350th Infantry, did, at Tarquinia, Italy, on or about 2 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy, on or about 20 October 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 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 50 $\frac{1}{2}$.

(234)

3. The evidence shows that on 1 July (1944), accused, a member of Company F, 350th Infantry, was given permission to be absent on pass from his company for a period of not more than 24 hours. A staff sergeant, who was accused's squad leader, had a roll call at the Tarquinia (Italy) rest area where accused's company was located on 2 July (1944) and accused was not present and had no permission to be absent. The sergeant did not see accused after 2 July (1944). (R. 7)

An extract copy of the morning report of Company F, 350th Infantry, received in evidence without objection, contained the following entries:

"4 July 1944 ***
34814734 Paul, Alton Pvt.
Above 11 EM fr dy to AWOL as of 2300, 2 July 1944.

10 July 1944
34814734 Paul, Alton Pvt. ***
Above 9 EM fr AWOL to trfd to Serv. Co., this Regt.,
per SO #85, dtd 10 July 1944" (R. 6;Ex. A).

An extract copy of the morning report of Service Company, 350th Infantry, received in evidence without objection, contained the following entries:

"28 October 1944
34814734 Paul, Alton Pvt.
Fr dropped fr Rolls as of 3 Aug 44 per NATOUSA Cir
#36 c.s., to ars in Hands of Mil. Auth. as of 0300,
19 Oct 44 & fr Ars. in Hands of Mil. Auth. to ars
in qrs as of 1600, 20 Oct 44. MCO 590 MSN 745 Duty
745

30 October 1944
34814734 Paul, Alton Pvt
Fr ars in qrs to Conf in Div. Stockade as of 29
Oct 44" (R. 6;Ex. C).

It was stipulated that accused was apprehended at Rome, Italy, on or about 20 October 1944 (R. 6;Ex. B).

Accused's squad leader testified for the defense that accused joined "the Division" shortly after the "big push" and witness had been in combat with accused and that accused was a very good man (R. 7,8).

Accused elected to remain silent.

4. It thus appears from the evidence that at the place and time alleged accused absented himself without leave and remained unauthorizedly absent until apprehended at Rome, Italy, on or about 20 October 1944. An intention to remain permanently absent was inferable from accused's unexplained prolonged absence, his failure to surrender to military authority while absent and in the neighborhood of numerous military posts and stations in

this active theater of operations, and from other circumstances in evidence (MCM, 1928, par. 130a). The court was warranted in finding accused guilty as charged.

5. A psychiatric report pertaining to accused and attached to the record contains the following:

"Psychiatric examination reveals no disease. Soldier is a 21 year-old with 10 years of schooling. He took flight prompted by some degree of anticipatory anxiety with a basic predisposing factor of insecurity resulting from early loss of a parent. He is liable for his misbehavior and is of questionable further combat value, although expressing willingness to return to front-line duty."

6. The charge sheet shows that accused is about 27 years of age. He was inducted into the Army 27 August 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.

Matthew R. Linn, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Merrill, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
30 December 1944.

Board of Review

MTO 4544

UNITED STATES)

v.)

Private ROBERT J. GILL)
(32 375 958), Company C,)
350th Infantry.)

88TH INFANTRY DIVISION)

Trial by G.C.M., convened at)
Montecatini, Italy, 15)
November 1944.)

Dishonorable discharge and)
confinement for 20 years.)
Eastern Branch, United States)
Disciplinary Barracks,)
Greenhaven, New York.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert J. Gill, then Staff Sergeant, Company C, 350th Infantry, did, near Volterra, Italy, on or about 10 July 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy on or about 3 November 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 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 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 50 $\frac{1}{2}$.

3. The evidence shows that about 1500 hours on 10 July 1944 accused, then company mess sergeant, and another noncommissioned officer, both members of Company C, 350th Infantry Regiment, left their company mess area for the personnel section. After walking about half a mile accused told his companion it was too far, he had changed his mind and was not going. Accused's companion left accused and continued to the personnel center alone. Accused disappeared and although the other noncommissioned officer remained with the company continuously from the date mentioned until the trial he did not again see accused with the organization. (R. 6-8)

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entry:

"Legoli, Italy	22 July 1944
32375958 Gill, Robert J.	S Sgt.
Fr dy to AWOL as of 0600, 10 July 1944"	
(R. 7; Ex. A).	

It was stipulated that accused was apprehended at Rome, Italy, on or about 3 November 1944 (R. 8; Ex. B).

Accused elected to remain silent (R. 8).

4. It thus appears from uncontroverted evidence that on the date alleged accused absented himself from his organization without proper leave and remained unauthorizedly absent until he was apprehended in Rome, Italy, almost four months later. An intention to remain permanently absent may be inferred from accused's unexplained prolonged absence and his failure to surrender to military authority while absent and in the vicinity of numerous military installations in this active theater of operations, and from other circumstances in evidence (MCM, 1928, par. 130a). The court was warranted in finding accused guilty as charged.

5. It was alleged that accused absented himself near Volterra, Italy, whereas the evidence does not establish the situs of the dereliction, unless by the reference in the morning report to Legoli, Italy. Legoli is located some ten miles from Volterra, and both were in the zone of combat operations in July 1944. The omission or variance was of no consequence as the situs was not of the essence of the offense charged (Dig. Op. JAG, 1912-40, sec. 416 (10); NATO 3213, Boros).

6. Attached to the record of trial is a psychiatric report of an examination of accused dated 18 November 1944 containing the following:

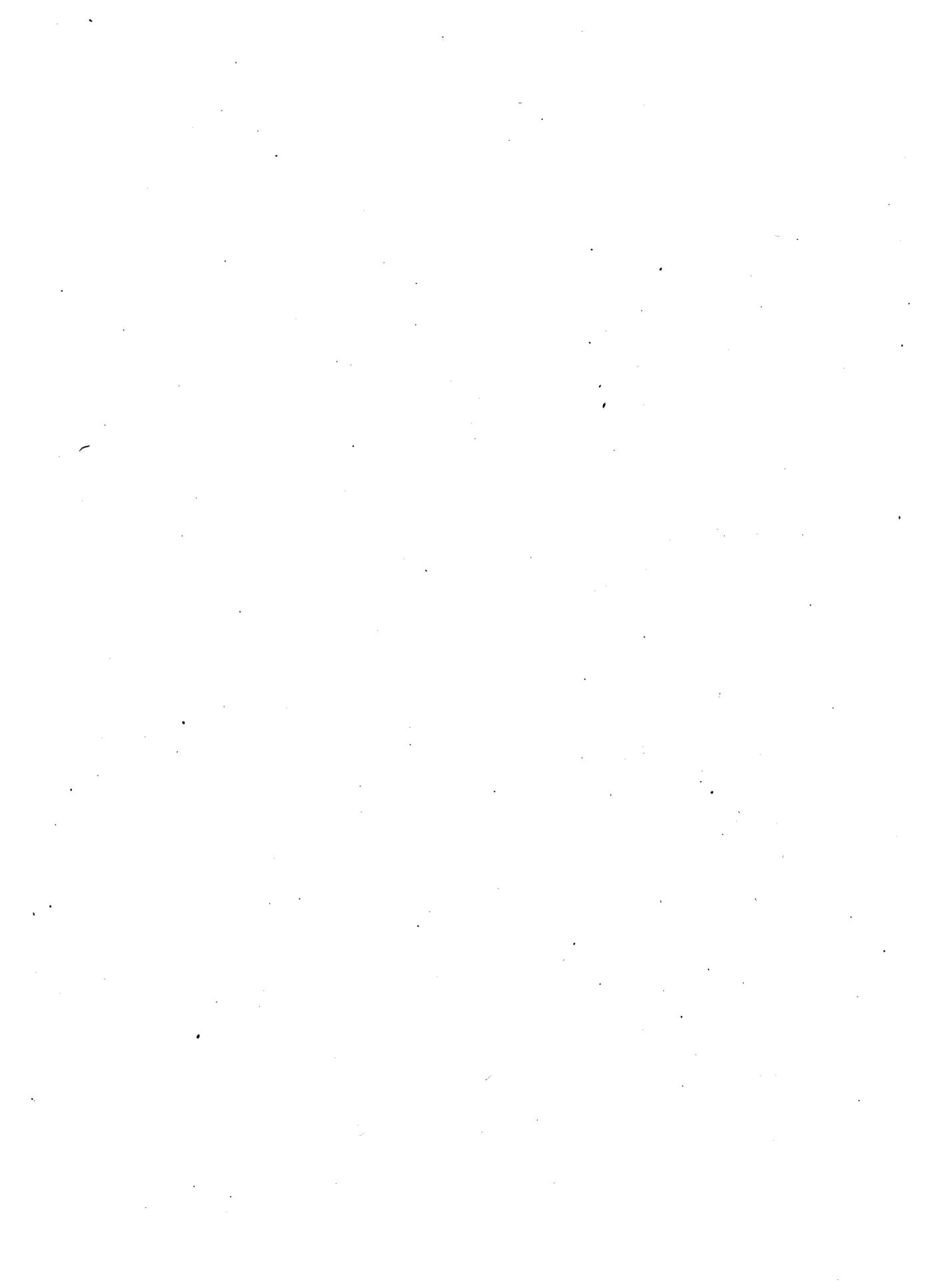
"Psychiatric examination reveals no disease. Soldier is a 30 year-old with 9 years of education. Developmental

history indicates an unstable family background with constant change of homes. His basic insecurity is manifest in a fear of darkness and depressive moods. Ineffective external discipline with frequent change of command and an anxiety component prompted his offense. He expresses willingness to return to combat duty, and may yet be of value in the combat situation."

7. The charge sheet shows that accused is 30 years of age, was inducted into the Army 19 June 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 and the sentence.

William R. Smith, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Kewich, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
27 January 1945.

Board of Review

MTO 4545

UNITED STATES	)	88TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Montecatini, Italy, 18 November
Private DONALD J. LYONS	)	1944.
(32 404 244), Headquarters	)	Dishonorable discharge and
Company, 2d Battalion, 349th	)	confinement for 50 years.
Infantry.	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Donald J. Lyons, Headquarters Company, Second Battalion, 349th Infantry, did, near Casanova, Italy, on or about 8 May 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Vallerano, Italy, on or about 2 November 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, all members of the court present concurring. The reviewing authority approved only so much of the finding of guilty of the Specification of the Charge as "involves

(242)

desertion as alleged terminated by surrender", approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50¹/₂.

3. The evidence shows that on 8 May 1944, accused was a member of Headquarters Company, 2d Battalion, 349th Infantry (R. 6,8).

Staff Sergeant Earl W. King, a member of accused's company since before they "came across", testified that he had not seen accused in the company area or with the company since 8 May (1944) (R. 9). Witness testified further that although he did not make the search he knew of his own knowledge that on 8 May (1944) a search of the company area was made for accused (R. 8). On examination by the court witness testified that all he knew about the search for accused was what had been told him (R. 9).

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"17 November 1944: Pvt. Donald J. Lyons, fr dropped fr rolls as absentee to abs conf 2 Nov 44 1600 hrs at Vallerino, Italy, 2675 Regt. M.P.s; fr abs conf 88th Inf. Div Stockade 6 Nov 44

9 May 1944: Pvt Lyons, Donald J. fr dy to AWOL 8 May 1944 0600 hrs" (R. 7; Ex. B).

It was stipulated that accused voluntarily surrendered to military authorities at Vallerano, Italy, on 2 November 1944 (R. 7; Ex. A).

Accused elected to remain silent (R. 9).

4. It thus appears from the uncontradicted evidence that at the time alleged accused absented himself from his organization without proper leave and remained unauthorizedly absent until he surrendered himself to military authority almost six months later. An intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence from his organization in this active theater of operations and from other circumstances in evidence (MCM, 1928, par. 130a). The court was warranted in finding accused guilty as charged.

5. When it was revealed on examination by the court that the testimony in chief of Sergeant King that a search of the company area had been made for accused on 8 May (1944) was based upon hearsay, such testimony should have been stricken and the court instructed not to consider it for any purpose. In view of the fact that accused's absence was established by an extract copy of the morning report of his company, admitted without objection, and corroborated in a measure by a written stipulation signed by accused that he surrendered to military authority on 2 November 1944, it cannot be said that the irregularity mentioned injuriously affected the substantial rights of accused.

276892

6. It was alleged that accused absented himself near Casanova, Italy, whereas the evidence does not establish the situs of the dereliction. The omission was of no consequence as the situs was not of the essence of the offense charged (D. . Op. JAG, 1912-40, sec. 416 (10); NATO 3213, Boros; MTO 4957, Millican).

7. Attached to the record of trial is a report of a psychiatric examination of accused dated 20 November 1944, containing the following:

"Psychiatric examination reveals a 32 year-old soldier with 7th grade education. He has a history of chronic social maladjustment characteristic of constitutional psychopathic state. He has a poor family background, left home at 12, has been imprisoned for grand larceny, and has been subject to alcoholic addiction since the age of 14. He committed his offense in gross neglect of sense of duty and responsibility. He is of little effective value in the military service."

8. The charge sheet shows that accused is 31 years of age, was inducted into the Army 13 July 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, as modified, and the sentence.

Walter P. Lee, Judge Advocate.
Reggie O. Wilson, Judge Advocate.
Henry C. Kewick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

AGO 512, U. S. Army,
3 February 1945.

Board of Review

MTO 4571

U N I T E D S T A T E S	)	88TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at
	)	Frassineta, Italy, 4 December
Private THOMAS A. CAMBERDELLA	)	1944.
(32 803 260), Company C, 350th	)	Dishonorable discharge and
Infantry.	)	confinement for life.
	)	Eastern Branch, United States
	)	Disciplinary Barracks,
	)	Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Thomas A. Camberdella, Company C, 350th Infantry, did, at Tarquinia, Italy on or about 27 June 1944 desert the service of the United States and did remain absent in desertion until he surrendered himself at Rome, Italy, on or about 9 September 1944.

ADDITIONAL

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

Specification: In that Private Thomas A. Camberdella, Company C, 350th Infantry, having been duly placed in confinement in the 88th Infantry Division Stockade on or about 19

not have permission to be absent. On 26 November (1944) he was returned and reconfined in the stockade. (R. 10-13)

The 88th Infantry Division stockade officer, Warrant Officer, Junior Grade, Alex D. Menz, testified that on 12 October (1944) he knew the "350th" was on the line against the enemy and understood it was tough and that this was "common knowledge among the prisoners" (R. 11). Witness testified further that accused had asked him if he could do anything about getting him back to his organization, and that he told accused that in the next day or two action would be taken. Thereafter accused "took off". (R. 11)

It was stipulated that accused voluntarily surrendered himself to military authority at Rome, Italy, on or about 9 September 1944; and further that accused was apprehended at Rome, Italy, on or about 24 November 1944 (R. 13; Ex. B).

Accused made the following unsworn statement:

"I had a talk with Mr. Menz about going up to my company and Lt. Osborne came over and talked with another lieutenant to see how many men had been willing to go back. After he had left I talked with Mr. Menz about going back to my company. Mr. Menz said this happened one day before I left but it was four. I remember because I took quite a ribbing from the fellows in the stockade because I said I would be willing to go back. I tried to get back and wanted to get back" (R. 13).

4. It thus appears from uncontradicted evidence that at the place and time alleged in the Specification of the Charge, accused absented himself from his organization without proper leave and remained unauthorizedly absent for almost two and a half months and until he surrendered at Rome, Italy.

It further appears from uncontroverted evidence that at the time alleged in the Specifications, Additional Charges I and II, accused after having been confined in the 88th Infantry Division stockade escaped from said confinement without proper leave and remained unauthorizedly absent for almost a month and a half, and until he was apprehended at Rome, Italy.

As to the Specification of the Charge, and the Specification, Additional Charge II, an intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence from his organization in this active theater of operations, termination thereof by apprehension in the last instance, and from other circumstances in evidence (MCM, 1928, par. 130a). Moreover, the circumstances of accused's absences were such that an intention to avoid hazardous duty was also inferable in each case. The court was warranted in finding accused guilty of desertion in each instance as charged.

(248)

5. It was alleged in the Specifications, Additional Charges I and II, that the respective offenses were committed "near San Lorenzo, Italy", whereas the evidence does not establish the situs of the derelictions other than that they occurred at the 88th Infantry Division stockade. There is no suggestion in the record that accused was misled or surprised by this omission, and the situs not being of the essence of the offenses charged, none of his substantial rights were injuriously affected thereby.

6. Attached to the record of trial is a report of a psychiatric examination of accused, dated 4 December 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 20 year-old individual of Italian parents with a normal intellectual capacity. He had made an adequate civilian adjustment having had 3 years of high school education and no record of delinquency. Developmental history reveals considerable difficulty with an aggressive father. The reactivation of attitudes of rebellion against authority in the army prompted resentment towards regimentation and discipline and motivated his irresponsible act. He is of questionable further combat value."

7. The charge sheet shows that accused is about 21 years of age, was inducted into the Army 19 February 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 the sentence.

Matthew R. Iron, Judge Advocate.

George O. Wilson, Judge Advocate.

(absent), Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
1 February 1945.

Board of Review

MTO 4595

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, 21 (27)
November 1944.)

Private EMMET F. BELLVILLE)
(37 050 928), Company B,)
11th Armored Infantry Battalion.)

Dishonorable discharge and
confinement for 30 years.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

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

Specification: In that Private (then Technician Fifth Grade) Emmet F. Bellville, Company "B" Eleventh Armored Infantry Battalion, did, without proper leave, absent himself from his camp at near Babbonia, Italy, from about 30 July 1944 to about 18 August 1944.

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

Specification: In that Private Emmet F. Bellville, Company "B", Eleventh Armored Infantry Battalion, did, at near Palaia, Italy, on or about 28 August 1944, desert the service of the United States by absenting himself without proper leave from his bivouac, with intent to avoid hazardous duty, to

(250)

wit: Actual combat with the enemy, and did remain absent in desertion until he returned to military control on or about 1 November 1944.

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

Specification: In that Private Emmet F. Bellville, Company "B", 11th Armored Infantry Battalion, did, near Marano, Italy, on or about 1 November 1944 misbehave himself before the enemy, by refusing to join his organization which then was engaged with the enemy, after having been ordered to do so by First Sergeant John J. Hvostal.

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 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 shows that on or about 30 July 1944, and thereafter, accused was a member of Company B, 11th Armored Infantry Battalion, which was located at Babbonia, Italy (R. 4,5). Extract copies of the morning report of accused's company, containing the following entries, were admitted in evidence by stipulation:

"30 July 1944
37050928 Bellville, Emmet P. 745 T/5
Dy to AWOL 0830 hrs.

26 August 1944
37050928 Bellville, Emmet F. 014 T/5
AWOL to dropped fr rolls as absentee.

28 August 1944
37050928 Bellville, Emmet F. 014 Pvt
Dropped as absentee to returned to mil
control 18 Aug 44 to duty 27 Aug 44."

"30 August 1944
37050928 Bellville, Emmet F. Pvt.
Dy to AWOL 1600 hrs 28 Aug.

5 October 1944
37050928 Bellville, Emmet F. Pvt.
AWOL to dp fr rolls as an absentee
Oct 2nd.

1 November 1944
37050928 Bellville, Emmet F. Pvt.
Dropped fr rolls as absentee to return
to Dy." (R. 8; Exs. A,B)

On or about 28 August 1944 Company B was located at Palais, Italy. Orders

were given and "every man was notified that the company was moving out to a defensive position" against the enemy at Ponte A Egola, Italy. This information was passed on to accused but he was not with the company when it moved out to take up its position. The acting first sergeant made a check and found that accused was absent. He did not see accused again until 1 November (1944) when he was returned to the company rear command post at Marano, Italy. Accused did not have permission to be absent. (R. 4,5)

On or about 1 November 1944, Company B was located in the vicinity of Marano, Italy, and was being counterattacked by the enemy. First Sergeant John J. Hvostal testified that accused, who knew the tactical situation at the time,

"came in from AWOL that day and he reported to me and I told him to go down and get some chow. He went down to get some chow and while he was sitting there I told him to draw equipment from the supply sergeant, that he was going up to join the company at the front, and he said that no first sergeant or anybody else would make him go up to the front."

Sergeant Hvostal told him to "stay in the area and that we would see about that". Accused did not go up to the front that day. (R. 6-8)

Accused elected to remain silent (R. 8).

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 unauthorizedly absent until 18 August 1944, in violation of Article of War 61.

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge II, accused again absented himself from his organization without proper leave and remained unauthorizedly absent until 1 November 1944, a period of more than two months. At the time accused absented himself he had been notified, together with all the other men in his organization, that the company was moving out to take up a defensive position against the enemy. Accused was not with the company when it departed. The court was warranted in concluding that accused absented himself with the intention of avoiding the hazardous duty of combat with the enemy, in violation of Article of War 58 (MCM, 1928, par. 130a).

It further appears that at the place and time alleged in the Specification, Charge III, accused's organization was on the front lines and was being counterattacked by the enemy (the German forces). Accused, who had just come "in from AWOL", was ordered by First Sergeant John J. Hvostal to draw equipment from the supply sergeant and join his company at the front. Accused refused to go, saying that no first sergeant or anybody else would make him go up to the front. It is clear that accused's organization was engaged with the enemy, that accused was in close proximity thereto and that accused's conduct, not being "conformable to the standard of behavior before the enemy set by the history of our arms", constituted misbehavior before the enemy, in violation of Article of War 75 (MCM, 1928, par. 141a).

5. A psychiatric report relating to accused, dated 10 November 1944, attached to the record of trial, contains the following:

"A mildly tense apprehensive white private who relates his story clearly and concisely. His mother was very nervous. In civilian life he adjusted fairly well doing mechanical work and painting. In the army he has had no unusual difficulties. He was with the 1st Armd. Regiment for approx. 2 yrs. and then was sent to the infantry during the reorganization of the division in July. He has experienced approx. 10 months of combat during which time he has been tense and nervous and has had difficulty with his stomach. In June 1944 he was evacuated with an Anxiety State and was returned to duty after 3 days hospitalization. He was not wounded; no loss of consciousness; closest shell approx. 15 yards away.

"At the present time is this soldier suffering from any mental defect, disease or derangement? Yes
(1) If so, state briefly the nature of the present mental defect or disorder. Psychoneurosis, Anxiety State, Miled.

"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."

6. The charge sheet shows that accused is 26 years of age, was inducted into the Army 24 January 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.

Martin R. Linn, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Kenick, Judge Advocate.

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
15 March 1945.

Board of Review

MTO 4623

U N I T E D S T A T E S)

v.)

Private FRANK R. HENDERSON.
(32 773 341), Company A,
450th Signal Heavy
Construction Battalion.)

XV AIR FORCE SERVICE COMMAND

Trial by G.C.M., convened at
Bari, Italy, 17 November 1944.
Dishonorable discharge and
confinement for 10 years.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

-
1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
 2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that, FRANK R. HENDERSON, Private, Company "A" 450th Signal Heavy Construction Battalion, did, in the vicinity of Gioia, Italy, on or about Sixth of October 1944, with intent to commit a felony, viz; rape, commit an assault upon STANISLAWA PUCHALSKA, by willfully and feloniously striking the said, STANISLAWA PUCHALSKA on the face and body with his fist.

CHARGE II: Violation of the 96th Article of War.
(Nolle Prosequi entered by direction of convening authority.)

Specification: (Nolle Prosequi entered by direction of convening authority.)

A Nolle Prosequi was entered with respect to Charge II and its Specification by direction of the convening authority. Accused 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 12 years, two-thirds of the members of the court present concurring. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 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 50 $\frac{1}{2}$.

3. Stanislawa Puchalska, a driver in the Polish Army, testified that about 2000 hours, 6 October 1944, she left the Polish Hospital at Casamassima (Italy) in an empty closed-cab Dodge truck for Motola (Italy) (R. 7,8). Between 2030 and 2100 hours, about two miles beyond Gioia, a town enroute, Stanislawa, who could not speak or understand English, stopped the truck to pick up an American soldier (R. 9,20,21) who had sprung in front of the vehicle (R. 21). The soldier asked her if she was going to Motola to which she replied, "No Motola" (R. 9). The soldier then entered the cab of the truck and sat beside her (R. 9,20). As she was about to start the vehicle the soldier grabbed her hands and in her efforts to free herself she accidentally stopped the engine. Stanislawa freed her left hand and seized a wine bottle which was on the seat. She raised the bottle as if to strike the soldier and he left the truck.

Stanislawa then attempted unsuccessfully to start the engine (R. 9, 15,20). The soldier returned and as he was standing by the cab door she threw the wine bottle at him but missed, the bottle breaking on the pavement (R. 10). She held the inside handle of the cab door but the soldier managed to open it, entered the cab and struck her in the face with his fists. After striking the woman a number of times the soldier again left the cab. She got out and tried unsuccessfully to stop a passing truck, re-entered the cab of her vehicle and again attempted unsuccessfully to start the engine. The soldier reappeared, entered the cab and began striking her in the face with his fist, breaking her nose. (R. 10) She then became "numb". The soldier got out of one side of the cab. Stanislawa got out the other side and stopped an Italian truck. Due to linguistic difficulties she was unable to explain the situation and the Italian vehicle proceeded on its way. She then returned to her truck and, being unable to see and too exhausted to get into the cab, held on to the door for support. The soldier returned and Stanislawa began to scream. The soldier attempted to quiet her by saying "shhh". He then resumed beating her, kicked her on the legs and said "starta". Another vehicle, which subsequently proved to be a Polish truck, approached and the soldier ran away.

The Polish truck stopped and the occupants, after searching unsuccessfully for Stanislawa's assailant, took her and the truck to

her camp (R. 10-12). During the entire incident the lights on Stanislaw's vehicle were burning (R. 20). She testified that accused was her attacker (R. 12,13). About 15 days after the attack she, without assistance, recognized and identified accused in a line up of eleven soldiers (R. 18).

Stanislaw testified further that accused attempted to drag her from the vehicle but she prevented this by holding to the steering wheel (R. 15). At the time of the incident she was wearing trousers. Her assailant made no effort to remove them (R. 16). Asked if he attempted to have sexual intercourse with her she testified:

"I cannot state that, I know only that he tried to throw me out and he beat me" (R. 16).

In reply to a question as to whether accused placed his hand on her anywhere except on her wrist or hands Stanislaw testified:

"I cannot lie, I cannot describe it, I was afraid; he was catching me, but I don't know exactly how or where; he wouldn't allow me to cry and he put his hands on my mouth" (R. 19).

When the woman returned to her station, about 2100 hours on the night of the alleged assault, blood was on her blouse and hands, her nose was bleeding, one eye was completely closed and the other eye and her face showed signs of blows. The following morning her face was swollen and one eye was so swollen she could not open it (R. 23).

It was stipulated that if an officer of the Polish Medical Corps were present she would testify that she examined Stanislaw (date not disclosed) and found that her nose was broken, that there was a sub-cutaneous hemorrhage of the lower lids of both eyes, a sub-conjunctival hemorrhage of the lower part of the eyes and a small brown spot on one of her legs (R. 24).

The evidence shows further that on 6 October 1944 accused was a member of the 450th Signal Battalion stationed about two miles from the town of Gioia (Italy) on the road to Motola, and with six other soldiers occupied a tin house or hut located four or five yards off the Gioia-Motola highway. On the date mentioned a detachment of accused's organization consisting of about nine men, with all of whom accused was acquainted, was stationed at Motola (R. 25,26,33,38,43).

About 1755 hours on the date alleged accused and the six soldiers who occupied the hut with him went into the town of Gioia to see a movie. After arriving in Gioia accused left his companions and they attended the movie without him (R. 26,37). About 1900 or 1930 hours accused went to a civilian barber shop in Gioia, was shaved, and left the shop about 1945 hours. At that time he had no scratches or cuts on his face (R. 29,30).

When the movie was over, about 1945 hours, accused's companions went directly to their hut, which took about seven or eight minutes. Four or five minutes after they arrived they heard a noise, and 100 or 150 yards

(256)

down the road in the direction of Motola they saw a closed-cab truck with the lights burning. They started toward it and heard a woman scream. Two Polish soldiers drove up in another truck. The American soldiers saw a woman in the road shouting. She was dressed in a British uniform with thick worsted pants, and had a cut under her eye which was bleeding (R. 32, 33,37). Following a conversation between the Polish soldiers and the woman, which the American soldiers did not understand, the woman and one of the Polish soldiers got into the woman's truck and drove away (R. 26,32,33). On the highway near the truck the American soldiers observed a broken bottle (R. 33).

About 2100 hours accused returned to his hut and was observed to be staggering. He went to bed (R. 34,36). The following day accused had an inch-long scratch or cut on the right side of his face (R. 34,35,36).

Between 2000 and 2030 hours accused was seen by the sergeant of the guard and assistant bar tender in the 366th Infantry bar in the camp area of the 366th Infantry Regiment, located a mile south of Gioia and about 300 yards off the Motola road (R. 34,38,39,43). Accused appeared to be slightly intoxicated and had a scratch on the right side of his chin which seemed to be fresh (R. 39,40). He remained at the bar about an hour and then left with a corporal who was directed by the sergeant of the guard to accompany accused to his camp. The corporal drove accused to the door of his hut (R. 39,42,43,44,45).

A member of accused's company testified for the defense that he was in a line-up with accused and that Stanislawka stopped and looked at witness for about three minutes the first time she walked down the line. Witness testified further that there were eight or nine men in the line-up, all dressed alike and about the same size and height but not exactly the same color (R. 48,49,50).

The assistant bar tender at the 366th Infantry bar testified for the defense that he saw accused in the bar between 2000 and 2030 hours on the date of the alleged offense and served him three or four drinks. Accused had on an "OD" shirt and witness did not notice any blood on his clothes (R. 51). Witness testified further that accused was slightly intoxicated (R. 52).

An agent of the Criminal Investigation Division who investigated the case testified for the defense that he questioned accused with reference to the alleged offense and secured a statement from him. Accused did not make any confession as to having been involved in the alleged assault and stated he did not know a thing about it. He had a scratch on his face but was unable to recall how he received it (R. 53).

The agent was made the court's witness and testified that he was present on 21 October (1944) at a line-up of 11 men when Stanislawka identified accused. She went down the line once, pausing long enough to observe each man then came back and picked out accused. Witness testified further that accused told him that between 1930 and 2000 hours on the date of the alleged assault he was in the 366th Infantry bar (R. 54-57).

A staff sergeant of accused's company testified for the defense that two or three times prior to the date of the alleged offense he had instructed accused not to go to the 366th Infantry bar (R. 69).

Accused testified that on the evening in question he went to Gioia with other soldiers to see a movie. Because he had to arise early the following morning and was afraid he would fall asleep, he did not attend the movie but wandered around the town, and about 1900 hours went to a barber shop and was shaved. While in the barber shop he secured a small (about a half pint) bottle of cognac which he drank. He left the barber shop about 1915 hours and rode in a truck to the 41st Depot, and then went to the 366th Infantry bar, where he had four or five drinks. About 2100 hours he was taken to his billet by a noncommissioned officer. He testified further that as he was getting into the truck it started with a jerk and he fell and scratched his chin (R. 58,59,62,63). Accused told his staff sergeant that the barber who shaved him cut him, because he was afraid the sergeant would reprimand him for not having gone to the movie with his companions and for having gone to the 366th Infantry bar (R. 59). Accused denied having seen Stanislawa prior to the day she identified him in the line-up, and denied hearing a woman scream on the night of the alleged offense (R. 59,60,61). He testified further that the barber did not cut him and that he was not so drunk on the night in question that he did not know what he was doing. He did not learn that someone had attacked a "Polish WAC" until about 1100 hours the following day (R. 59, 64,66). About 0930 hours on the day following the night of the alleged assault accused went to the barber in Gioia who had shaved him the previous evening and told him that if his sergeant came in the barber was to tell him that he cut accused while shaving him the preceding night (R. 65,70).

The barber testified in rebuttal that accused came to him on the morning following the alleged assault and requested him, if he was asked, to tell the sergeant that he (witness) had cut accused while shaving him the preceding evening. Witness refused to accede to the request. Accused did not have a bottle of cognac in his shop the preceding night and did not appear to be under the influence of intoxicating liquor. (R. 70,71)

The investigating officer testified in rebuttal that on 11 November (1944) accused told witness that he was drunk on the night of the alleged offense and did not remember where he received the cut on his face, but that he did not get it at the barber shop and that he told the sergeant a lie about being cut by the barber (R. 72).

4. It thus appears from the evidence that at the place and on the date alleged and in the night time Stanislawa Puchalska, the person named in the Specification, Charge I, was attacked and beaten by an American soldier. There is substantial evidence warranting the conclusion that accused was her assailant.

The question presented is whether the evidence supports the finding with respect to the intent entertained by accused at the time of the assault. Whether there is in the record of trial any substantial evidence to sustain the finding of the court that at the time of the assault accused had the intent to ravish his victim by force and notwithstanding her resistance, is a question of law which must necessarily be considered by the Board of Review and does not involve determining the weight of the evidence or passing upon the credibility of the witnesses (CM 199369, Davis, IV B.R. 37,40; CM 239839, Harrison, XXV B.R. 273, 277 and authorities cited).

An assault with intent to commit rape is an offense in which the specific intent must be shown to exist. In such an offense proof of the assault alone is not sufficient to establish guilt. It is necessary in such a case that the specific intent be established either by independent evidence, as, for example, words proved to have been used by the accused, or by inference from the nature of the act itself (MCM, 1928, pars. 126a, 1491). It follows, therefore, that in order to sustain the findings of guilty the evidence must show that accused committed an assault upon Stanislawa with the specific intent to ravish her.

An assault with intent to commit rape is defined as:

" * * * an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. * * *

"The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice" (MCM, 1928, par. 1491);

and as otherwise expressed:

"Intent to commit rape. This must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape. It must be inferable from all the circumstances that the design of the assailant, in the battery, was to gratify his passions at all events and notwithstanding the opposition offered-- to overpower resistance by all the force necessary to the successful accomplishment of his purpose" (Winthrop's reprint, 1920, p. 688).

Intent being a mental process it must of necessity be inferred, in cases of this character, from the circumstances surrounding the attempt, including the time and place thereof, and the actions of accused including the degree of violence applied and the language or threats used (Winthrop's reprint, 1920, p. 688).

Evidence as to intent, being purely circumstantial in nature, is not, under the rules of law, substantial evidence upon which a finding can be made unless it is such as to exclude every reasonable hypothesis except that of accused's guilt (CM 199369, Davis, IV B.R. 37,40 and authorities cited).

The evidence in its most incriminating aspect shows that accused in the night time perpetrated a brutal attack upon Stanislaw. He struck her in the face with his fists, broke her nose, kicked her, and attempted to pull her out of her truck. The brutality of the attack, however, is not alone sufficient to warrant the conclusion that it was perpetrated with a concurrent intent to ravish. A finding of such intent can not rest alone on conjecture and surmise.

As was so cogently stated in Robat v State (91 Tex. Cr. Rep. 468; 239 S.W. 966), adopted and quoted with approval by the Board of Review in CM 199369, Davis, supra:

"It is essential that a specific intent to commit rape be established by the testimony, and it must go beyond the mere possibility of such intent.***
The fact that the conduct attributed to the appellant was atrocious and merited punishment cannot take the place of proof establishing the elements of an assault with intent to rape."
(Underscoring supplied)".

The evidence shows that the entire incident took place at about 2100 hours on a main, heavily traveled highway. When Stanislaw stopped the truck accused, before entering the cab, inquired if she was going to Motola where acquaintances of his and members of his organization were stationed. The lights on the truck were burning during the entire time the intermittent assaults were in progress. So far as the evidence shows accused, although he tried to drag the woman from the cab, made no effort to remove her from the immediate vicinity of the vehicle nor did he attempt to have intercourse with her at any of the times she was out of the truck, despite the fact that the last time she left the vehicle she could not see and was completely exhausted. Stanislaw testified at length (her testimony filling 14 pages of the record) and her testimony is devoid of any statement that accused attempted to ravish her. On the contrary her delineation of the incident tends to negate the existence of such intent on his part. She testified unequivocally that accused made no effort to disrobe her. When asked specifically if he attempted to have sexual intercourse with her she replied she could not state that he did so. When asked whether accused placed his hands on any part of her body except her hands and wrists, she testified in the negative. In so far as the evidence shows accused did not make any lascivious remark or gesture.

It has been aptly stated that:

" * * * for a man to be guilty of the crime of an attempt to commit rape, he must not only have intended to use the force necessary to accomplish his purpose,

notwithstanding the woman's resistance, * * * he must, in addition to this, have done some act which, in connection with the intent, constitutes the attempt" (Wharton's Criminal Law, 12th Ed., sec. 743).

The actions of accused as disclosed by the evidence, including his attempt to drag the woman from the cab, were as consistent with an intent to appropriate Stanislaw's vehicle to his own use, to commit robbery or any one of a number of other crimes, as they were with an intent to have sexual intercourse with her by force and against her will. The circumstances that the assault and brutal battery were committed by a colored soldier upon a white woman in the nighttime, while possibly suggestive of a lewd purpose, is not legal evidence of intent to rape, in the absence of any word or act of a nature which would, as a matter of human experience, ordinarily be expected to accompany a lustful purpose.

Although each case in which an assault with intent to rape is charged must be considered on its own individual merits, it may be remarked that the evidence in this case is no more persuasive of an intent to commit rape than the evidence in CM 188356, Sheehan, I B.R. 113; CM 198724, Clark, III B.R. 249; CM 220805, Peavy, XIII B.R. 73; and CM 239839, Harrison, XXV B.R. 273, in each of which it was held that the intent was not established. In his review of the record of trial the staff judge advocate cited as authority for a conclusion that intent to rape was sufficiently established, a digest of a review by the Board of Review set forth in Section 451(2), Bulletin of The Judge Advocate General, May, 1933. The Board of Review does not find that the cases are parallel. The full review in the cited case (CM 233183, Gray) shows that accused, prior to the assault in that instance, made suggestive remarks in the presence of the woman and after intruding his company upon her invited and forced her to a secluded area, put his arm about her, forced her to the ground and pressed his knee against her knees. He later asserted that he had accomplished sexual intercourse with her. The type of words and acts in the cited case which founded the inference of intent to rape are wholly lacking in the instant case.

Consideration has been given to the fact that accused made inconsistent statements with respect to the manner in which he received the cut on his chin, and also that he attempted to have the barber corroborate his untrue account thereof. His explanation of his actions in this regard was not convincing and hardly plausible. However, this evidence at most shows only an attempt by accused to support his denial that he was implicated in any way in the incident giving rise to the charge. Such evidence does not remotely tend to establish that at the time of the attack accused entertained the intent requisite to support the findings and therefore, so far as the issue of intent is concerned, is of no legal significance.

The Board of Review is of the opinion that there is no substantial evidence in the record of trial showing that at the time of the assault accused intended to commit rape.

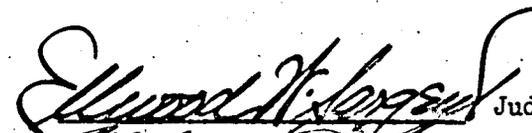
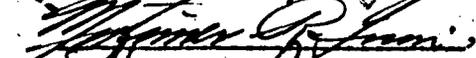
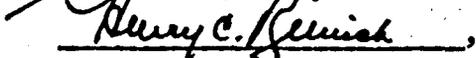
There remains to be considered the question whether the evidence and pleading support the lesser included offense of assault and battery. A lesser included offense may be carved out of a greater offense when such offense is necessarily included in that charged (MCM, 1928, par. 78c). It is alleged in the Specification that accused assaulted Stanislaw Puchalska by striking her on the face and body with his fist. In the opinion of the Board of Review there is in the record competent evidence establishing these allegations of assault and battery, in violation of Article of War 96 (CM 239839, Harrison, XXV B.R. 273; CM 220805, Peavy, XIII B.R. 73, 79; CM 199369, Davis, IV B.R. 37, 41; CM 198724, Clark, III B.R. 249, 289). Intent to do bodily harm was not alleged.

5. The maximum limit of punishment authorized on conviction of an assault and battery is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par. 104c).

Confinement in a penitentiary is not authorized by Article of War 42 upon conviction of assault and battery in violation of Article of War 96, that offense not being recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States or of the District of Columbia.

6. The charge sheet shows that accused is about 37 years of age and that he was inducted into the Army 9 March 1943. He had no prior service.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involve findings that accused did at the place and time alleged in the Specification, Charge I, commit an assault upon the woman named by willfully striking her on the face and body with his fist, in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months in a place other than a penitentiary, Federal correctional institution, or reformatory, and forfeiture of two-thirds pay per month for six months.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

(262)

MTO 4623

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
15 March 1945.

TO: Commanding General, XV Air Force Service Command, APO 520, U. S. Army.

1. In the case of Private Frank R. Henderson (32 773 341), Company A, 450th Signal Heavy Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, at the place and time alleged in the Specification, Charge I, commit an assault upon the woman named by willfully striking her on the face and body with his fist, in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months in a place other than a penitentiary, Federal correctional institution, or reformatory, and forfeiture of two-thirds pay per month for six months, which holding is hereby approved. Upon your disapproval of so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of an offense other than the lesser included offense hereinbefore described, upon your disapproval of so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months, and upon your designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory, you will, under the provisions of Article of War 50 $\frac{1}{2}$, have authority to order execution of the sentence.

2. The evidence in this case is such that trial for an assault with intent to do bodily harm in violation of Article of War 93, would be justified. It is recommended that the entire sentence be disapproved and that a rehearing be directed upon the charges with amendment thereof prior to the rehearing to allege an assault upon the woman named with intent to do bodily harm. In this connection your attention is invited to Paragraphs 84, 89 and 117b of the Manual for Courts-Martial, 1928, and to the fourth subparagraph of Article of War 50 $\frac{1}{2}$.

3. 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:

(MTO 4623).



HUBERT D. HOOVER
Colonel, J.A.G.D.

Assistant Judge Advocate General

Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
20 February 1945.

Board of Review

MTO 4638

UNITED STATES)

FIFTH ARMY)

v.)

Trial by G.C.M., convened at
APO 464, U. S. Army, 3 November
1944.

Private HARRY R. BRATTON
(39 142 708), Company B,
370th Infantry.)

Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.)

REVIEW by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Harry Bratton, then Private first class, Company B, 370th Infantry Regiment, did, at or near Piaggiori, Italy, on or about 18 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one John D. Black, formerly Private first class, Company B, 370th Infantry Regiment, 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. He was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and 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, Mediterranean 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 50 $\frac{1}{2}$.

3. The evidence shows that on 18 September 1944, Company B, 370th Infantry Regiment (Combat Team), 92d Infantry Division, was in the lines (R. 6). The company's platoons were tactically deployed and headquarters detachment, of which accused and Private First Class John D. Black (the deceased) were members, was bivouacked in and sharing an Italian house with a "lady and three children" at Piaggiore, Italy (R. 4-6,12). About 2100 hours on that date, while accused and several other soldiers were at mess in the kitchen of their bivouac quarters, the "lady" asked for the light which was being used in the kitchen and Black, who was in an adjoining room, stepped into the kitchen and said "'Gentlemen, the lady wishes to have the light to go upstairs with'". Accused said "'God damn the light and the lady too' *** 'I will kill any mother-fucker that fucks with this light'". A "little" argument ensued between accused and Black and the latter offered to go outside and fight "with fists". Accused said nothing and Black, who was "calmed" by a Corporal Collins, entered the adjoining room and sat down. (R. 12,13) Once during the argument Black, while in the adjoining room, picked up a carbine which was against the wall and "smacked" his hand against it, but did not work the bolt. Collins told Black to calm down and the latter then put down the carbine. (R. 13,16,17)

About 2030 hours and during the argument between accused and Black, their first sergeant came into the kitchen, inquired as to "what it was all about" and accused told him that Black had threatened his life. The first sergeant told accused and the soldiers who were eating that after they finished their meal they were to leave and let the woman have the room, and that the others were to get out of the kitchen and go to bed. The sergeant returned to the orderly room which adjoined the kitchen and immediately thereafter accused appeared and repeated that Black had threatened his life. (R. 6,7) After 2100 hours the company commander called an assembly at which accused and Black were present, warned the men as to the nature of their duties, and stated that they were to refrain from drinking and being lax in the performance of such duties. He added "'Gentlemen, if you have to fight, put down your rifles and knives and fight like men', *** 'If you want room, I will give you room'". Accused jumped up and said "'But Captain Dulan, this is my life and that man (Black) threatened me'". Captain Dulan told accused to "shut up" and the latter calmed down for a time. However accused again interrupted Captain Dulan during his talk and said "'That man (Black) threatened my life two times and he will not do it again'". The company commander appeared to be "disgusted" and dismissed the group. (R. 7,8,13) Accused remained to talk to the company commander who ordered him to get his equipment and be ready to go up to the second platoon. Captain Dulan called the second platoon leader and told him that he was sending accused "up there". An M-1 rifle was then issued to accused who, about 2130 hours,

gathered all his equipment except his helmet. He went ostensibly in search of the helmet, wearing a cartridge belt and with the rifle on his shoulder. While his company commander and first sergeant waited in the orderly room for his return, they heard several shots fired in quick succession. Upon leaving the orderly room they met accused who handed his rifle to the first sergeant and said "Put me under arrest; I have shot a man". (R. 8,9) The first sergeant went into Black's room and found him lying on the floor (R. 10).

After the commanding officer had dismissed the assembly, Black and Private Solomon Shields went to their sleeping quarters in the room next to the kitchen, where they and Private Willie Brown put their blankets on the floor and went to bed. Shields was in a "T" position above Black's head and was about two feet from Black and Brown. (R. 13,14,17) No light was in the room. The three men lay down on their blankets and were talking about home when suddenly Black began to snore. (R. 14,16,17) About five or ten minutes after the three men laid down, Shields saw accused come into the room with a soldier named Thomas. They had a bottle of "something" and accused, who had a rifle in his hand, struck a match, held it "high up over us", and then left and went upstairs. In about "a minute or two", accused returned to the room, again struck a match, spoke to no one and departed. About "three minutes" later accused entered the room for the third time, and as on the two previous occasions was accompanied by Thomas. Accused lit another match, called to Brown twice and asked "Brown? *** Aren't you asleep yet?", to which Brown answered, "No". Accused then said "Go to sleep, you son-of-a-bitch", blew out the match and left. About "seven or eight minutes" later he visited the room a fourth time, which was about 30 minutes after the assembly had been dismissed by the company commander. As he stepped inside he struck a match, went into another room and blew out the match. Shields testified that accused then "stepped around the shoe rack where Black was lying with his head toward Brown, *** stopped at the bottom of Black's feet and shot eight times with the rifle". The shots, which Shields counted, were fired in quick succession and "sounded like a tommy gun going off". The clip "jumped out" and accused "threw the bolt home and snapped it again". Witness was about five or ten feet from accused when the shots were fired and although there was no light in the room he saw accused by the flashes of light from the gun. The first bullet "ricocheted" and hit Shields in the head. He ran into the kitchen and saw accused who ran toward the "outside door" and fell over two or three chairs. (R. 13-17)

Captain John T. Gill, Jr., Medical Corps, First Battalion surgeon, 370th Infantry, who was acquainted with Black, examined the latter about 2200 hours that evening. Black was dead. Captain Gill found

"four wounds of entry of some bullets which were located two in the left upper abdomen and two in the chest—one being in the middle and one to the right—and there was one wound of exit of the bullet."

The wounds were gun shot wounds and were the competent producing cause of death. (R. 20)

After being warned that he need not say anything and that whatever he said could be used against him (R. 18), accused made an oral statement to the investigating officer about September 18 or 19. Accused stated that about 2100 or 2200 hours on the evening in question he had an argument with Black in the kitchen of the building. Black had "snatched food" from him and accused told him to get away and not disturb him. Black then left the room, returned and stood in the doorway with a "carbine" in his hand. He "worked the bolt as if to work the carbine" and said "I am going to kill some son-of-a-bitch here". Black looked at accused and "gave him indications that he was referring to him as the man he (Black) was probably going to kill". Another soldier intervened at that point and the company commander called accused and all other soldiers present to the company "C.P.". He cautioned the men about "arguing and making threats and so on". Accused then went back to go to bed and passed through the room in which Black was "supposed" to be sleeping. Black was "working over his carbine" and accused "was afraid Black was going to shoot him at that time and so he (accused), having his rifle with him, fired first". He did not remember how many shots were fired and was nervous and excited. It "was either Black or himself and Black had threatened him several times on previous occasions, so he shot him". He further stated, "I had one glass of wine about three o'clock in the afternoon but I was not drunk". (R. 18,19)

Accused elected to remain silent (R. 20).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused shot and killed with a rifle Private First Class John D. Black, Company B, 370th Infantry Regiment, the person named in the Specification. There is evidence that about 30 minutes preceding the fatal assault accused and Black engaged in a verbal altercation over a light, in the course of which Black "offered to go outside and fight with fists". At one time during the argument Black, while in an adjoining room, picked up a "carbine", "smacked" his hand against it and then put it down against the wall. Another soldier present told Black to calm down and Black sat down. Shortly thereafter he went to sleep in his quarters. Accused entered the darkened room in which Black was sleeping four separate times within a period of a few minutes. Each time he lighted a match. On the fourth visit to the room accused took a position at Black's feet and fired eight times with a rifle at Black who was asleep upon the floor. After accused fired the eighth shot the clip "jumped out" of the rifle and accused then "threw the bolt home and snapped it again". Four of the bullets penetrated Black's body, resulting in his death. There is an abundance of evidence to furnish the basis for inferences that accused aggressively searched out Black and fired the fatal shots willfully, deliberately and with an intention to kill.

About 30 minutes before the shooting accused complained to his company commander that deceased threatened his life and stated that the former would not "do it again". There was evidence that during the argument deceased, in an adjoining room, secured a carbine. However, he put down the carbine when spoken to. Accused, in his statement to the investigating officer, asserted that on his way to bed he passed through deceased's room,

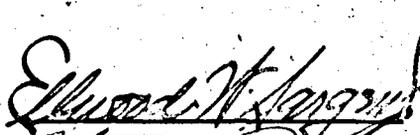
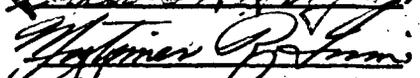
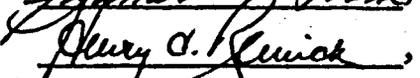
that the latter was "working over his carbine" and that because he feared deceased would shoot him at that time accused, who had his rifle with him, "fired first". The law of self-defense is set forth in the Manual for Courts-Martial as follows:

"To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can" (MCM, 1928, par. 148a).

Accused's version as to the circumstances surrounding the actual shooting was in sharp conflict with the testimony of Shields. The court was justified in declining to believe him. Moreover accused's statement that deceased was "working over his carbine" when the former passed through the room, if true, did not assert facts furnishing a reasonable basis of belief that accused was then in immediate danger of death or serious bodily harm. Accused admittedly made no effort to avoid the conflict. The court was fully warranted in concluding that there was no legal excuse or justification for the killing and that the homicide was committed with malice aforethought as alleged (MTO 5121, Crews).

5. The charge sheet shows that accused is 38 years of age, was inducted 27 October 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 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.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

(269)

MTO 4638, 1st Ind.
20 February 1945 (Continued).

sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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:

(MTO 4638).



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

(Sentence as commuted ordered executed. GCMO 30, MTO, 20 Feb 1945)



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
28 January 1945.

Board of Review

MTO 4687

U N I T E D S T A T E S)

v.)

Private BENNY H. RUGGIERO)
(33 582 509), Company I,)
349th Infantry.)

88TH INFANTRY DIVISION

Trial by G.C.M., convened at
Frassineta, Italy, 8 December
1944.

Dishonorable discharge and
confinement for life.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Benny H. Ruggiero, Company I, 349th Infantry, did, near Villamagna, Italy on or about 11 August 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy on or about 8 November 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions, one by summary court-martial for failure to obey an order not to converse with a prisoner of war in violation of Article of War 96, and two by special courts-martial, one for absence without leave in violation of Article of War 61, and the second for absence without leave and for breaking restriction in violation of Articles of War 61 and 96 respectively, 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 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 11 August 1944, Company I, 349th Infantry, of which accused was a member, had been "off the lines" for about two weeks and was in the vicinity of Villamagna, Italy, for a rest and boat training with the "intention" of crossing the Arno River (R. 6-8).

Accused's squad leader testified that the expected crossing of the Arno River was considered by "the men" in the company as "pretty rugged" and that he was "sweating it out" and "guess(ed) the rest of the men were too" (R. 7). Witness testified further that on 11 August 1944 accused was reported absent, following which, a check was made of the "area" and accused was found to be "definitely absent", and that since that time accused has not been present for duty with the company and that accused did not have permission to be absent from the company between 11 August 1944 and 8 November 1944 (R. 7).

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"14 August 1944: Pvt Ruggiero, Benny H. fr dy to AWOL
1900 hrs 11 Aug 44.

17 November 1944: Pvt Ruggiero, Benny H. fr dropped
from rolls as absentee to abs conf Rome Allied Area
Command 1200 hrs 8 Nov 44" (R. 9; Ex. A).

It was stipulated that accused was apprehended at Rome, Italy, on or about 8 November 1944 (R. 9; Ex. B).

Accused elected to remain silent (R. 8).

4. It thus appears from uncontroverted evidence that at the place and time alleged accused absented himself from his organization without proper leave and remained unauthorizedly absent until he was apprehended at Rome, Italy, about three months later. An intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence and his failure to surrender to military authority while absent and in the vicinity of numerous military installations in this active theater of operations, and from other circumstances in evidence (MCM, 1928, par. 130a). The circumstances of accused's initial absence, moreover, were such that an intention to avoid hazardous duty was also inferable. The court was warranted in finding accused guilty as charged.

5. Attached to the record of trial is a report of a psychiatric examination of accused dated 7 December 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 21 year-old of Italian extraction with 2 years of high school education and erratic occupational record. Development of a panic reaction to the battle situation made it difficult for him to adhere to the right. He was not fully cognizant of the seriousness of his offense. He is of questionable further combat value."

6. The charge sheet shows that accused is 20 years of age, was inducted into the Army 5 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.

Martin A. Ryan, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Blunich, Judge Advocate.



Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
30 January 1945.

Board of Review

MTO 4689

UNITED STATES)

v.)

Private GEORGE I. TUCKER)
(31 233 799), Service)
Company, 351st Infantry.)

88TH INFANTRY DIVISION)

Trial by G.C.M., convened at)
Montecatini, Italy, 5 November)
1944.)

Dishonorable discharge and)
confinement for 30 years.)
Eastern Branch, United States)
Disciplinary Barracks,)
Greenhaven, New York.)

REVIEW by the BOARD OF REVIEW

Irion, Wilson and Remick, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private George I. Tucker, Service Company, 351st Infantry, did, near Carinola, Italy, on or about May 9, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy, on or about September 5, 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 30 years, 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

(276)

trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 9 May 1944 accused, a member of Service Company, 351st Infantry, located at Carinola, Italy, was absent from his company. The first sergeant of accused's company testified that he made a check of the area and did not find accused and did not see him again until 20 October (1944) when he was returned from the Fifth Army Stockade. Accused did not have permission to be absent from 9 May 1944 to 5 September 1944 (R. 7). Witness testified further that the 351st Infantry Regiment had been engaged with the enemy (Germans) for about nine days when accused "took off", at which time there was a "rumor around" and two days later the regiment "launched an attack and, during accused's absence, had been engaged with the enemy about 70 days. (R. 7)

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"May 10 - 31233799 Tucker, George I. Pvt
Dy to AWOL as of 0800 hrs 9 May 44

Sept 18 - 31233799 Tucker, George I. Pvt
AWOL to abs in hands of mil auth as of 1500
hrs 5 Sept 44; fr abs in hands of mil auth
to abs conf 5th Army Stockade as of 5 Sept
44" (R. 8; Ex. A).

It was stipulated that accused was apprehended at Rome, Italy, on or about 5 September 1944 (R. 8; Ex. B).

Accused elected to remain silent (R. 8).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused absented himself from his organization without proper leave and remained unauthorizedly absent until he was apprehended at Rome, Italy, almost four months later. An intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence, the manner of its termination, his failure to surrender to military authority while absent and in the vicinity of numerous military installations in this active theater of operations, and from other circumstances in evidence (MCM, 1928, par. 130a). Moreover, the circumstances of his initial absence were such that an intention to avoid hazardous duty was also inferable. The court was warranted in finding accused guilty as charged.

5. Attached to the record of trial is a report of a psychiatric examination of accused, dated 7 November 1944, containing the following:

"Psychiatric examination reveals a 35 year-old individual with a basic neurotic inadequacy. He had been under observation for mental illness in 1937 and manifests a compulsive-obsessive pattern of reaction with fear of open spaces, and self destruction compulsions. Under

(271)

battle stress he developed a panic state and severe anxiety reactions, which he resolved in flight. The soldier had difficulty in adhering to the right because of this anxiety and is unsuitable for combat service because of neurotic instability."

6. The charge sheet shows that accused is 35 years of age, was inducted into the Army 17 November 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.

William R. Lewis, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Reusch, Judge Advocate.

