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GENERAL
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BOARD OF REVIEW
OPINIONS

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HOLDINGS OPINIONS AND REVIEWS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

**NORTH AFRICAN THEATER OF OPERATIONS
MEDITERRANEAN THEATER OF OPERATIONS**



VOLUME 6 B.R. (NATO-MTO)
CM MTO 4716-CM MTO 6411

CONFIDENTIAL

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AUTH: TJA G 4/15/46 BY: A.G.K

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

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Holdings Opinions and Reviews

BOARD OF REVIEW

Branch Office of The Judge Advocate General

NORTH AFRICAN THEATER OF OPERATIONS

MEDITERRANEAN THEATER OF OPERATIONS

Volume 6 B.R. (NATO-MTO)

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

APO 512, U. S. Army,
19 January 1945.

Board of Review

MTO 4716

U N I T E D S T A T E S)	34TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private WOODROW W. STANLEY)	APO 34, U. S. Army, 7 November
(34 409 368), Company A,)	1944.
135th Infantry.)	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.
(Nolle prosequi).

Specification: (Nolle prosequi).

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

Specification: In that Private Woodrow W. Stanley, Company "A", 135th Infantry, did, in the vicinity of Cecina, Italy, on or about 2 July 1944, run away from his organization, which was then engaged with the enemy, and did not return thereto until 10 August 1944.

A nolle prosequi was entered with respect to Charge I and its Specification.

(2)

He pleaded not guilty to and was found guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of 20 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 1 July 1944, Company A, 135th Infantry, of which accused was a member, was in a defensive position near Cecina, Italy. The company had previously taken the position in combat (R. 8) and was receiving mortar and artillery fire from the German forces (R. 6). About 1000 hours on the date mentioned it was relieved and moved about two miles to the rear (R. 6) in regimental reserve (R. 11). No enemy fire was received in this position (R. 10). At about 1000 hours on the following day orders were received to move out. Ammunition was distributed to the members of the company at about 1200 hours and between 1300 and 1400 hours the company moved through Cecina to Rosignano where on 3 July it attacked the enemy and came under fire (R. 6,7,10).

A staff sergeant of accused's company testified that he saw accused with the company at about 0800 hours, 2 July 1944, but that accused was not present when the ammunition was distributed and that he and others of the platoon searched for accused but he could not be found. He did not have permission to be absent (R. 7-9). Witness testified further that he was with accused's company continuously from 2 July (1944) to the "middle of August" (1944) and he did not see accused with the organization at any time during that period (R. 7).

It was stipulated that true extract copies of the morning report of accused's company contained the following entries:

"5 July 1944: 34409368 STANLEY, Woodrow W. Pvt.
Fr duty to AWOL eff 0600 hrs July 3/44.

11 Aug 1944: 34409368 STANLEY, Woodrow W. Pvt.
Fr AWOL Jul 3/44, Dropped fr roll as Unauthorized
Absentee Aug 2/44 to Reasgd & Jd to Abs in Conf
eff 10 Aug/44.

3 Sept '44: M/R entry of 5 July 1944 concerning Pvt.
Stanley, Woodrow W., which reads duty to AWOL eff
3 July should be correct to ready Duty to AWOL eff
2 July 1944" (R. 12).

Staff Sergeant Edward L. Farley, Headquarters Company, 1st Battalion, 135th Infantry Regiment, testified for the defense that his regiment was relieved by the 442d Regiment and withdrew on 2 July 1944 and that at 1415

hours on that date his battalion was "alerted to move at four-fifteen" to "march across the river up to Highway 68" (R. 13,14).

Accused testified that he joined his organization "at the first crossing of the Volturno River". He thought that he could "soldier" and wanted to return to either Company A or any other company. He testified further that he liked his squad, his company, and had never had any trouble with any of "the men". (R. 15)

4. It thus appears from uncontradicted evidence that at the place and time alleged accused, without authority, left his organization while it was in reserve in the immediate vicinity of the front lines and was preparing to reengage in combat with the German forces. He did not return until 10 August 1944. From the facts and circumstances in evidence the court was warranted in finding that accused ran away from his organization while it was engaged with the enemy, as charged (MCM, 1928, par. 141a).

Accused's company was "engaged with the enemy" only in the broad sense. He "ran away" only in the broad sense. The company as well as accused were in a reserve position at the time accused disappeared and thus absented himself without leave. It sufficiently appears however that the misbehavior of accused through absenting himself without leave occurred while he was before the enemy within the meaning of Article of War 75, and that the Specification was sufficient fairly to apprise him that he was charged with such misbehavior before the enemy. It has been held that the question as to whether an accused is before the enemy at the time he misbehaves depends on the tactical relationship existing and that troops in reserve positions may be before the enemy (Dig. Op. JAG, 1912-40, sec. 433(2); NATO 2893, Kopetchny).

5. Attached to the record of trial is a report of a psychiatric examination of accused made 21 September 1944 in which it is stated that at the time of the commission of the alleged offenses 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 24 years of age. He was inducted into the Army 5 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.

Walter P. Forn, Judge Advocate.

George O. Wilson, 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,
1 March 1945.

Board of Review

MTO 4750

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private LEWIS R. SMITH)	Rear Echelon, 92d Infantry
(35 787 395), Company M,)	Division, 26 December 1944.
371st 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 Lewis R. Smith, Company "M", 371st Infantry, did at or near Forte dei Marmi, Italy, on or about 4 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Staff Sergeant Charles V. Caswell, a human being, by shooting him with a gun.

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 the "duration" of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United

(6)

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 4 December 1944 Staff Sergeant Charles V. Caswell (deceased), Staff Sergeant Ernest W. Brewster, Corporal Thomas H. Hairston and accused, all members of Company K, 371st Infantry Regiment, were occupying a room on the second floor of the Mortar Platoon command post (near Pozzi or Pietresanta, Italy) (R. 8,9,20,32,38,39). The room was very small and contained a chest or cabinet, a table, a chair and, along the left-hand wall, the mattress-beds of Sergeant Brewster, Sergeant Caswell, accused and Corporal Hairston, in that order respectively (R. 9-11,19,22,24, 25; Ex. B). The four men were armed with M-1 rifles (R. 9), which were in the room (R. 22). It was contrary to orders to have loaded weapons while the men were in buildings "unless they are on the ground" (R. 36). Caswell and Brewster had loaded their rifles the previous Saturday night (December 2); Brewster put two clips of ammunition (R. 9,10) in Caswell's "gun, and (we) slept with the rifle by our side" (R. 10). Brewster testified he was positive the rifle was not cleaned from Saturday until Monday and that it was not removed from the room during that period (R. 14,15). He believed that accused knew the rifle was loaded for "he always knew that we keep our weapons loaded on the line", and "We was on the mountain; we always keep our weapons loaded" (R. 19).

About 0900 hours the four soldiers were asleep in the room. Caswell got up and as he was the first man to arise that morning he began to awaken the others in accordance with the usual custom (R. 9,13,30,31). Brewster (who, with Hairston, was one of the two eyewitnesses of the shooting) testified that after Caswell procured some water from downstairs, he "came back upstairs" and

"set his steel helmet in the chair, poured water in the helmet, and started washing his face. He was washing his face with a washrag. Pvt Lewis R. Smith (accused) was (a)sleep on his left. He takes his washrag, wrings it out, and hits Smith with the rag" (R. 9).

Hairston also saw Caswell "winding up a bath cloth" and saw him strike accused

"with the little rag he had in his hand. After he hit him, Lewis R. turned over and made a statement to him, which I do not remember now, not the exact words, but anyway, Sgt Caswell evidently didn't like it" (R. 21).

Accused reached over the bed on his right, secured Caswell's rifle, "knocks the safety off" and said "'If you hit me again, I will shoot you'" (R. 9). At that time he was pointing the rifle directly at Caswell (R. 21,26), who asked "Did you say you would shoot me" (R. 9,17) or, "If I hit you again, you'll shoot me?" (R. 21,26), to which accused answered "Yes, that is what I said" (R. 9,17). When Caswell stood over accused and wound up "the bath

cloth", he "popped" it or snapped it twice like a whip. The blow was not such as to injure accused and he did not appear to be angry (R. 31,32). However, when Caswell "popped him again with the rag, *** the rifle went off" (R. 21). Brewster, who had momentarily turned over in his bed to put out a cigarette, heard the shot (R. 9) and saw the rifle in accused's hands immediately before and after he turned over (R. 12,16,19). When the shot was fired Caswell was standing up (R. 25), facing accused, about three and one half to four feet from the end of his bed (R. 18). Caswell fell when the shot was fired (R. 21). Hairston, who had seen and heard accused knock the safety off the rifle (R. 21,28,30), saw accused fire the rifle (R. 21,22). He described accused's actions as follows:

"Before he turned over, he was lying on his left side, before he turned over to pick up the rifle. After he turned over and picked up the rifle, he was lying on his right elbow, and naturally, lying on his right side, with the rifle pointing diagonally up this way (indicating by simulating holding a rifle at approximately 45° angle, pointing forward). If you care, I will demonstrate. He was laying on his left side, this way (assuming position on floor, outstretched, lying on left side), down at the bed. He turned over, picked up the rifle in the only bed on his right, and he was in this position (indicating by rolling over, toward right, simulating grasping of rifle, and coming to rest on right side, supported on right elbow), just like that, and when he fired the rifle, he was setting in that position. After he fired, he laid his rifle down, throwed the rifle back on the bed. That is the way it was" (R. 23).

Caswell was shot from the front in the upper right chest, the bullet coming out in his back (R. 17,23,27). He did not stagger but fell against the wall, immediately after the shot, and slid down the wall (R. 20,23). Hairston jumped up immediately and said "'Smith you shot this man!'. Accused replied "'No, I didn't'", and asked "'Did I shoot you, Caswell'" or "'Where did I shoot you, Caswell?'" (R. 12,21). Hairston repeated that accused had shot Caswell and went downstairs to telephone for aid. On his return he heard Caswell say "'Take me out of here!'". (R. 21,22) Brewster called the company command post and notified the first sergeant that Caswell had been shot (R. 12,13,17). While Brewster was carrying Caswell downstairs the latter said "'Boys, I am shot bad'" (R. 16).

Brewster testified that he heard no cross words between Caswell and accused and as far as witness knew both were good friends--"I wouldn't say they always played like that each morning, but we usually played a lot in the platoon". However, that morning "It wasn't like they always did". (R. 13,14) Hairston testified that during the five or six months he had known accused he had not heard him have any words with Caswell (R. 24).

Immediately after receiving Brewster's telephone call at about 0900 hours, First Sergeant Jerry D. McRae, Company M, 371st Infantry Regiment,

went in a jeep with Technical Sergeant Clarence L. Jones, of the same company, to the Mortar Platoon command post, where he found a group of men bringing Caswell down the stairs (R. 32,33,37,38). Caswell had a hole in his upper right chest (R. 34,38) and was bleeding from the back (R. 38) but was alive at the time for "he groaned" (R. 33). He was wrapped in blankets, placed as comfortably as possible in the jeep, and was driven about half a mile to the battalion aid station. Jones held him in his arms, with his left arm under his back (R. 33,35,38-40). During the trip to the aid station, which was at about 0913 hours (R. 39), Caswell said nothing to McRae (R. 34,35) but called Jones's name several times (R. 39-41). He received no other injuries between the two points (R. 34,39).

Upon arrival at the battalion aid station, McRae personally turned Caswell over to the medical personnel in attendance and he and Jones identified him as Staff Sergeant Charles V. Caswell (R. 33,34,38,39). Captain Charles V. Charles, Medical Corps, attending surgeon, 3d Battalion, 371st Infantry, examined Caswell about 0920 hours 4 December at the battalion aid station. He had "a hole in his *** right chest, and seemed very ill, had no pulse, quite restless, and obviously had been bleeding" (R. 42,43). "The diagnosis at that time was gunshot wound, penetrating right chest, severe" (R. 44). Captain Charles sealed the wound in the right chest, also a very large wound in the "back of his chest", and then gave Caswell plasma and morphine. It required two bottles of plasma before the pulse could be felt. As the pulse became frequent and rapid, Captain Charles determined to evacuate him to Company C Collecting Company, 317th Medical Battalion. Caswell was "alive at that time, though very poorly" but was not rational. (R. 43) He was received and examined at the 317th Medical Battalion Clearing Station at Viareggio, Italy, at about 1220 hours 4 December by First Lieutenant Milton F. Quander, Medical Corps. His condition was fair but he was comatose. (R. 45,46) Lieutenant Quander, after inspecting the dressing, gave no treatment but, at 1230 hours sent him immediately to the 32d Field Hospital (R. 46) where he was found dead on arrival. The body was returned to the clearing station where it was examined by Captain Marshal M. Jones, Medical Corps, who pronounced Caswell dead (R. 47-49). In Captain Jones's opinion the cause of death was "the gunshot wound, penetrating right chest" (R. 49).

On 12 December 1944 accused, after being "warned of his rights under Article of War 24", made a sworn statement before First Lieutenant Frank A. Scott, 371st Infantry Regiment, investigating officer. Lieutenant Scott was "positively sure" that accused, who was not coerced and not promised leniency, understood his rights, and made the statement voluntarily of his own free will. (R. 6-3; Ex. A) The statement, admitted in evidence without objection (R. 7), was as follows:

"On the morning of 4 December 1944 I was lying in bed when S/Sgt. Charles Caswell got up. Each morning we fool around a little among ourselves. This morning while I was still in bed S/Sgt Caswell hit me once with a washcloth. I don't recall telling S/Sgt Caswell that I was going to shoot him. I picked up S/Sgt Caswell's

rifle and held it up in the air. I did not know it was loaded and did not knock the safety off. I don't even remember having my finger on the trigger but suddenly the rifle went off. S/Sgt Caswell fell and I believe he said, 'Smith you shot me.' I said, 'No, I didn't.' Someone called a jeep and they took S/Sgt. Caswell out" (Ex. A).

For the defense, Captain Eugene E. Johnston, of accused's company, testified that accused, whom he had known prior to coming overseas, had given him no trouble in the company.

"He is just an average soldier. Nothing out of the ordinary. I can't say he is bad, and I can't say he is good; he is just an average soldier, but he has never caused me any trouble" (R. 50).

With respect to rifles,

"The orders were to keep them locked, and before we went on the line, I had conferences with the company at one time, and several other occasions with the noncoms, cautioning them about the accidents, and I know around company headquarters it was pretty well enforced."

If Captain Johnston had inspected that platoon in the building at 0900 hours he would have expected to find the rifles "loaded and locked, because we were on the front line". (R. 52)

Accused, after conferring with defense counsel, elected to remain silent (R. 53,54).

4. It thus appears that at the time alleged in the Specification accused shot with an M-1 rifle Staff Sergeant Charles V. Caswell, the person named in the Specification, who died of a gunshot wound in his chest approximately four hours later. Accused admitted in his sworn statement that he picked up Caswell's rifle when the latter hit him with a face cloth, that he held it in the air and that he was holding it when it was discharged. He claimed that he did not know it was loaded and that he did not knock off the safety. There is evidence of eyewitnesses, however, that Caswell, who was engaged in awakening the other occupants of a room, hit accused with a washcloth and that accused secured Caswell's rifle, which he knew to be loaded, knocked off the safety and said "If you hit me again, I'll shoot you". Caswell did hit accused again with the washcloth, whereupon accused fired the rifle at him, as he stood facing accused about three and a half or four feet away. The bullet entered the right chest and came out in the back. Caswell fell to the floor, wounded, and died shortly thereafter as a result of his wound.

The evidence affords substantial basis for inferences that accused fired the fatal shot willfully, deliberately and with intention to kill.

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When Caswell responded to the taunt by accused the latter made good his announced intention and fired the rifle. The specific intent necessary to establish the offense of murder, malice aforethought, was evident from his expressed threat to shoot, his intentional and unlawful use of a deadly weapon in a deadly manner, and the certain knowledge that his act would in all probability result in the death of, or at least grievous bodily harm to, another person.

The record suggests the question whether accused was so provoked by the deceased's striking him with the washcloth as to reduce the crime to voluntary manslaughter.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation. ***

"The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.

"In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark.)" (MCM, 1928, par. 149a).

There is no evidence in the record, nor is it suggested in accused's statement, that he was seized with uncontrollable passion or fear, that he was in imminent danger of great bodily harm, or that he lost control of himself after deceased struck him. Rather it is affirmatively shown that accused used deceased's response to the taunt as a pretext to carry out his impetuous but lethal purpose. The impetuous nature of the act was not a defense. And assuming that accused was angry, anger alone will not reduce the crime of murder to manslaughter, for there must also be adequate provocation. In a legal sense, clearly, there was no adequate provocation. The circumstances, moreover, exclude any theory of legal justification or excuse (NATO 2880, Watson).

5. Upon cross-examination by the defense, Jones testified that while at the battalion aid station Caswell called Jones

"over to the stretcher where he was, and I went and asked him what did he want, and he told me that Smith had shot him, and I said, 'He didn't do it intentionally, did he?' and he said, 'Yes, he did,' and I asked him, he asked me where was he. I told him he was down to the Mortar Platoon

CP, and he told me all he wanted to do was get back there. So I told him he would be all right, and he asked me if I thought so. I said, 'Yes,' it was a small shot in his shoulder. He asked me if I would write to his wife. I told him I would write to her. At that time, one of the aid men called me to give them his age, and I did that as best I could, sir" (R. 40).

Jones could not testify as to whether or not Caswell knew he was dying at the time of the conversation (R. 41). The circumstances do not warrant the inference that deceased was "under a sense of impending death", thus bringing the statements within the exception to the hearsay rule admitting in evidence dying declarations (MCM, 1928, par. 148a). The statements were however elicited in cross-examination on the part of the defense for its own purposes. Their reception by the court did not constitute error which can be said to have injuriously affected the substantial rights of accused.

6. It was alleged that the murder was committed at or near Forte dei Marmi, Italy, whereas the evidence does not establish the situs of the offense, other than that it occurred somewhere near Biareggio, Italy, where the medical installations were. 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 offense charged, none of his substantial rights were injuriously affected thereby (AW 37).

7. The charge sheet shows that accused is 21 years of age, that he was inducted 5 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. 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.

Edward H. Morgan, Judge Advocate.
Malvina G. Brown, Judge Advocate.
Dewey C. Quirk, Judge Advocate.

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

APO 512, U. S. Army,
19 January 1945.

Board of Review

MTO 4771

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private HAROLD C. PACK)	Montecatini, Italy, 15 November
(34 332 844), Company I,)	1944.
350th Infantry.)	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 Harold C. Pack, then Corporal, Company I, 350th Infantry, did, near Monte Grande, Italy, on or about 26 October 1944 desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid hazardous duty, to wit: combat with the enemy, and did remain absent in desertion until he surrendered himself near Monte Grande, Italy, on or about 27 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. 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 26 October 1944 accused was a member of Company I, 350th Infantry Regiment, which was then stationed at Monte Grande (Italy) (R. 7). His platoon was about 1500 yards from the enemy and within mortar range (R. 8). One battalion of the 351st Infantry Regiment had pushed forward and faced the enemy in front of accused's company, which followed behind. The company had not been in an attack that day. On the morning of 26 October accused told his squad leader that he had an injured knee and that he must go to the aid station. The squad leader gave accused permission to go to the aid station provided he also secured the permission of the platoon sergeant. The squad leader did not observe that accused limped. (R. 7) Accused did not at any time on 26 October seek such permission of the platoon sergeant, and the platoon sergeant did not give him permission to go anywhere (R. 8). The aid station was from 100 to 1500 yards to the rear of the company. The route to it led over about 100 yards of "slippery, muddy, steep hill" then along a fairly good road to a mule trail with "knee-deep mud the rest of the way". It was foggy and since the company had moved up at night it was difficult to find one's way back to the aid station. (R. 9)

An extract copy of the morning report of accused's company, received in evidence without objection, contained the following entries:

"28 October 1944 34332844 Pack, Harold C. Cpl.
Fr dy to AWOL as of 0800 26 Oct 44.

28 October 1944 34332844 Pack, Harold C. Cpl.
Fr AWOL to ars. in hands of Mil. Auth. as of 1300
27 Oct 44.

28 October 1944 34332844 Pack, Harold C. Cpl.
Fr ars in hands of Mil. Auth. to ars in qrs as of
1400 28 Oct 44.

30 October 1944 34332844 Pack, Harold C. Pvt.
Fr ars in qrs to conf in Div Stockade as of 1300
29 Oct 44" (R. 10; Ex. A).

A military policeman of the 88th Infantry Division, who was acquainted with accused, testified that at about 1430 hours, on 27 October, at a point from 250 to 300 yards from the position occupied by accused's company, another military policeman asked witness to take accused to the Provost Marshal's office and stated that accused was "turning himself in" (R. 10). Witness proposed to take accused to his company, but accused said he wanted to go to the Provost Marshal's office (R. 11). Accused also said that "he was away from the Company and that he was turning himself

in" (R. 10). Enroute to the Provost Marshal, while riding in a jeep, some remarks were made about "being tried" and accused was asked why he did not go back to the company. Accused said "If I get twenty years I'll be forty-three when I get out". Accused appeared to walk normally at this time. (R. 11) Later a "Colonel Fry" asked accused if it were necessary to place a guard over him and accused said "I think you better" (R. 10).

Accused's squad leader, a private who had known accused "about a day" but had "seen him in the company", testified that accused performed his duties as a good soldier, and was, in witness' opinion, an outstanding soldier. Witness testified he would like to be with accused in combat (R. 7,8). The platoon sergeant testified he knew nothing of accused's service except that he was wounded in action on a date previous to 26 October 1944.

Accused elected to remain silent (R. 11).

4. It thus appears from uncontradicted evidence that on 26 October 1944, and at the place alleged in the Specification, accused absented himself from his organization without leave and remained absent without authority until 27 October 1944. He left his command while it was within 1500 yards of the enemy and within mortar range and was in support of a battalion facing the enemy. The following day he surrendered to military police instead of returning to his company, which was then not more than 300 yards away. Intent to avoid combat was inferable. Combat duty of such character was manifestly hazardous. From the facts and circumstances appearing in proof, the court was justified in concluding that accused quit his organization with intent to avoid hazardous duty, as charged. The essential elements of that form of desertion defined by Article of War 28 and chargeable under Article of War 58 were established (MCM, 1928, par. 130a).

5. Attached to the record of trial is a report of a psychiatric examination of accused dated 18 November 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 23 year-old farmer with a 6th grade education. A brief exposure to battle traumas with the death of buddies, and a minor wound precipitated his flight. He was inadequately motivated and because of improper discipline did not restrain from selfish motives. He may still be effective in combat function."

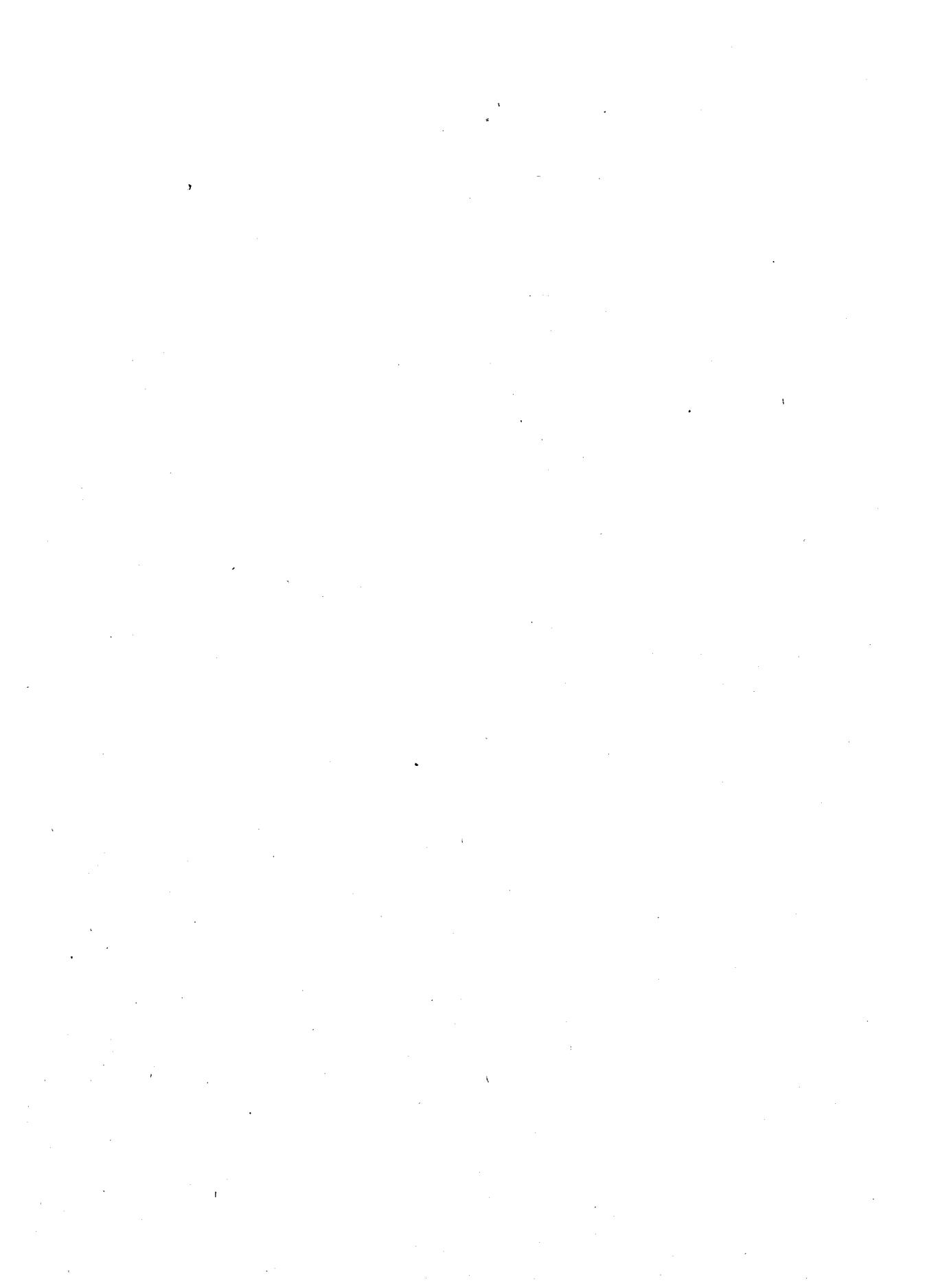
6. The charge sheet shows that accused is 23 years of age, was inducted into the Army 27 June 1942 and had no prior service.

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

Malvin G. Lamm, Judge Advocate.

George O. Wilson, Judge Advocate.

- 3 - Henry C. Fenwick, Judge Advocate.



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

APO 512, U. S. Army,
5 March 1945.

Board of Review

MTO 4787

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private DONALD R. GRADY)	Frassinetta, Italy, 30 November
(33 920 129), Company E,)	1944.
349th Infantry.)	Dishonorable discharge, suspended, and confinement for ten years.
)	MTOUSA Disciplinary Training Center.

OPINION by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

Original examination by Sessions, Judge Advocate.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Donald R. Grady, Company E, 349th Infantry, did, at Montecatini, Italy, on or about 16 November 1944, with intent to avoid an impending move to a combat sector, wrongfully refuse to perform duty with his company.

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 ten (10) years. The reviewing authority approved the sentence, ordered it executed but suspended execution of the dishonorable discharge until the soldier's release from confinement and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 223, Headquarters 88th Infantry Division, 31 December 1944.

3. The evidence shows that on or about 16 November 1944 Company E, 349th Infantry Regiment, in which accused was a rifleman, was in a rest center in Montecatini, Italy. Prior to this date he had been in combat for seven or eight days. Captain Martin A. Coker, 349th Infantry Regiment, the company commander, testified that on that date he "had occasion to hold a conversation with accused" and that

"We talked for about 15 or 20 minutes and I asked him if he felt like he could come back up and do his duty with the company but he said that he didn't think he could for he was having trouble with his head. He said that shells affected him so that he couldn't stand it. I tried to talk with him just like a father and told him what the alternative was but he said that he would prefer to take a court-martial rather than go back to the front lines. I again explained to him just what that would mean and pointed out that he would be liable to get anything from five to fifty years. I told him what it would mean to his folks and to his girl back home but it didn't seem to do any good. I had him arrested and placed in the stockade". (R. 7)

Witness further testified that Company E was returning to the front "within four or five days" but that he did not know whether or not accused knew of the prospective move. Witness did not give accused a "direct order" but accused "said that he would refuse to do duty" (R. 7) with the company (R. 8). Witness had previously talked with accused only when he joined the company and did not know whether accused had gone to the aid station or whether he "was afraid" (R. 7). Accused told witness that he could not "stand it" in the front lines due to trouble with his head. He further stated that the shells affected his eyes and he could not sleep. (R. 9,10)

It was stipulated on behalf of the defense that accused received a gunshot wound in the left eye six years prior to induction and that in May 1944 he received a bayonet wound in the same eye. The latter wound necessitated his wearing glasses. He did not wear glasses prior to entering the Army. (R. 8)

Accused testified that he did not wear glasses in civilian life but that as a result of the bayonet wound was required to wear them because the vision in his left eye dropped from 20-50 to 20-200 (R. 8). In civilian life he had to abandon bank work after three months because it was injurious to his eyes. His eyes tested 20-30 on induction but his

prescription for glasses carried a 20-50 correction. It was necessary for him to wear glasses at the front at all times and he experienced "a lot of trouble keeping the mud off them". (R. 9) He further testified that he had been on the "line" for approximately eight days and

"I could not get my sleep and as a result of losing sleep I couldn't see more than four or five feet with my glasses on. The shells caused headaches and made me feel that I could do my company no good. One night I broke some communication wires and the wireman had to get out in plain sight of the enemy and repair them." ***"I had been out on outpost and in coming back I had to stay almost on top of the man directly ahead of me in order that I wouldn't lose him because it was impossible for me to see any distance. This was annoying to the man ahead of me for when he would have to stop as he had to on a number of occasions I bumped into him. In trying to keep up with the man ahead of me, my feet became tangled up in the wires because I couldn't see them. I had trouble in even seeing the man ahead of me. My one foot hooked the wires and they broke as I fell down." (R. 8)

Accused went to the aid station four times in one week (R. 8). On one occasion he received a medical examination for about 20 minutes, and was told that one of his eyes was not exactly normal, that it reacted to light but was not "as fast" as the other eye (R. 9). Rest improved his vision, cleared his head, and made him feel better, but pills given him were not effective (R. 8). He also testified that

"I am not afraid of the front lines but I just want to be at a place where I can get my sleep. I want to do my country some good. If I can just get my sleep I can do my share. The doctors said there was nothing which they could do for my injury but that it would just have to correct itself. The doctors said it was entirely possible that such a thing would occur and that they were going to try to get me reclassified, if possible. I had had no word from them about this and felt that I might just as well tell Captain Coker I couldn't do it";

and that

"Back in the States they had sent me to Cooks and Bakers School so that I could get my sleep at nights but the captain said that his kitchen was already full and that he could not use me anywhere excepting as a rifleman. I talked with him there for about 20 minutes and we had a very nice talk. He was very nice to me and talked just like a father would." (R. 9)

4. It is alleged in the Specification that with intent to avoid an

impending movement to a combat sector, accused wrongfully refused to perform duty with his company. The essence of the alleged offense was the refusal to perform duty. If the allegation of refusal be interpreted as an averment of disobedience of orders the proof wholly fails to support it, for there is no evidence that an order to perform any specific or general duty was given to accused or that he failed to perform any prescribed duty. On the contrary, Captain Coker, the company commander, testified that he did not give accused a "direct order". Accused was placed in restraint immediately after his conversation with his company commander and his performance of normal company duties was not possible during such restraint.

If the allegation of refusal be interpreted to charge a mere declaration of intention to refuse to perform his duties, there is support for it in the evidence for Captain Coker testified that accused did, at the place and time alleged, make such a declaration, based on asserted physical incapacity. The Board of Review is convinced, however, that the making of the declaration was not, under the circumstances proved, an offense punishable under the Articles of War.

The precise nature of the occasion in the course of which the conversation between accused and Captain Coker occurred was not established. It was not shown whether accused was called before the officer for the interview or whether the interview was initiated by accused. It clearly appears however that the conversation was conducted at a rest center on an informal and friendly basis, the officer seeking to talk to accused "just like a father" in order to determine not only his willingness but also his fitness to serve at the front. It also appears that accused's declaration of refusal was made only in response to direct questioning initiated by the officer who, in his efforts to make his determination, invited accused to speak. There is no evidence that the remarks by accused manifested recalcitrance, intentional defiance of military authority, contempt or disrespect in substance or in the manner of delivery. There is no evidence that persons other than the officer heard the remarks, or that the making of the remarks could have induced insubordination in others. It is clear that despite the palpable error in his mental attitude towards further service in combat, accused, in making his declaration answered truthfully, candidly and with complete honesty as to his state of mind and resolutions. To have answered the questions otherwise would have made him guilty of fraud in failing to disclose his true feelings and fitness. It was his military duty to answer truthfully and to express his honest views as to his physical condition and mental outlook when called upon by his military superior to do so. From all the evidence accused was certainly justified in entertaining a belief that he was being directed to express his views. Had he refused to reply at all he would have been chargeable with the commission of other military offenses.

The following expressions of opinion by The Judge Advocate General in a case in which, under similar circumstances, a soldier in responding to questions by his superior officer declared his intention to refuse to bear arms against the enemy and made statements indicative of disloyalty, are applicable here:

"The dissenting member was of the view that accused simply made honest statements to investigating officers when called upon to speak and that to convict him for making the statements would amount to punishment for abstract disloyalty, that is, for 'evil thoughts'. I agree with the minority view.

"The proceeding was an official investigation resulting from declarations by accused upon his induction. One of its purposes was to encourage accused to tell the truth about his state of mind. This he did, with complete frankness and honesty, as it was his military duty to do. To have lied would have subjected him to trial and punishment. Had he remained silent he would have been guilty of legal fraud in failing to disclose his true feelings. As has been said by a United States District Court (U. S. v. Herberger, 272 Fed. 278, 291):

'Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter.'

"He declared that he refused to take up arms against the national enemies and that he would refuse to do so in the future. He did not, however, disobey any order to bear arms and did not refuse to perform any specific duty required of him. He declared his views upon induction but it was not charged or proved that he made a dishonest or otherwise culpable effort to avoid military service. He merely revealed his sentiments. There was no subversive act or intent on his part, nor any attempt to convert others to his point of view. The statements were not made under such circumstances that a subversive result was to be expected. Federal statutes make criminal only those disloyal utterances which are made with intent to interfere with military operations or involve attempts to cause insubordination, disloyalty in others, mutiny or refusal of military duty (50 U.S.C. 33; 18 U.S.C. 9). There was no such intent here.

"In my view these honest official statements disclosing the

true sentiments of accused, made only because accused was asked by his military superiors to make them, were not of a nature to bring discredit upon the military service and were not to the prejudice of good order and military discipline within the meaning of Article of War 96. In my opinion the record of trial is legally insufficient to support the findings of guilty and the sentence." (CM 229062, Irskens, XVII BR 43; CM 229063, Bresky, XVII BR 51. See also CM 232786, Conjurksi, XIX BR 189.)

As recommended pursuant to the opinion of The Judge Advocate General the findings and sentences adjudged in the cases cited were vacated by the Secretary of War.

The Board of Review in this Branch Office, in holding that an offense was committed by a soldier who, aboard a transport about to undertake certain landing operations on a hostile shore, made disrespectful, defiant and contemptuous declarations, partly of his own accord, avowing a determination not to perform his duty in the course of the operations, made the following pertinent observations:

"The circumstances under which the utterances were here made, distinguish the misbehavior of accused from the conduct of a soldier who, without any reference to any particular military duty or mission, upon invitation or inducement by his superior officer, in order that his fitness for service may be determined, discloses his state of mind with respect to his intended conformity with his military commitments and obligations. In the latter case, although he entertains and discloses contemptuous or disloyal sentiments, the soldier is protected in his right of free speech and honest expression of opinion. It is to the interest of the government that it be advised of the present and potential usefulness of the soldier whom it has called for its defense" (NATO 107, Burke).

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence should be restored.

Ellwood V. Ferguson, Judge Advocate.
James G. Dunn, Judge Advocate.
Henry C. Reavis, Judge Advocate.

(23)

MTO 4787

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
5 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

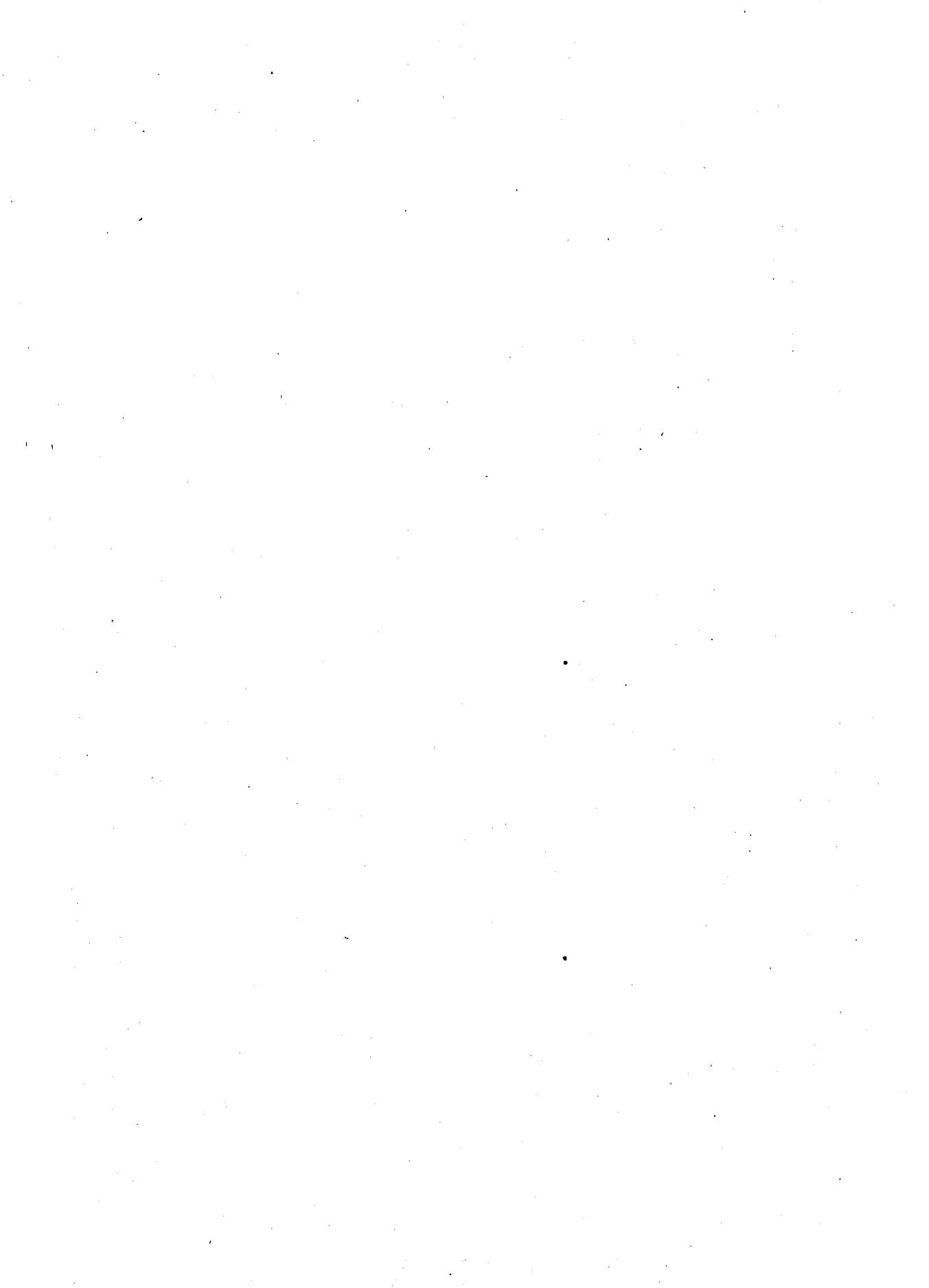
1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50 $\frac{1}{2}$ the record of trial by general court-martial in the case of Private Donald R. Grady, 33 920 129, Company E, 349th Infantry, together with the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and sentence. I concur in the opinion of the Board of Review and recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.



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

2 Inclosures
Form of Action
Record of trial

(Findings and sentence vacated. GCMO 40, MTO, 12 Mar 1945)



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

APO 512, U. S. Army,
31 January 1945.

Board of Review

MTO 4796

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private VICTOR J. DiGIOVACHINI)	Frassinetta, Italy, 8 December
(33 086 598), Battery C, 338th)	1944.
Field Artillery 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Victor J. DiGiovachini, Battery C, 338th Field Artillery Battalion, did, near Maroduccio, Italy, on or about 26 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Florence, Italy, on or about 30 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 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 $\frac{1}{2}$.

3. The evidence shows that on 26 September 1944 accused, a cannoneer in Battery C, 338th Field Artillery Battalion, was a member of a forward "observer party" going forward with a line company of the 3d Battalion, 350th Infantry, to bring artillery fire on the enemy. Accused was left at the 3d Battalion "CP" near Maroduccio, Italy, about 1000 yards from the front lines, and told to remain there with some equipment until he was sent for. Other members of the party went forward with the line company. Later a corporal returned for the equipment left with accused but accused was not there (R. 6-8). A member of the forward observer party testified that on the following morning he made a search "around the CP" for accused but did not find him, and did not see accused thereafter and as far as he knew accused did not have permission to be absent. Witness testified further that accused's battery was at the front "up on the line" from 26 September 1944 until 30 November 1944. (R. 7)

A cannoneer of accused's battery testified that while at the 3d Battalion "CP" on 26 September 1944, accused asked him "what it was like up there" and he told accused "it was a little different but not too much". Accused said "he was scared and didn't want to go up forward" and "didn't like staying there on account of being shelled" and that he was going to "take off". (R. 8-10) Witness testified further that accused appeared normal (R. 9,10).

Another member of accused's battery testified that he saw accused at the "Red Cross" in Florence, Italy, on 9 November 1944 and accused told him that "when Sergeant Daverin got killed he couldn't stand it any longer" and that he should have returned to his outfit but as long as he was "this far" he was going to wait "until they caught up to him" (R. 11). Still another member of accused's battery testified that he saw accused at Florence, Italy, on 9 November 1944 and told him that "he had better come back" and accused said "he was going to stay" (R. 12).

An extract copy of the morning report of accused's battery, introduced in evidence without objection, contained the following entries:

"2 October 1944

33086598 DiGiovachini Victor J Pvt

MIA as of night of 26 September, 1944 fr area approx
2000 yds Southeast of Castel Del Rio, Italy. Dropped
fr rolls as of 26 September, 1944.

PPM

LEOH

21 November 1944

(Asgd) CORRECTION (10-2-44)

33086598 DiGiovachini Victor J (FA) Pvt
Entd as MIA as of 26 Sept/44 in the vicinity of
Castel Del Rio, Italy dropped fr rolls as of
26 Sept/44.

SHOULD BE

33086598 (Asgd) DiGiovachini Victor J (FA) Pvt

Status of sol changed fr MIA as of 26 Sept/44 to AWOL in the vicinity of Florence, Italy as of 26 Sept/44.

RHS

OET" (R. 13;Ex. B).

It was stipulated that accused was apprehended at Florence, Italy, on or about 30 November 1944 (R. 12,13; Ex. A).

It was stipulated for the defense that if Major Joseph Slutsky, 88th Division Psychiatrist, were present he would testify that he examined accused and believes that he is a latent homosexual, oversexed, and a potential suicide (R. 13).

Accused elected to remain silent (R. 13).

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 Florence, Italy, over two 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, his statements while absent, the manner of the termination thereof and from other circumstances in evidence (MCM, 1928, par. 130a). Moreover, the circumstances of accused's initial absence were such, and his remarks to other members 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 6 December 1944, containing the following:

"Psychiatric examination reveals a 25 year-old of Italian parentage with a 6th grade education. Developmental history reveals a sexual perverse practice dating back to civilian contacts with homosexuals with whom he lived for several years.***These sexual compulsions of a severe nature have continuously hampered his wilful control in adhering to the right. He is resentful towards punishment and threatens to do violence to himself if imprisoned. His condition is diagnosed as Constitutional Psychopathic State - Sexual Psychopathy. He is of no further value in the combat situation and of questionable value in the military service, being a fit subject for disposition under the provisions of AR 615-368."

6. The charge sheet shows that accused is 25 years of age, was inducted into the Army 3 July 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

(28)

Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

Malvina P. Forni, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Reinch, Judge Advocate.

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

APO 512, U. S. Army,
 6 March 1945.

Board of Review

MTO 4846

U N I T E D S T A T E S)	XV AIR FORCE SERVICE COMMAND
v.)	Trial by G.C.M., convened at
Technician Fifth Grade FRANK)	Foggia, Italy, 24 November
OWENS, JR. (34 750 735), 1249th)	1944.
Engineer Composite Platoon,)	Dishonorable discharge and
Fire Administration Fire Control,)	confinement for 25 years.
38th Service Group.)	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 94th Article of War.

Specification: In that Technician Fifth Grade Frank Owens, Junior, 1249th Engineer Composite Platoon FAFAC, did, at Ramitelli Airfield, Italy, on or about 12 October 1944, knowingly and without proper authority apply to his own use a certain motor vehicle, to wit one one-quarter ton 4x4 truck, Command and Reconnaissance, Registration Number W-20154679, of a value of more than fifty dollars, property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 78th Article of War.

Specification: In that Technician Fifth Grade Frank Owens,

Junior, 1249th Engineer Composite Platoon FAFC, did, in conjunction with Sergeant George E. Taylor, 100th Fighter Squadron, 332nd Fighter Group, at Termoli, Italy, on or about 12 October 1944, force a safeguard, known by him to have been placed over the premises occupied by the Railway Station at Termoli, Italy, by overwhelming the guards posted for the protection of the same.

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

Specification 1: In that Technician Fifth Grade Frank Owens, Junior, 1249th Engineer Composite Platoon FAFC, did, in conjunction with Sergeant George E. Taylor, 100th Fighter Squadron, 332nd Fighter Group, at Termoli, Italy, on or about 12 October 1944, with intent to do him bodily harm, commit an assault upon Private William G. Roy, 30th Somerset Light Infantry, by pointing at him a dangerous weapon, to wit a Calibre .45 Thompson sub-machine gun.

Specification 2: In that Technician Fifth Grade Frank Owens, Junior, 1249th Engineer Composite Platoon FAFC, did, in conjunction with Sergeant George E. Taylor, 100th Fighter Squadron, 332nd Fighter Group, at Termoli, Italy, on or about 12 October 1944, with intent to do him bodily harm, commit an assault upon Private Arthur Holmes, 30th Somerset Light Infantry, by pointing at him a dangerous weapon, to wit a Calibre .45 Thompson sub-machine gun.

Specification 3: In that Technician Fifth Grade Frank Owens, Junior, 1249th Engineer Composite Platoon FAFC, did, in conjunction with Sergeant George E. Taylor, 100th Fighter Squadron, 332nd Fighter Group, at Termoli, Italy, on or about 12 October 1944, with intent to do him bodily harm, commit an assault upon Technician Fifth Grade Chelsea L. Edwards, 835th Engineer Aviation Battalion, by pointing at him a dangerous weapon, to wit a Calibre .45 Thompson sub-machine gun.

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

Specification 1: In that Technician Fifth Grade Frank Owens, Junior, 1249th Engineer Composite Platoon FAFC, having received a lawful order from Private William G. Roy, 30th Somerset Light Infantry, a sentinel in the execution of his duty, to leave the premises at or around the Railway Station at Termoli, Italy, did, on or about 12 October 1944, willfully disobey the same.

Specification 2: In that Technician Fifth Grade Frank Owens, Junior, 1249th Engineer Composite Platoon FAFC, did, at Termoli, Italy, on or about 12 October 1944, without the

consent of the owner, wrongfully take and carry away one Calibre .45 Thompson sub-machine gun, value about one hundred fifty dollars (\$150.00), the property of the 30th Somerset Light Infantry, British Army.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of two previous convictions by summary courts-martial, one for wrongfully appearing in an off-limits area and another for operating a motor vehicle in a reckless and careless manner, both in violation of Article of War 96. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures of all pay and allowances due or to become due and confinement at hard labor for 25 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 50 $\frac{1}{2}$.

3. The undisputed evidence shows that on 12 October 1944 accused's organization, 1249th Engineer Composite Platoon, was stationed at Ramitelli Airfield (Italy). There had been issued to the organization for the purpose of operations, a quarter ton four by four truck, No. 20154679, commonly known as a "Jeep", the value of which was in excess of \$50.00 (R. 7). Permission to use the vehicle could be obtained only from the organization commander, First Lieutenant Walter B. Sherriff, and two section leaders, Staff Sergeant Larry Johnson and Sergeant W. D. Johnson (R. 7,8,10,12,14). The members of the organization, including accused, and the dispatcher, had been instructed that before using the vehicle they must first secure such permission (R. 8-11,14,15). Neither Lieutenant Sherriff nor the two section leaders authorized accused to use any vehicle on 12 October (R. 8, 11,13). On that date accused asked the dispatcher, Corporal Alonzo D. Abner, to "make out a dispatch" to Termoli. When Abner asked him if it was "all right" and accused replied in the affirmative, the former did not question him further because he believed accused had permission "from Sergeant Johnson" (R. 14), and "figured that any man that came to me had permission". Asked if accused showed him anything in writing, Abner testified "No sir, I take that for granted" (R. 15). He dispatched to accused the jeep numbered 20154679 and the latter drove away from the company area (R. 14,15).

Accused drove the jeep to Termoli, and had as a passenger Private Ralph L. Williams of his organization. In Termoli, about 1730 hours, they picked up Sergeant George E. Taylor of 100th Fighter Squadron, 332d Fighter Group. They then drove to the railway station in Termoli, parked the vehicle outside the station and stood in front of the building for two or three minutes. (R. 16,17,51-53) A British military policeman approached (R. 17, 18) and said "'It is off limits to you boys. I am telling you because the American MP's will come down and carry you away'". (R. 18) There was a sign which read "off limits". Williams replied "'Fine'" (R. 17), asked

Taylor and accused to leave and the three men went to the Allied Bar in Termoli (R. 17,18,52,53). They began to drink (R. 17) but, according to Taylor's testimony, "not enough to be drunk" (R. 52). Accused and Taylor decided to leave and told Williams they would return for him later (R. 17, 18).

About three weeks prior to 12 October 1944, the railroad station at Termoli, Italy, had been placed out of bounds to all allied troops by the Railway Transport Officer who was "in Allied Engineers" (R. 19). A public restaurant was situate within the railway station where liquors or wine were for sale (R. 20). The station was placed off limits because Greek, American and English soldiers "had been coming to the station, using the restaurant for wine, causing trouble with women and interfering with the guards work" (R. 19). On 12 October Corporal C. Johnson, A Company, 30th Somerset Light Infantry, British Army, was on duty at the railway station, in charge of the train guards and the "static" guard (R. 19). His orders were "to take charge of all trains and to see that the guards kept soldiers away from the station and Italian civilians under control" (R. 20). Signs were visible which indicated to troops that the station was off limits. One sign was on the platform, another was on the outside of the restaurant and a third was by the railroad on the other side of the restaurant. The signs covered the different directions in which persons would approach the station (R. 20). At 1400 hours Corporal Johnson posted two guards as "sentinels" (R. 21) at the station, Privates Arthur A. Holmes and William G. Roy, both of the 30th Somerset Light Infantry, each of whom was armed with a Thompson sub-machine gun which belonged to their regiment. The value of each gun was about \$150. Holmes and Roy were on duty until 2200 hours and were to guard the station and marshalling yards. They were ordered to guard all government property, to prevent pilfering, to keep Allied troops out of the station, to protect civilians and to prevent them from riding on the trains. During a 24 hour period many people frequented the station, most of whom were Italians. About six trains a day stopped at the station, some of which were loaded with foodstuffs and ammunition. There were passenger trains at night, and through trains, loaded with munitions and war supplies, stopped at the station. The guards were also charged with the duty of protecting such munitions and supplies. They were empowered to use any force necessary to prevent Allied troops from entering the station and to shoot if anyone disobeyed an order. (R. 20,21,24-26, 34-36)

Accused and Taylor drove up to the railway station about 1700 hours in a jeep which they parked about 30 yards on the other side of the platform (R. 26,35,52,53). At the station with Holmes and Roy, the two guards, was an American soldier, Corporal Chelsea Edwards, who was lawfully on the premises (R. 26,27,35). Holmes approached accused and Taylor and when he asked what they wanted at the station they replied "'We are looking for a piece of ass'". Holmes replied "'You won't find any around this station. It is out of bounds'". When Taylor and accused, who were then inside the platform and at a place which was out of bounds, began to argue with each other, Holmes brought them to Roy (R. 26). Accused and Taylor also asked Roy "for a piece of ass" (R. 37), and the latter informed them that they

would not get any women in the station, that it was out of bounds to all allied troops. He asked them three times to leave and they did not do so (R. 27,32,33,37,42). One (Taylor) said "'I am a Sergeant and I have permission to walk on the platform'" (R. 27). Holmes replied that Taylor had no orders to be on the premises and that the station was out of bounds and off limits (R. 28). As the "corporal (accused) was too stubborn" Roy cocked his Thompson sub-machine gun, pointed it at accused and Taylor (R. 37) and said "'If you don't walk away, I will shoot'" (R. 28). Taylor "ducked out of the line of fire" (R. 37), knocked the weapon out of Roy's hand and twisted the latter around. He put his left arm around Roy's throat and with his right hand put the cutting edge of an open blade of a six inch knife against Roy's throat, immediately under the jugular vein (R. 28,29,37,38). When Roy's gun fell to the ground accused picked it up, pointed it at Holmes and shouted that he would shoot if Holmes walked toward Roy (R. 29,38). Taylor told Holmes to drop his gun but the latter said that he would fight it out. Taylor then told him to drop the gun or he would slit Roy's throat. Roy ordered Holmes to drop the weapon, claiming that it was a matter of either Holmes' gun or his (Roy's) life (R. 29,30,38,39). When Holmes dropped his gun on the ground accused, still holding Roy's weapon, pointed it at Holmes, forced him to retreat about seven yards and picked up the gun with his left hand (R. 30,33,39). He "covered" Holmes and Edwards and handed Holmes' gun to Taylor (R. 30,39). Taylor then released Roy by pushing the latter forward (R. 39). Accused and Taylor shouted "'We will shove the Tommies out when we leave the station'", and one said "'You will find the guns outside the gate'" (R. 30). Accused and Taylor then pointed the guns at Holmes, Roy and Edwards and accused warned them not to move or he would shoot (R. 30,31,33,39,42). Accused went toward the platform and Holmes and Edwards attempted to follow him. About five minutes later a shot was fired "from a house of the railway" about 100 yards away and from the direction in which accused and Taylor had disappeared. Holmes testified that the shot passed "Right over our heads" (R. 31) and Roy testified that it was fired "from a Tommy gun" (R. 40,42). Each testified that in his opinion accused had been drinking because witness detected the odor of liquor, and for the same reason Roy was also of the opinion that Taylor had been drinking (R. 32,41).

About 2000 hours accused was apprehended about 60 feet from the railway station by Private Louis A. Weisbrod, 1053 Military Police Company, and taken to the military police station where he was identified by Holmes, Roy and Edwards (R. 32,40,44,48,49). The jeep numbered 20154679 was found at the station, inside the mar shalling area at the end of the platform (R. 22,43,44). Roy's gun was found the following morning on "the island just outside the station" (R. 23,32,47), and Holmes' gun was found that afternoon in Taylor's tent, under his mattress cover (R. 23,32,45-47). Holmes and Roy also identified accused at the trial (R. 29,39).

For the defense the commander of accused's organization, Lieutenant Sheriff, testified that accused had been a member of the organization since its activation in June 1944 and that he drove a supply truck. He performed his duties well, his character was good, and his general reputation for veracity was also good (R. 50).

Accused elected to remain silent (R. 54).

4. The evidence clearly sustains the findings of guilty of mis-application of a government motor vehicle in violation of Article of War 94 (Charge I and its Specification), assaults with intent to do bodily harm with a dangerous weapon upon Roy, Holmes and Edwards in violation of Article of War 93 (Charge III and its Specifications), willful disobedience of the lawful order of a sentinel and the wrongful taking and carrying away of a Thompson sub-machine gun, both violations of Article of War 96 (Charge IV and the two Specifications thereunder). The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of forcing a safeguard in violation of Article of War 78 (Charge II and its Specification).

There is evidence that a railway transport officer of the American Army or of the British Army in Italy ordered that the railway station at Termoli, Italy, be placed "off limits" to personnel of the Allied forces, that off-limits signs were posted on the premises and that soldiers of the British Army were placed on guard to insure compliance with the off-limits orders, to protect the operation of the railway and property of the Allied armies and to prevent disorders on the premises. Accused participated in an assault upon the sentinels and helped to disarm them. It does not appear that he entered the forbidden premises other than to commit the assault or that he injured any person or property which the sentinels were charged with protecting. There is authority for the view that the acts of accused were of a character which might constitute a forcing of a safeguard provided a safeguard was actually established (Winthrop's, reprint, p. 666), but whether or not the acts of accused amounted to a "forcing" of the protection afforded by the sentinels and the orders under which they performed their duties, it is clear to the Board of Review that no "safeguard" within the meaning of Article of War 78 had been established and that therefore no offense of forcing a safeguard as denounced by that Article was committed.

Article of War 78 reads as follows:

"Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct."

What is a safeguard? The Manual for Courts-Martial contains no definition of the term but the Rules of Land Warfare published in Field Manual 27-10, 10 October 1944, Basic Field Manual of the War Department, contains the following:

"A safeguard is a detachment of soldiers posted or detailed by a commander of troops for the purpose of protecting some person or persons, or a particular village, building, or other property. The term 'safeguard' is also used to designate a written order by a commander of belligerent forces for the protection of

an enemy subject or enemy property. It is usually directed to the succeeding commander requesting the grant of protection for such individuals or property. Written safeguards may be delivered to the parties whose persons or property are to be protected, or they may be posted on the property. The violation of a safeguard is a grave offense against the laws of war. ***

"Soldiers on duty as safeguards are guaranteed against the application of the laws of war, and it is customary to send them back to their army when the locality is occupied by the enemy, together with their baggage and arms, as soon as military exigencies permit" (pars. 241, 242).

Under this definition the essence of a safeguard is a commitment by the commander of belligerent forces for the protection of persons or property of the opposing belligerent, or possibly, of a neutral affected by the relationship between the belligerents. Its violation is an offense against the laws of war, that is, against the rules governing the relationship of belligerent forces in their prosecution of war. A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to insure order within its own forces, even though the forces be in a theater of combat operations. The posting of guards or of off-limits signs does not establish a safeguard unless the protection thereby afforded is in furtherance of an undertaking by a commander to protect enemy or neutral persons or property. Quoting Army Regulations in effect when his Treatise on Military Law and Precedents was written, Winthrop states that the "effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national troops" (Winthrop's, reprint, p. 664). No pledge of honor can be involved in measures taken by a nation or its army to protect its own property or operations.

In Oppenheim's International Law (Vol. II, Sec. 219), safeguards are defined as follows:

"One belligerent sometimes arranges to grant protection against his forces to certain subjects or property of another belligerent in the form of safeguards, of which there are two kinds. One consists of a written order, given to an enemy subject or left with enemy property, addressed to the commander of armed forces of the grantor, and charging him with the protection of the individual or the property. Thereby he or it becomes inviolable. The other kind of safeguard is given by detailing one or more soldiers to accompany enemy subjects, or to guard the spot where certain enemy property is, for the purpose of protection. Soldiers on this duty are inviolable on the part of the other belligerent; they must neither be attacked nor made prisoners, and they must, on falling into the hands of the enemy, be fed, well kept, and eventually safely sent back to their corps."

Applying the definitions stated, it is enough to say that the posting of the guards and off-limits signs as proved in this case did not in any measure involve a commitment by a commander of belligerent forces for the protection of persons or property of the enemy or of a neutral affected by belligerency. The proof supports that part of the allegations of the Specification, Charge II, which charges in substance that accused wrongfully and by force overwhelmed the guards posted for the protection of the railway station and premises described. This was a disorder violative of Article of War 96.

5. The most closely related offense to that of wrongfully and by force overwhelming the English guards or "sentinels" posted to protect the station is that of striking or otherwise assaulting a sentinel in the execution of his duty, for which the maximum period of confinement imposable is one year (MCM, 1928, par. 104c). The maximum period of confinement imposable for the offense of misapplication of the government vehicle is five years (Charge I and its Specification). The most closely related offense to willful disobedience of the order of the English sentinel to leave the station premises is that of willful disobedience of the lawful order of a sentinel in the execution of his office, and larceny of property of a value of over \$50. is the most closely related offense to that charged of wrongfully taking and carrying away the sub-machine gun alleged. The maximum period of confinement imposable for these two offenses is one and five years respectively (Charge IV and its Specifications). The legality of the approved sentence of confinement for 25 years is, therefore, dependent upon the confinement imposable for the three assaults with intent to do bodily harm upon the persons of Roy, Holmes, and Edwards respectively, by pointing at each a dangerous weapon (Charge III and its Specifications). The charging of accused with three separate specifications alleging an assault as to each victim was proper.

"Where accused in attempting to escape fired at his pursuers as a group and with the purpose of striking any one of them, separate specifications alleging assault as to each man fired upon were proper, although the offenses arose out of the same transaction and resulted from the same shots. C.M. 192409 (1930)" (Dig. Op. JAG, 1912-40, sec. 428 (5), pp. 294-295) (See also, NATO 1092, Scott).

If, however, the three assaults of which accused was found guilty were but different aspects of the same act, the sentence with respect to these three offenses must be reduced to the maximum authorized for a single assault (MCM, 1928, par. 80a; NATO 1092, Scott).

After Taylor seized Roy and placed his knife at the latter's throat, accused picked up Roy's gun which had fallen to the ground, pointed it directly at Holmes, and threatened to shoot him if he went toward Roy. After Holmes dropped his own gun at Taylor's insistence and Roy's order, accused, still pointing Roy's weapon at Holmes, forced him to retreat about seven yards and picked up Holmes' gun with his left hand. Accused then for the

first time directed Roy's weapon at Edwards, in addition to Holmes. Thereafter he "circled around" and gave Holmes' gun to Taylor who released Roy by shoving him forward. Accused then for the first time pointed the gun in his possession at Roy, and also aimed it at Edwards and Holmes. He warned them not to move or he would shoot. Accused thus committed three separate and distinct assaults, each against a different individual. Separate acts of force, sufficiently distinct in point of time and movement, were directed against each victim. Accordingly, the offenses committed were not different aspects of the same act. The case is, therefore, distinguishable from NATO 1092, Scott, and CM 231710, Bearden et al (XVIII BR 277), where, for the purposes of punishment, the offenses charged were properly held to be but different aspects of the same act. The Board of Review is of the opinion that the maximum period of confinement imposable for the three assaults with intent to do bodily harm with a dangerous weapon is 15 years, and that the sentence, as approved, is legal.

6. The charge sheet shows that accused is 21 years of age and was inducted 14 May 1943. He had no prior service.

7. The court was legally constituted. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings that accused did, at the time and place alleged, in conjunction with Sergeant George E. Taylor, 100th Fighter Squadron, 332d Fighter Group, wrongfully and by force overwhelm the guards posted for the protection of the railway station and premises described, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charges I, III, IV and of the Specifications under each, and legally sufficient to support the sentence as approved. Penitentiary confinement is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon, 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.

Edward W. Langstaff, Judge Advocate.
John F. Johnson, Judge Advocate.
Henry C. Klemek, Judge Advocate.

MTO 4846 1st Ind.
 Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
 6 March 1945.

TO: Commanding General, XV Air Force Service Command, APO 520, U. S. Army,

1. In the case of Technician Fifth Grade Frank Owens, Jr. (34 750 735),

(38)

MTO 4846, 1st Ind.
6 March 1945 (Continued).

1249th Engineer Composite Platoon, Fire Administration Fire Control, 38th Service Group, 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 of Charge II and its Specification as involves findings that accused did, at the time and place alleged, in conjunction with Sergeant George E. Taylor, 100th Fighter Squadron, 332d Fighter Group, wrongfully and by force overwhelm the guards posted for the protection of the railway station and premises described, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charges I, III, IV and of the Specifications under each, and legally sufficient to support the sentence as approved, which holding is hereby approved. Upon your disapproval of so much of the findings of guilty of Charge II and its Specification as involves findings of guilty of an offense other than the lesser included offense hereinbefore described, you will, under the provisions of Article of War 50 $\frac{1}{2}$, 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 4846).



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,
 30 January 1945.

Board of Review

MTO 4895

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private CHARLES F. McMAHON)	Montecatini, Italy, 5 November
(32 003 293), Headquarters)	1944.
Company, 2d Battalion, 351st)	Dishonorable discharge and
Infantry.)	confinement for 25 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 Charles F. McMahon, Headquarters Company, 2nd Battalion, 351st Infantry, did, in the vicinity of Albano, Italy, on or about June 16, 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself in the vicinity of Sassaleone, Italy, on or about October 20, 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 25 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. The evidence shows that on 16 June 1944 Headquarters Company, 2d Battalion, 351st Infantry, of which accused was a member and assigned to the ammunition platoon, was in a rest and training area near Albano, Italy, and at reveille formation on that date accused was reported absent by his squad leader (R. 6,7). An ammunition platoon squad leader testified that after 16 June (1944) accused's company moved from Albano to Tarquinia (Italy) and continued its training and that about the middle of July (1944) the company "went up in the lines and fought the Germans again". Witness testified further that he had been with the company continuously from 16 June 1944 and accused has not been present. (R. 7)

A sergeant of accused's company testified that he was a patient in the 37th General Hospital, at Bagnoli (Italy), from 16 June (1944) to 20 October (1944) and saw accused, who was not a patient, for "a good three weeks" "hanging around the hospital" (R. 9).

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"June 16 - 32003293 McMahon, Charles F. Pvt.
Dy to AWOL as of 0630 hrs.

Oct. 26 - 32003293 McMahon, Charles F. Pvt.
AWOL to dy as of 1100 hrs 20 Oct 44.
Dy to conf Div Stockade as of 21 Oct 44"
(R. 8; Ex. A).

It was stipulated that accused voluntarily surrendered to military authority on or about 20 October 1944 (R. 9; Ex. B).

Accused elected to remain silent (R. 9,10).

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 surrendered himself to military authority more than four 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. Attached to the record of trial is a report of a psychiatric examination of accused, dated 8 November 1944, containing the following:

"Psychiatric examination reveals a 28 year-old individual with 3 years of high school education. He has an erratic occupational record and manifests psychopathic traits of

character. Prior to military induction he held a political job. He left his organization with intentful neglect of military responsibility. Examination reveals no disease."

6. The charge sheet shows that accused is about 29 years of age, was inducted into the Army 27 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.

Marion R. Gilm; Judge Advocate.

George O. Wilson, Judge Advocate.

Henry C. Clinch, Judge Advocate.



(43)

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

APO 512, U. S. Army,
25 January 1945.

Board of Review

MTO 4957

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private JOHN J. MILLICAN)	Frassinetta, Italy, 28 November
(31 251 265), Company C,)	1944.
351st Infantry.)	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 Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John J. Millican, then Private First Class, Company C, 351st Infantry, did, in the vicinity of Partido, Italy on or about 18 July 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended in the vicinity of Cecina, 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, "more than three-fourths of the members" of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to

15 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 18 July 1944 accused was a rifleman in Company C, 351st Infantry Regiment, which was part of a task force "trying to take Palaia" (Italy) and was "pinned down in a draw" (R. 6-8). Accused returned from a hospital to the kitchen area of his company and stated to a platoon guard that "he wasn't feeling well yet and that the doctor told him to report to the 313th Medics" and that "he was going to (the) medics" (R. 7). The platoon guard told accused that if he felt ill he should report to the "clearing station" (R. 8).

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following relevant entries:

"October 1944

6 ***

31251265 Millican, John F. Pfc So much of remark on M/R 4 Oct 44 as reads dy to AWOL as of 0600 hrs 17 July 44 is corrected to read dy to AWOL as of 1500 hrs 18 July 44" (R. 8,9; Ex. A).

It was stipulated that accused returned himself to military control in the vicinity of Cecina, Italy, on or about 2 October 1944 (R. 9;Ex. B).

A noncommissioned officer testified for the defense that accused joined the company "at Camp Gruber in the first bunch of replacements in November or December of 1942". And,

"I wouldn't say he was best soldier, but he tried; he always had some sort of stomach trouble. I guess that's why he went to hospital." "If he tries, he's all right." (R. 9)

Accused made the following unsworn statement through counsel:

"The accused has fought through all of the campaigns up to the time of his absence. He was hospitalized twice for a nervous state. All his life he has had a nervous condition. During his absence he never had any intention to stay away and was always in uniform. He wanted to get away from something terrifying; he couldn't take it any more. He was a good soldier; at one time he was authorized the combat infantry badge, which was awarded" (R. 10).

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 surrendered to military control in the vicinity of Cecina, Italy, almost three months later. An intention

to remain permanently absent may be inferred from accused's unexplained prolonged absence and his failure for a period of almost three months to report to any of the numerous military installations in this active theater of operations, and from other circumstances in evidence (MCM, 1928, par. 130a). Intent to avoid hazardous duty might also be inferred. The court was warranted in finding accused guilty as charged.

5. It was alleged that accused absented himself near Partido, Italy, whereas the evidence does not establish the situs of the dereliction. 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. It was alleged that accused's unauthorized absence was terminated by apprehension, whereas the proof shows that it was terminated by surrender. This is immaterial, there being ample evidence of the intent to desert.

7. Attached to the record of trial is a report of a psychiatric examination of accused dated 10 November 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 32 year-old with 6 years of education. He attempted a rationale of somatic complaints as a means of escaping from the intolerable battle situation and committed his offense when the opportunity presented itself conveniently with conscious intent to escape from hazardous duty. He is inadequately motivated and is of questionable value in front-line service."

8. The charge sheet shows that accused is 32 years of age, was inducted into the Army 20 November 1942 and had no prior service.

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

William G. Pittman, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Meusch, Judge Advocate.

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

APO 512, U. S. Army,
31 January 1945.

Board of Review

MTO 4958

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private EDWARD KALLAS)	Montecatini, Italy, 9 November
(12 096 274), Company I,)	1944.
351st Infantry.)	Dishonorable discharge and
)	confinement for 35 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 Private Edward Kallas, Company I, then of Service Company, 351st Infantry, did, at Minturno, Italy, on or about 17 May 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy, on or about 5 July 1944.

Specification 2: In that Private Edward Kallas, Company I, 351st Infantry, did, in the vicinity of San Romano, Italy, on or about 24 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 23 August 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 35 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 trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 17 May 1944, at Minturno, Italy, Service Company, 351st Infantry, of which accused was a member, was engaged in combat with the enemy (R. 7). Accused's first sergeant testified that as soon as his company reached Minturno in the attack on 17 May (1944), he looked for accused "for KP" but did not find him. Witness testified that accused "took off" and witness did not see him again until 5 July (1944). Witness testified further that accused did not have permission to be absent from 17 May (1944) to 5 July (1944). (R. 7)

The evidence shows further that on the night of 24 July 1944, near San Romano, Italy, Company I, 351st Infantry, of which accused was then a member, was engaged with the enemy (R. 8,9). Accused's first sergeant testified that on 24 July 1944 accused was brought to the company "CP" near San Romano, Italy, in a jeep and on 25 July (1944) accused was not present "there". Witness testified further that "later on in September" (1944) he brought accused back from "regiment" under guard. Accused did not have permission to be absent from his company from 24 July (1944) to 23 August (1944). (R. 8)

An extract copy of the morning report of Service Company, 351st Infantry, introduced in evidence without objection, contained the following entries:

"June 1944

20 - 12096274 Kallas, Edward Pvt Dy to AWOL as of
0645 hrs 17 May 44; AWOL to drpd fr rolls of this
orgn per AR 615-300 as of 17 June 44

July 1944

7 - 12096274 Kallas, Edward Pvt AWOL to dy as of
2200 hrs 5 July 44 (Prev drpd fr rolls of this
orgn as AWOL) (R. 7; Ex. A).

An extract copy of the morning report of Company I, 351st Infantry, introduced in evidence without objection, contained the following entries

"August 1944

14 - 12096274, Kallas, Edward Pvt Dy to AWOL as of
24 July 44

24 - 12096274 Kallas, Edward Pvt AWOL to drpd fr
rolls of this orgn per AR 615-300 as of 24 Aug 44" (R. 9; Ex. B).

It was stipulated that accused was apprehended at Rome, Italy, on 5

July 1944 and further that accused was again apprehended at Rome, Italy, on 23 August 1944 (R. 10; Ex. C).

Accused elected to remain silent (R. 10).

4. It thus appears from uncontradicted evidence that at the place and time alleged in Specification 1, accused absented himself from his organization without proper leave and remained unauthorizedly absent for more than a month and a half and until he was apprehended at Rome, Italy.

It further appears from uncontroverted evidence that at the place and time alleged in Specification 2, accused absented himself from his organization without proper leave and remained unauthorizedly absent for a month and until he was again apprehended at Rome, Italy.

As to each Specification, an intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence, the manner of its termination in each instance, from his failure on each occasion 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 accused's absences were such that an intention to avoid hazardous duty was also inferable. The court was warranted in finding accused guilty as charged.

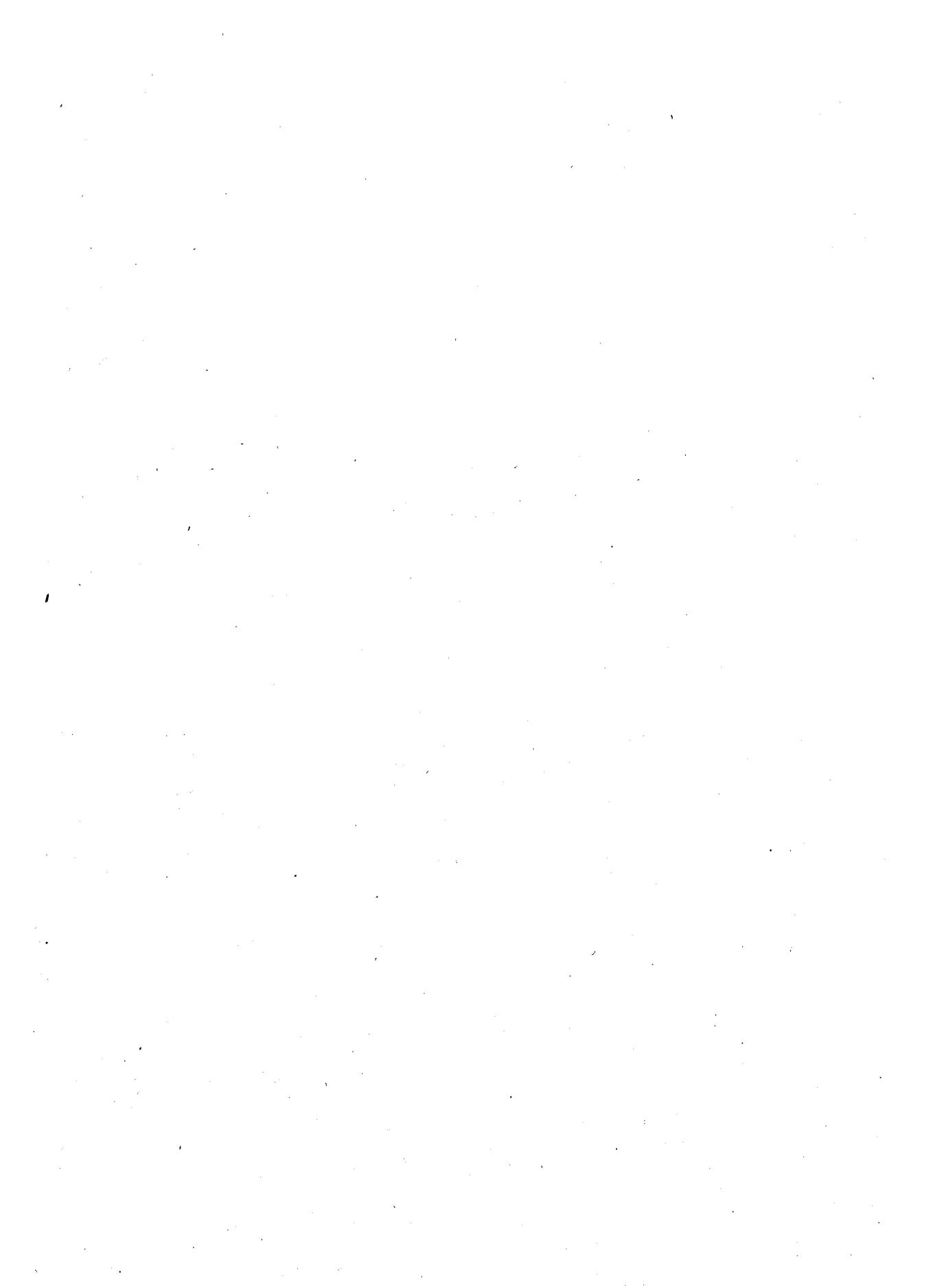
5. Attached to the record of trial is a report of a psychiatric examination of accused, dated 13 November 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 23 year-old, poorly motivated individual. This soldier has had no combat and is of poor combat material. He is below average in intelligence, having spent 10 years in the first four years of school."

6. The charge sheet shows that accused is 21 years of age, that he enlisted in the Army 6 July 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.

Malvin R. Farn, Judge Advocate.
George O. Wilson, Judge Advocate.
Henry C. Klinek, Judge Advocate.



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

APO 512, U. S. Army,
 2 March 1945.

MTO 4977

Board of Review

U N I T E D S T A T E S)	34TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private VIRGIL EMORY)	APO 34, U. S. Army, 1 December
(34 721 653), Company C,)	1944.
135th Infantry Regiment.)	Dishonorable discharge, suspended,
)	and confinement for 15 years.
)	MTOUSA Disciplinary Training
)	Center.

OPINION by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

Original examination by Sessions

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

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

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

Specification: In that Private Virgil Emory, Company "C", 135th Infantry Regiment, did, in the vicinity of Monzuno, Italy, on or about 11 October 1944, misbehave himself before the enemy by failing to rejoin his company, then engaged with the enemy, when under a duty to do so.

CHARGE II: Violation of the 69th Article of War.
 (Nolle prosequi.)

Specification: (Nolle prosequi.)

A nolle prosequi was entered with respect to Charge II and its Specification. He pleaded not guilty to and was found guilty of Charge I and its Specification. 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 at such place as the reviewing authority might direct for 15 years, three-fourths of the members of the court present concurring in the sentence. The reviewing authority approved the sentence, directed its execution but suspended execution until the soldier's release from confinement of that portion thereof adjudging dishonorable discharge and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders No. 52, Headquarters 34th Infantry Division, 6 January 1945.

3. The evidence shows that on 10 October 1944, at Bruscoli, Italy, Lieutenant Colonel Charles P. Greyer, Infantry, Executive Officer of the 135th Infantry Regiment, directed that members of a group of enlisted men, including accused, be returned to their organizations, units of the regiment, which were then engaged in combat with the enemy in the vicinity of Monzuno, Italy (R. 6,7). All of the men were under guard (R. 12) and according to the records of accused's unit, Company C, accused was in a status of confinement in the regimental stockade at Rosignano, Italy (R. 9). Lieutenant Colonel Greyer talked to the men individually, told them they were being returned to their organizations which were in combat, that they were needed there and that he was "ordering each one back to fight with their companies" (R. 7). He told accused his sentence would be suspended and he would be on a full duty status upon his return to his company (R. 13).

Following the remarks by Lieutenant Colonel Greyer the group of men, including accused, was returned under guard to the stockade about three or four miles distant from the place where the instructions were given them, for the purpose of procuring their arms and equipment and to await transportation under guard to their respective companies (R. 7-9,12,13). Transportation was later furnished over a period of two or three days for the purpose indicated (R. 7,8). In response to a question as to whether accused had authority, had he desired to do so, to leave the stockade and return to his company with or without transportation, the officer testified: "No, he could not have, he was to be returned to his Company under guard to be sure he would get to his Company". The officer also testified that the men were not to be released from confinement until they had actually rejoined their companies and receipts for them had been obtained by their guards. (R. 12)

On 11 October accused escaped from confinement while still under guard and disappeared (R. 12,13). He did not return to his company (R. 9) although his first sergeant had received official notice that he would be returned (R. 9,10). He would have been returned under guard had he not escaped (R. 12).

Long range enemy artillery fire "had been" falling in the vicinity of the place where Lieutenant Colonel Greyer's instructions were given to accused (R. 7).

Accused made an unsworn statement that he had received only two years primary education, that he had joined the 34th Infantry Division on 10 January 1944 and had suffered from "trench feet" for about 30 days as a result of service at Cassino, Italy, and that he "was at Anzio". It was stipulated at the request of the defense that a named psychiatrist, if present, would testify that on examination he had found accused of border-line intelligence (mental age about ten years) and was "more liable to give in to normal battle fears". (R. 11)

4. The gist of the offense charged was the alleged failure of accused, while before the enemy, to rejoin his company when under a duty to do so. The evidence sufficiently shows that accused did not on the date alleged in the specification or at about that time rejoin his company which was then engaged in combat. The proof wholly fails to establish, however, that accused was in fact under a duty to rejoin his company as alleged. On the contrary the testimony affirmatively shows that accused was at the time of his alleged offense in a status of confinement, that he was in restraint under guard, that he had been told he would be returned to his company under guard and that he did not have authority, on his own volition, to return to his company. At the time of his escape from confinement and thereafter his place of duty was not in his company but in the stockade where he had been confined. Had he gone to his company following his escape he would have further violated the specific orders given him. Because of the failure in proof as to accused's duty to rejoin his company the conviction must fall.

After the findings had been reached the president of the court stated:

"For the record I would like to state that the courts' decision as to the guilt of the accused in this case is based along these lines. The members feel that evidence to the effect that the accused escaped confinement after being notified that he would be taken from the stockade under guard to rejoin his Company in combat can be reasonably construed as a wilful failure on the part of the accused to rejoin his Company." (R. 14)

The court was conscious of the deficiency in proof but concluded that the escape of accused following the instructions given him was misbehavior so closely related to the alleged failure to rejoin his company and so clearly evidencing an intention not to rejoin, that a finding of a violation of a duty to return was legally justified. The escape was, in fact, related to the alleged failure to rejoin for the escape effectively obstructed compliance with the command for accused's return to his company in the manner directed, but the escape by accused did not in itself amount to failure to rejoin his company, and the wrongfulness of the escape did not relieve accused of the obligation imposed upon him to return to his company only as directed, namely, via the stockade and under guard.

It is equally clear that the escape evidenced an intention on the part of accused not to return to his company in the manner directed and an intention, no doubt, to avoid the hazards of combat, but a person cannot be punished for his intention or state of mind alone. Misbehavior before the enemy imports a wrongful act or omission. As appears above accused's omission to rejoin his company was not wrongful for it was his duty to remain in and to return to the stockade pending his return under guard to his company.

Accused's escape with intention to avoid combat may have amounted to desertion as defined by Article of War 28 or to obstruction of orders in violation of Article of War 96. If in fact the escape occurred in the presence of the enemy it may of itself have amounted to misbehavior before the enemy within the purview of Article of War 75. But the facts constituting none of these offenses were charged or found, and the record demonstrates that the court did not intend to find any such offenses. Since no one of these offenses is identical with or included in the specific misbehavior alleged, a finding of guilty of desertion, obstruction of orders or misbehavior through escape, even had the court intended such a finding, would be in fatal variance with the allegations (NCM, 1928, par. 78c). It has been authoritatively held that where an accused is charged with specific acts of misbehavior before the enemy he cannot legally be found guilty of other and distinct acts of misbehavior (Dig. Op. JAG, 1912-40, sec. 433 (4)).

It follows that the evidence is not legally sufficient to support the findings of guilty.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Edward K. Morris, Judge Advocate.
James G. Finn, Judge Advocate.
Henry C. Reavis, Judge Advocate.

MTO 4977

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
 2 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50½ the record of trial by general court-martial in the case of Private Virgil Emory, 34 721 653, Company C, 135th Infantry Regiment, together with the opinion of the Board of Review that

MTO 4977, 1st Ind.
2 March 1945 (Continued).

the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings of guilty and the sentence be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.



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

2 Incls.
Incl. 1 - Form of Action
Incl. 2 - Record of Trial

(Findings and sentence vacated. GCMO 41, MTO, 12 Mar 1945)



(57)

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

APO 512, U. S. Army,
12 February 1945.

Board of Review

MTO 5009

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

v.

Private LYLE E. DAILEY
(33 410 886), Company B,
351st Infantry.

88TH INFANTRY DIVISION

Trial by G.C.M., convened at
Frassinetta, Italy, 7 December
1944.
Dishonorable discharge and
confinement for life.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.

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 Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Lyle E. Dailey, Company B, 351st Infantry, did, in the vicinity of Piedemonte D'Alife, Italy, on or about March 2, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of Baranello, Italy, on or about May 28, 1944.

Specification 2: In that Private Lyle E. Dailey, Company B, 351st Infantry, did, in the vicinity of Sezze, Italy, on or about May 31, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of Campobasso, Italy, on or about October 28, 1944.

(58)

He pleaded not guilty to and was found guilty of the Charge and both Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, all members of the court present concurring. The reviewing authority approved the sentence, 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 2 March 1944, at Piedemonte D'Alife, Italy, Company B, 351st Infantry, of which accused was a member, was in training and the members of the company had been alerted to move up on the line the "next morning" (R. 5,6,8,9). The company went into the lines on about 7 March (1944) at Minturno (Italy), and from that date to 28 October (1944) the company was in combat about 133 days (R. 6,8).

A soldier of accused's company testified that on 2 March 1944 accused entered his tent and asked to borrow his flashlight and said "he (accused) was going to get some clothes he left at an Italian house in town". Witness further testified that he had not seen accused since that date until "today", and that witness had been in the company area every day since 2 March 1944, with the exception of one period of five days. (R. 5,6) A staff sergeant of accused's company, who was present when accused borrowed the flashlight on the night of 2 March 1944, testified that "we were told we were on the alert and would be leaving on 24 hour notice", that he made a check of the area that night and accused was not present and was not present in the company area from 2 March (1944) to 17 June (1944), when witness went to the hospital. As far as witness knew accused did not have permission to be absent from 2 March (1944) to 28 May 1944 (R. 7,8).

The company clerk of accused's company testified that about 2 March 1944 the company was alerted for front-line duty and that no passes were issued on that date. Accused was not present with the company from 2 March 1944 to 30 May 1944 and did not have permission to be absent during that time. Witness further testified that on 31 May (1944) he saw the 88th Division "MP's" bring accused in and turn him over to the Service Company, near Sezze, Italy, and that accused was to go up to his company with four other men, all of whom had rifles. The men left and "were supposed" to be going to the company. Witness was present with the company from 31 May (1944) to 28 October (1944) and accused was not present for duty during that period. He did not have permission to be absent. (R. 9)

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"Company B

March 1944

3 - 33410886 Dailey, Lyle E. Pvt Dy to AWOL as of
0600 hrs 2 Mar 44

351st Infantry

June 1944

- 13 - 33410886 Dailey, Lyle E. Pvt AWOL to dy as of
30 May 44
13 - 33410886 Dailey, Lyle E. Pvt Dy to AWOL as of
31 May 44" (R. 10; Ex. A).

It was stipulated that accused was apprehended in the vicinity of Baranello, Italy, on or about 28 May 1944, and further that he was apprehended again in the vicinity of Campobasso, Italy, on or about 28 October 1944 (R. 10; Ex. B).

Accused elected to make the following unsworn statement through his counsel:

"I went awol at a place called Piedemonte D'Alife, Italy, I crossed the river and went into town about four in the afternoon. I tried to return to my company about midnight but the river had risen and it was even impossible for trucks to get across. After waiting so long to get across, the other boy with me said it was no use to go back now as we would only get six months for it anyhow. This man had been court-martialed before, so I thought he knew. I followed him. I wanted to turn myself in all the time but didn't have enough will power. I thought of my family and friends and what they would think. All I want is a chance to go back to the front and do my part and prove that I have something good in me. I would like a chance to fight. I couldn't go home and have them ask me what I did for my country" (R. 10).

4. It thus appears from uncontroverted evidence that at the place and time alleged in each Specification, accused absented himself from his organization without proper leave and remained unauthorizedly absent until he was apprehended almost three months after his first absence in the vicinity of Baranello, Italy, and again apprehended about five months after his second absence in the vicinity of Campobasso, Italy. As to each Specification, an intention to remain permanently absent may be inferred from his prolonged respective absences, his failure to surrender to military authority while in the vicinity of numerous military installations in this active theater of operations, the fact that he was apprehended on both occasions, and from other circumstances in evidence (MCM, 1928, par. 130a). Moreover, the circumstances of accused's respective initial absences, were such that as to each an intention to avoid hazardous duty was also inferable. The weight to be given accused's unsworn statement through his counsel was for the court, which 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 6 December 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 21 year-old with an 11th grade education. He displayed

a transient irresponsibility in the commitment of his offense. However, a condition of anticipatory anxiety reduced his wilful control in adhering to the right. The underlying motivation for his flight was to escape the imminent threat of battle, in hope that punishment would not be too severe, however, severe enough to keep from combat duty. He fully realized the consequences of his choice. He is of no value in the combat situation."

6. The charge sheet shows that accused is about 21 years of age, was inducted into the Army 1 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.

Elliott H. 1217215, Judge Advocate.
Jeffries O. Brown, Judge Advocate.
Henry C. Russell, Judge Advocate.

(61)

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

APO 512, U. S. Army,
29 January 1945.

Board of Review

MTO 5011

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private CHARLES T. JARLOCK)	Frassineta, Italy, 8 December
(20 631 956), Service Company,)	1944.
351st Infantry.)	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 Charles T. Jarlock, Service Company, 351st Infantry, did, in the vicinity of Carinola, Italy, on or about May 12, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy, on or about November 26, 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, all members of the court present concurring. The reviewing authority

approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 11 May 1944, Service Company, 351st Infantry, of which accused was a member, was at Minturno (Italy), about 18 miles from the front lines. The 88th Infantry Division, including the 351st Infantry Regiment, launched an attack against the enemy (Germans) on the date mentioned, and on the following day was "pushing -- in the attack". From 12 May 1944 to 26 November 1944, the 351st Infantry Regiment was engaged in almost continual firing and was within enemy artillery range and under enemy artillery fire most of the time. (R. 6-8)

The first sergeant of accused's company testified that all the men in Service Company knew the "push" was scheduled to begin on the evening of 11 May 1944. Accused was on detail at the recreation tent. The following day witness saw accused in the vicinity of Carinola, Italy (about eight miles from Minturno), and directed him to return to his organization immediately. Witness testified further that when he returned to the company he could not locate accused and that accused had not been with the company since 12 May 1944. (R. 7,8) Witness testified further that accused, with other soldiers, had been turned over to him as excess "T/O strength" to Service Company and that he explained to the group, including accused, that they were front line replacements and were restricted to the area (R. 8,9).

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"May 1944

13 - 20631956 Jarlock, Charles T. Pvt Dy to AWOL
as of 1800 hrs 12 May 44

December 1944

3 - 20631956 Jarlock, Charles T. Pvt Fr AWOL to
abs in hands of mil auth Rome, Italy as of 1400
hrs 26 Nov 44; fr abs in hands of mil auth Rome,
Italy to conf Regt Stockade as of 3 Dec 44"
(R. 9; Ex. A).

It was stipulated that accused was apprehended at Rome, Italy, on or about 26 November 1944 (R. 9; Ex. B).

Accused elected to remain silent (R. 9).

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, over six months later. An intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence, from 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 10 December 1944, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 25 year-old with 9 years of schooling, oriented as to time, place, and person. He has been subject to alcoholic addiction; 'can't get away from it when troubled' and manifest insecurity traits in his personality make-up. He absented himself from his organization and remained away because of fear of penalty in his possible transfer to a front-line unit. He is of questionable combat value."

6. The charge sheet shows that accused is 25 years of age, that he enlisted in the Army 21 August 1939 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.

Maurice P. Linn, 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,
 24 February 1945.

Board of Review

MTO 5033

U N I T E D S T A T E S)	91ST INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Privates JAMES J. SIVILS)	Monghidoro, Italy, 8 January
(38 564 012), Company G,)	1945.
DONALD W. NESBITT (17 160 514))	As to each accused: Dishonorable
and CLAUDE R. WILLIAMS)	discharge and confinement for
(34 378 750), both of Company)	life.
L, all of 363d Infantry.)	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 were tried jointly upon the following Charge and Specification:

CHARGE: Violation of the 66th Article of War.

Specification: In that Private Claude R. Williams, Company L, 363rd Infantry, Private Donald W. Nesbitt, Company L, 363rd Infantry and Private James J. Sivils, Company G, 363rd Infantry, being garrison prisoners under sentences of confinement at hard labor, did, at Monghidoro, Italy, on 30 December, 1944 jointly, each acting in concert with the other, cause and participate in a mutiny by persistently and concertedly refusing to perform labor in the repair of roads, in defiance of the lawful orders of First Lieutenant Arber Johnson, 91st Infantry Division, their superior officer, all with the intent to subvert for the time being lawful military authority.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by special courts-martial, one for failure to obey a lawful order of a noncommissioned officer to fall out with his rifle in violation of Article of War 69 (65 or 96) and one for absence without leave in violation of Article of War 61, was introduced as to Williams; evidence of one previous conviction by special court-martial for misbehavior before the enemy by refusing to advance with his command when so ordered in violation of Article of War 75, was introduced as to Nesbitt; and evidence of one previous conviction by special court-martial for absence without leave in violation of Article of War 61, was introduced as to Sivils. Each 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 as to each 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 the morning of 29 December 1944, 28 prisoners, including the three accused who were garrison prisoners, were in confinement at the 91st Infantry Division Stockade at Monghidoro, Italy. On that morning four prisoners were "kept in *** for a wood detail" and the remaining 24 were assigned to work on a road with Company B, 316th Engineers. (R. 8) The road was in the vicinity of Barbarolo and on "the first day" there was a considerable amount of shelling by the enemy (R. 14). On the morning of 29 December the men on the wood detail went to work but First Lieutenant Arber Johnson, prison officer, 91st Infantry Division, was informed by his detail sergeant that some of the men assigned to the road detail refused to go to work (R. 9). Lieutenant Johnson went to the stockade accompanied by Second Lieutenant John Sullivan, 91st Military Police Platoon, 91st Infantry Division, who had been sent to assist the former in setting up the stockade (R. 9,12). Lieutenant Sullivan told the prisoners that

"during the time they were our prisoners there they were going to work and we would see that they did work. And if they didn't work they would have to suffer whatever consequences might arise."

Lieutenant Johnson directed Lieutenant Sullivan to order the men to go to work and the latter said "I am now giving you an order to go out and go to work. I'm asking you individually if you intend to obey that order". (R. 12) The roll was then called and 15 men, including the three accused and a prisoner named Nazelrod, refused to go to work. A guard was placed in the stockade and the 15 prisoners were left therein. (R. 8,12) Of the 24 men assigned to the road detail, 18 had worked on the road the previous day (on 28 December), and the remaining six were new prisoners who arrived at the stockade on that date (R. 8).

During the afternoon of 29 December, the Commanding General, 91st Infantry Division, visited the stockade and the 15 prisoners were "lined

up" (R. 13). The commanding general read to them the 66th Article of War and the "proof that was required according to that manual". He then asked each of the 15 prisoners individually if he understood what he (the general) "had told them". Each man, including the three accused, replied in the affirmative. The commanding general then "repeated over again to make sure they understood", and stated that if the men persisted in their conduct they would be punished. (R. 10) He further stated that "there was a possibility there might be a death sentence" (R. 11), that he did not believe the men realized what they were doing (R. 9), and that if they did, "they wouldn't do it" (R. 9,10). They "owed it to their country, their families and to themselves to do their duty in the United States Army" (R. 10). He gave the prisoners "the rest of the afternoon to think over what they had done" and said that if they went to work the following morning "that would be the end of the whole situation" (R. 13).

On 29 December Privates Donald J. Farmer, Company K, Raymond Scheffler, Company C, and J. D. Bailey, Company L, all of the 363d Infantry, garrison prisoners who lived in the same tent with the three accused, went to work (R. 15,18,27,28). Enemy shell fire fell that day in the vicinity of the road (R. 18). After the commanding general's speech Hazelrod, one of the 15 prisoners who refused to go with the road detail (R. 20,21), went to the tent occupied by the three accused and talked with them about the situation during the rest of the afternoon, for about two and a half hours. They discussed the general's speech, "deciding whether we would up or not" (R. 21). No man would say whether he would go to work and each said "he had all afternoon and night to think it over and until eight o'clock the next morning" (R. 22). After supper Farmer, Scheffler and Bailey joined the three accused and Hazelrod in the tent and the discussion was continued by these men for three or four hours (R. 16,22,24,25,28). Farmer, Scheffler and Bailey told the three accused and Hazelrod that "It wasn't bad up there, that we were working behind a high bank, *** that we were in a pretty good spot" (R. 18). They tried to persuade the four men "to go back up" (R. 22). Hazelrod did not make a decision but said he thought he should comply (R. 24). The three accused did not do much talking (R. 18,23) and when questioned by the others "none of them would say whether they were going up or not" (R. 24), but said "they wouldn't know until the next morning, as he (the commanding general) had given them until the next morning to make up their minds." (R. 28) They repeatedly expressed indecision (R. 24).

Farmer testified that neither accused had much to say (R. 16,17). Sivils was uncommunicative (R. 18) and "just read books, sat around writing letters, didn't say too much" (R. 17). Williams appeared to be calm and Nesbitt, who seemed worried (R. 17,18), said that he had until the following morning to make up his mind (R. 16). Hazelrod testified that he did not hear Williams say anything, that Nesbitt and Sivils did not do much talking and had not made up their minds (R. 22,23). According to Scheffler, Sivils said nothing or very little and Nesbitt, who appeared to be the calmest of the three accused, took part in the discussion but witness did not remember what Nesbitt said. Williams appeared to be "a little talkative" and said something about the commanding general's remarks, but did not talk.

much. Witness testified the three accused did not appear to know what they would do and would not say whether they were going to go forward. (R. 24,25) Witness testified:

"Since they had been under artillery fire they did not seem to think it was such a serious offense to refuse to go up. Even though the General had told them they could not believe it. They had gone up once before and had been under artillery fire as I understand it, and didn't want to go up again. Apparently they figured it was like that all the time" (R. 26).

On the whole the three accused were rather quiet. In witness' opinion they understood what mutiny was. (R. 26) Witness did not believe accused made any contact with the other men who refused to go to work. "They merely said they wondered what the rest would do and figured how many would stay back and go up, etc." (R. 27). Bailey testified that the occupants of the tent went to bed at 2100 hours after discussing the matter at intervals from 1700 hours (R. 28). Nesbitt told what the commanding general had said, and each accused remarked that mutiny "was what they were trying to put on the guys who refused to go up front under artillery fire". Sivils was unable to make up his mind. Witness did not hear any of accused attempt to persuade anyone else not to go to the front the next day. (R. 29)

On the morning of 30 December the three accused refused to go to work, and Lieutenants Johnson and Sullivan went to the stockade. Lieutenant Johnson first talked to Williams, urged him to go to work, and attempted to impress upon him the seriousness of refusal. (R. 9) Williams hesitated, "shifted around from foot to foot and said he just couldn't take it up there. He was afraid of the shell fire". He said he "could not go up". (R. 14) Lieutenant Johnson then gave Williams a direct order to go to work and the latter, according to Lieutenant Johnson, replied "No, I won't go." (R. 9). Lieutenant Sullivan testified that Williams did not expressly refuse to comply but did not comply (R. 14). Lieutenant Johnson repeated the order to accused Nesbitt and Sivils each of whom flatly refused to go to work (R. 9,14). Accused stated that they "were afraid of the shell fire up there" (R. 10). Lieutenant Sullivan testified that a fourth man initially refused to go to work but "had a change of heart" (R. 13). The evidence indicated this soldier was Nazelrod (R. 13,24,37,38).

For the defense, Major Abraham L. Kauffman, Medical Corps, 91st Infantry Division psychiatrist, testified that he had examined Sivils who informed witness in a rather vague way of the charge against him (R. 30,31). A psychometric test disclosed that Sivils had a mental age of nine years which was below the standard laid down by the Army. In witness' opinion Sivils was aware that he had committed an offense for which he would be punished, but because of his rather low grade of intelligence and immature judgment and reasoning ability, despite the reading of the 66th Article of War, did not fully comprehend the seriousness and consequences of the alleged offense. Witness sensibly doubted if Sivils understood the meaning

of mutiny. It was Major Kauffman's further opinion that Sivils could distinguish between right and wrong and that "Generally speaking" he could adhere to the right. Witness also examined Nesbitt and Williams and believed that both were also able to distinguish right from wrong and to adhere to the right. (R. 32-34)

Nesbitt testified that he joined the 91st Infantry Division 15 November 1942, went into combat 4 July 1944 and was confined in the stockade on 2 November (R. 35). He worked with the road detail on 28 December and the enemy "kept putting in artillery". Some of the shells landed from 300 to 400 yards away from the men. (R. 36,37) The following day 15 out of 18 men who worked on the road 28 December, including the three accused, refused to go back on the road. The three accused also refused to go on 30 December. Witness refused to work 30 December because the "artillery shells drive me about half nuts and I would rather not do any more time under it". He did not understand, after hearing the commanding general's speech, that if the men individually refused to go to the front, it constituted mutiny. He did not try to persuade anyone else not to go because the commanding general said that "if they found a ringleader among us" the man should be shot, so "the men didn't mention it". (R. 37) Witness did not tell Williams or Sivils what witness would do the following morning, nor did they tell him what action they would take. When one accused was asked by the others what he intended to do, he replied he did not know. No one decided on the night of 29 December what he would do the following morning nor did anyone state, upon arising the morning of 30 December, whether he had made up his mind. Witness had fully made up his own mind regardless of any action taken by the others, and would not have gone on the detail had all the others decided to do so. The commanding general had told the men that actions such as those taken would constitute mutiny, that they would not be punished if they went to work but that if they refused, they would be punished. (R. 37-39)

Williams and Sivils elected to remain silent (R. 40).

4. It thus appears from the evidence that on the morning of 29 December 1944 at the 91st Infantry Division Stockade at Monghidoro, Italy, the three accused, Hazelrod and 11 other garrison prisoners refused to go to work with the road detail. Each man was individually ordered to go to work and each refused. That afternoon the Commanding General of the 91st Infantry Division spoke to the men, read and explained to them the 66th Article of War concerning the offense of mutiny, and asked each man individually if he understood. After each replied in the affirmative the officer repeated his explanations, told the men that they would be punished if they persisted in their conduct and gave them the remainder of the afternoon to consider their conduct. He further stated that if they went to work the following morning "that would be the end of the situation". Hazelrod and the three accused discussed the remarks and the situation the rest of the afternoon and they, together with their tentmates Farmer, Scheffler and Bailey, who went to work with the road detail that day, continued the discussion for about four hours that evening in their tent. The following

morning the three accused again refused to go to work with the road detail when ordered to do so by Lieutenant Johnson. Each was again individually ordered to go to work and each refused to do so.

It was alleged in the Specification that the three accused

"did *** jointly, each acting in concert with the other, cause and participate in a mutiny by persistently and concertedly refusing to perform labor in the repair of roads, in defiance of the lawful orders of First Lieutenant Arber Johnson ***, their superior officer, all with the intent to subvert for the time being lawful military authority." (Underscoring supplied)

Mutiny is defined as "consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same ***" (Winthrop's, reprint, 1920, p. 578). It is stated in the Manual for Courts-Martial that:

"Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. ***

"The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent. ***

"The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others. The intent to create a mutiny or sedition may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances" (MCM, 1928, par. 136a).

"b. BEGINNING OR JOINING IN A MUTINY OR SEDITION

"Discussion.—See 136a. There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases" (MCM, 1928, par. 136b).

"c. CAUSING OR EXCITING A MUTINY OR SEDITION

"Discussion.--See 136a. As in 136b, no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities" (MCM, 1928, par. 136c).

In view of the foregoing authorities it is clear that the three accused jointly, each acting in concert with the other, caused and participated in a mutiny as alleged. On 29 December they and 12 other prisoners refused to go to work with the road detail, basing their refusal on the assertion that the vicinity in which the men worked was subject to enemy shell fire. Although no evidence was introduced as to the events which led up to such refusal by the 15 soldiers, considering the number of men involved and the fact that all at the same time suddenly refused on the same morning to go to work, it is reasonable to infer that their refusal was the direct result of concerted, if not preconcerted, action. Following the warning contained in the commanding general's speech, the three accused and their tentmate Nazelrod discussed the situation in the tent the remainder of the afternoon. There is testimony that no one of accused would then declare his intentions. The four men also thoroughly discussed the matter in the tent with their other three tentmates for about four hours that evening. Bailey, Farmer and Scheffler attempted to persuade the three accused to go to work the following day and assured them that it "wasn't bad up there, that we were working behind a high bank, *** that we were in a pretty good spot". Despite the efforts of Bailey, Farmer and Scheffler, and the assertion of Nazelrod that he thought he "would go back", the three accused together uniformly maintained a stubborn silence as to their intentions, refused to commit themselves, and said they would not know what they would do until the following morning. When they arose the next morning the three accused were also silent with respect to their impending actions. Later that morning Nazelrod and the other 11 men went to work but the three accused steadfastly refused to do so. Their stated reasons for their actions were identical, namely, fear of shell fire.

The actions of accused on 29 and 30 December disclose a most striking similarity of thought and behavior throughout the entire period, which bespeaks preconcert. Together they "stuck to their guns", and persistently and categorically refused to go to work with the road detail despite detailed explanations and express warnings given them with respect to the offense of mutiny. It may be inferred that each, by his remarks, demeanor and refusals, encouraged and tended to cause the others to engage in similar insubordination. Their conduct, under the circumstances in evidence, exhibited collective action, a "concert of insubordination", and a persistent and concerted refusal to obey orders with intent to subvert lawful military authority. The evidence furnished ample basis for the inference that the insubordination displayed was the result of a combination, an express or tacit understanding, to resist lawful military authority. The fact that the insubordination was concerted and involved a combination or agreement

was, like any other fact, susceptible of proof by circumstantial evidence (MCM, 1928, par. 136a). The overt act consisted in the concerted refusal to obey the order to go to work with the road detail on 30 December. It sufficiently appears that a mutiny occurred and that each accused caused and participated in the mutiny.

5. It appears from the evidence that the officer who appointed the court, the Commanding General, 91st Infantry Division, addressed the accused and other soldiers on 29 December in an effort to instruct them and prevent further insubordinate or mutinous conduct. It does not appear however that he originated, adopted or became responsible for the charges involving the acts of accused on the following day. He did not become the accuser.

6. The charge sheets show that Sivils is 19 years of age and was inducted 6 August 1943, that Nesbitt is 21 years of age and enlisted 7 November 1942, and that Williams is 23 years of age and was inducted 22 October 1942. 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. Confinement in a penitentiary is authorized by Article of War 42 for the offense of mutiny (participating in a mutiny). The offense of causing a mutiny, as found, is also recognized as an offense of a civil nature and is so punishable by penitentiary confinement for more than one year by Sections 9 and 13, Title 18, United States Code, and is therefore punishable by penitentiary confinement under Article of War 42. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentences.

Edward K. Kraske, Judge Advocate.
Walter G. Sonn, Judge Advocate.
Henry C. Reisch, Judge Advocate.

(73)

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

APO 512, U. S. Army,
13 February 1945.

Board of Review

MTO 5121

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private OTIS B. CREWS)	Naples, Italy, 26 September
(14 057 830), 3423d Quarter-)	1944.
master Truck Company.)	Death.

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 Otis B. Crews, 3423rd Quarter-master Truck Company, did, At or near No. 53 Via San Donato, Orto D'Atella, Italy, on or about 16 January 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Wilbur Bryant, (NMI); a human being, by shooting him with a US Army Pistol, Cal. . 45.

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 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 and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 16 January 1944 Raffaella del Prete resided at 53 Via San Donato, Orto D'Atella, Italy, where she operated a wine shop. On that date she "was sitting in front of the fireplace" when three colored soldiers opened the door, entered, and asked for "signorine, signorine". Two of the soldiers were short and one (accused) was tall. When the woman replied "we have no signorine here", the soldiers drank three glasses of wine which were on a mantelpiece in the room and asked for more. She told them that the wine "was all finished", became "very much afraid" when she "saw that they didn't want to leave the wineshop", and sent for the military police. (R. 22)

Corporal Milton K. Ziegler, Company E, 344th Engineer Regiment, formerly of the 2651st Military Police Company, testified that about 2000 hours that evening he was "on patrol" in the town with Private Wilbur Bryant (deceased) (R. 10-12,15). They were informed by a Mr. Della Corte, "the Italian interpreter who works out at the 553rd dump", that there were three colored soldiers in the wine shop who had not paid for "their drinks". Ziegler and Bryant went to the shop, knocked on the door and entered. (R. 10,14) Ziegler was unarmed (R. 13,17) and Bryant held a carbine, not on his shoulder but "on guard" and "in a ready position" (R. 14). The room, which was lighted by a small oil lamp, was "real smoky" and Ziegler, who operated his flashlight, observed accused standing by the fireplace and two other soldiers standing on the same side of the room to the right (R. 10,15). Witness said to accused "this Italian made a complaint you haven't paid for the drinks *** let's pay for them and that will be all that's said". Accused, who had his hand in the right hand breast pocket of his field jacket, "grabbed it like a man who would be cocking a gun or gripping it good". Bryant was then standing in the middle of the room "ready with the carbine". Ziegler told Bryant to "watch it" and then told the soldiers to raise their hands, that they were to be searched. (R. 10,13,15) At this moment accused took a quick, sizeable step to the left and fired several shots. Ziegler, who was standing almost in front of accused, saw the latter fire and dodged behind a counter for protection. Bryant fell to the floor and the three soldiers dashed from the room. Witness seized Bryant's carbine and was about to follow them when Bryant said "don't leave me Ziegler I'm hurt". Blood was dripping from his left chest. The room was immediately locked and witness took Bryant to the 262d Station Hospital at Aversa. (R. 10-13,15-17) Ziegler was the only man who spoke and he addressed all his remarks to accused. Bryant and the three other soldiers remained silent during the entire incident. Neither witness nor Bryant used abusive language toward the three soldiers and Bryant did not suggest to Ziegler that they refrain from arguing with the soldiers and that they kill them instead. Witness asked the soldiers "in a nice way" to pay for their drinks. (R. 13-15) He did not actually see the weapon when it was fired by accused but after the incident he found on the floor empty cartridges which "came from a .45 pistol" (R. 12,17). At the trial he identified accused as the soldier who fired the shots (R. 10,11).

Raffaella del Prete, owner of the wine shop, testified that after the military policemen entered the room they exchanged "two or three" words with the colored soldiers, during which interval the tallest of the three colored soldiers (accused) fired several shots through the pocket of his field jacket. Both military policemen "got to the ground" and the "other

"two" colored soldiers ran. The wounded military policeman (Bryant) was then taken to Aversa. Because it was dark the woman was unable to identify the soldier who fired the shots. Each of the three colored soldiers had one glass of wine in her shop and no payment therefor was offered or received. (R. 22,23)

Private First Class Davis Morris, 304th Quartermaster Railhead Company, one of the two soldiers who accompanied accused to the wine shop, testified that they bought "some drinks" therein and that payment was made for the wine consumed by the three men (R. 20,22). Thereafter, "an old man" left the shop and returned with two military policemen, one of whom "said we didn't pay for the stuff" (R. 20). When the military policemen entered and were speaking to accused, Morris was standing near the rear door and the two military policemen were on the other side of the room. Witness was unable to hear all the conversation but did hear the remark "we better search them and see what they got". (R. 21) Accused fired a shot and "we left then and went on back to camp". Witness believed accused fired one shot. (R. 20)

Sanso Giuseppe, No. 32 Via Alessio Mazzocchi, Naples (R. 32), was in the shop when the American military policemen entered and at a time when three American colored soldiers were asking for more wine. A "few words" were exchanged between the military policemen and the colored soldiers. (R. 33) The policemen talked to the soldiers "calmly, not threateningly" and did not threaten the latter by means of any motions. Giuseppe did not speak English and could not understand the conversation. (R. 34) The "taller" of the three colored soldiers (accused) "stepped back a few steps" and fired about six shots from within the pocket of his jacket. One of the military policemen fell to the ground saying "American assassin, American assassin". Giuseppe, who then ran from the room (R. 33), could not identify the three colored soldiers (R. 34).

On 16 January 1944 Captain Elsworth K. Stuckey, Medical Corps, 262d Station Hospital, examined Bryant who was admitted to the hospital as an emergency patient, and found that the latter had two gunshot wounds, situate in the chest and abdomen (R. 7). The patient was in a state of shock (R. 8), and when an operation was performed it was discovered that both the bowel and diaphragm were perforated (R. 9). As the result of an internal hemorrhage caused by gunshot wounds, Bryant died on 18 January 1944 about 2200 hours (R. 8). His body was formally identified on 19 January at the Allied Cemetery by Agent John Kritko, Provost Marshal General's Office (R. 35).

On 31 July 1944 Agent Bernard Lipinsky, Criminal Investigations Division, Peninsular Base Section, warned accused of his rights and thereafter took a statement made by the latter without compulsion or offer of any reward. The statement was identified by Lipinsky at the trial and admitted in evidence, the defense stating there was no objection thereto (R. 18,19; Ex. 1). As accused testified in substantial accord with this statement concerning the immediate circumstances surrounding the shooting,

the details of such statement are not set forth herein except as follows: He stated, in part, that when he left camp he had a .45 caliber automatic pistol in his pocket and that when he fired at deceased he pulled the weapon out of the pocket of his field jacket. He gave the woman "a dollar" for a bottle of wine and she gave him 60 lire in change. After he and his companions drank the contents of that bottle he ordered another and gave the woman "the rest of the change". When she offered him some change in return he told her to keep it. (Ex. 1)

For the defense Giuseppe (supra) testified that he observed three colored soldiers drinking in the shop on the evening in question and saw one of the soldiers give some money to the "winekeeper" who took the money in her hand. Witness did not know whether the woman kept the money or whether "she gave the change back". (R. 32)

Private Richard W. Coleman, 3423d Quartermaster Truck Company (R. 23), testified that on the evening in question he accompanied Morris and accused to the wine shop where they had "a few glasses of vino". After they finished drinking, accused paid for the drinks and the three men sat in the shop and were "doing nothing". (R. 24,26) An Italian left the shop and returned with two military policemen who "wanted to know why we hadn't paid for the vino we drank". Before this time no one had asked why no payment had been made for the wine. When accused said that he paid for the wine the military policemen said "the niggers are no good, let's shoot them". Because of the manner in which the military policemen were talking, Coleman believed that the policemen might shoot. Accused then fired about two shots, "both fellows fell in the corner", and witness ran from the room. (R. 24-26)

Accused, after being advised of his rights (R. 27), testified that on the date alleged he knocked on the door of the wine shop and asked a woman who came to the door if "we could get a drink of wine". The woman replied in the affirmative and motioned them to enter. "After we drank one bottle of wine we ordered some more. I paid for both of us". An elderly Italian left the shop and returned with two military policemen. (R. 28) At this time accused and his companions were "fixing to go". Because he thought there would be trouble if he and his companions left at that time, he said "if we go now they'll think we're up to something *** Let's stay". (R. 28, 30,31) The military policemen entered and said "this man said you got some wine from this woman and didn't pay her" (R. 28). Accused replied that he had paid for the wine, that he did not "have to beat them out of anything I got", and that the woman "standing there can tell you whether I paid" (R. 29). The military policeman without "the tommy gun" (Ziegler), then said "goddamnit shut up" and walked toward accused with "his hand on his hip". Accused asked Ziegler to ask the woman whether he (accused) paid for the wine and stated that if she replied in the negative he would pay her again as he did not "want to beat them out of anything". The military policeman "in the corner with the gun" (deceased), said "you got no business in these people's house, you don't go in white people's houses in the states". Accused again requested that the woman be asked if he paid for the wine and again renewed his offer to pay her once more if she replied in the negative.

At this moment deceased said "don't argue with these goddamn niggers, let's kill them". Deceased "snapped" the gun from his shoulder and accused heard the safety click. Accused "was almost afraid to death" and "thought my only chance was to try to beat him to the shot". He "didn't know no further than to shoot". Accordingly, accused fired. - (R. 29,30)

4. It thus appears from the evidence that Ziegler and Bryant entered the wine shop as the result of Corte's complaint to the effect that accused and his companions did not pay for the wine which they ordered. Accused admitted that he knew Ziegler and Bryant to be military policemen. Ziegler informed accused that Corte said accused and his companions had not paid for the wine, and said "let's pay for them and that will be all that's said". There is evidence that accused, who had his hand in the right hand pocket of his field jacket, "grabbed it like a man who would be cocking a gun or gripping it good". Ziegler immediately told Bryant, who was "ready with" his carbine, to "watch it", and then told the soldiers to raise their hands, that they were to be searched. At this moment accused quickly stepped to the left and fired. Bryant fell to the floor, wounded. He died two days later, from the effect of the wounds.

There is ample basis in the evidence for inferences that accused fired the fatal shots willfully, deliberately and with intention to kill. At the time of the shooting, Ziegler and Bryant were engaged in the performance of their duty as military policemen to prevent disorders and accused admittedly recognized them as such. The specific intent requisite to establish the offense of murder, malice aforethought, was abundantly evident as was indicated by accused's willful opposition by force to lawful authority, his deliberate, intentional and unlawful use of a deadly weapon in a deadly manner, and the certain knowledge that his act would in all probability result in the death of, or at least grievous bodily harm to, another person.

The evidence as to accused's claim of self-defense was conflicting. Ziegler testified that he spoke "in a nice way" to the soldiers and that neither he nor deceased used abusive language or threatened them. His testimony was corroborated by that of Giuseppe who testified that the military policemen spoke "calmly, not threateningly" to accused and his companions, and did not threaten them by any motions, although Bryant carried his weapon in readiness. Accused and Coleman testified that the military policemen threatened to kill them, and accused further testified that deceased quickly pulled his "Tommy gun" from his shoulder and that he (accused) heard the safety click. The question of the credibility of witnesses, as well as the question of fact as to whether accused acted in self-defense was for the determination of the court. The court was justified in concluding that no force was threatened or attempted by the military policemen which carried any immediate danger or threat of danger to accused, and that accused made no effort to retreat or otherwise avoid resort to use of his firearm. 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).

The Board is of the opinion that the findings of guilty of murder are supported by evidence that accused deliberately and without legal justification, shot and killed Bryant without legal provocation on the part of the latter. The circumstances exclude any theory of legal justification or excuse and the evidence is devoid of any matters of extenuation or mitigation (NATO 2880, Watson). The conflicting evidence as to whether accused actually paid for the wine was not a material issue.

5. The charge sheet shows that accused is 27 years of age, that he enlisted 10 July 1941, and had no prior service.

6. The papers accompanying the record of trial show that accused was not identified and apprehended until 30 July 1944. The trial took place on 26 September 1944.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Edward W. Kriegel, Judge Advocate.
Walter P. Dunn, Judge Advocate.
Henry C. Kenick, Judge Advocate.

(79)

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

APO 512, U. S. Army,
13 February 1945.

Board of Review

MTO 5121

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private OTIS B. CREWS)	Naples, Italy, 26 September
(14 057 830), 3423d Quarter-)	1944.
master Truck Company.)	Death.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward V. Kosak, Judge Advocate.

John F. Irion, Judge Advocate.

Henry C. Remick, Judge Advocate.

MTO 5121

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
13 February 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Otis B. Crews (14 057 830), 3423d Quarter-master Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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.

(80)

MTO 5121, 1st Ind.
13 February 1945 (Continued).

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

(MTO 5121).

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

(Sentence ordered executed. GCMO 28, MTO, 13 Feb 1945)

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

APO 512, U. S. Army,
 14 February 1945.

Board of Review

MTO 5151

U N I T E D S T A T E S)	91ST INFANTRY DIVISION
v.)	Trial by G.C.M., convened in
Private RALPH DANIELS)	the vicinity of Loiano, Italy,
(35 212 309), Cannon)	15 January 1945.
Company, 362d Infantry.)	Dishonorable discharge and
)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 64th Article of War.

Specification: In that Private Ralph Daniels, Cannon Company, 362nd Infantry Regiment, being a garrison prisoner under sentence of confinement at hard labor, having received a lawful command from First Lieutenant Arber Johnson, 91st Infantry Division, his superior officer, to wit, "Daniels, I order you to go to work repairing roads for the engineers", did at Monghidoro, Italy, on or about 11 January 1945 wilfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special courts-martial, one for attempting to kill Private First Class Richard York in violation of Article of War 96, and one for desertion with intent to avoid hazardous duty in violation of Article of War 58. 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 50 $\frac{1}{2}$.

3. The evidence shows that on 10 January 1945 accused was confined in the 91st Forward Division Stockade, Monghidoro, Italy, as a garrison prisoner under a sentence which included confinement at hard labor for six months. On the morning of 11 January First Lieutenant Arber Johnson, 91st Infantry Division, prison officer of the stockade, was informed that accused refused to go to work. Johnson then interviewed accused, asked him whether he was going to work, and the latter replied "'No, sir.'" Johnson then said "'Daniels I order you to go to work repairing roads for the Engineers'". Accused answered "'Sir, I won't go!'". When he was asked why he would not work, he replied that he did not mind working but that he refused to work under shell fire. Although Johnson talked with him "some more", accused persisted in his refusal to go to work. (R. 6,7,9-11) The work detail left without him (R. 7,12,13). Lieutenant Johnson had previously told accused that it was possible that the latter would be working under shell fire (R. 8), and accused had stated to the provost sergeant that he did not believe in killing anyone and that he "wasn't going up in front under shell fire" (R. 9,10). Lieutenant Johnson had previously heard shell fire in the vicinity of the work detail concerned, but none of the prisoners had ever been hit. The shell fire was no different than that experienced by the average engineer soldier who worked on the roads. (R. 8,11)

For the defense, accused testified that he had worked in coal mines since the age of 11 and that he had been in the Army about three years. He never went to school and could not read or write. He was in a camp for conscientious objectors in the United States. When he first entered the Army he "told them at Huntington, Virginia" that he did not "believe in killing, that I wasn't going to kill". He had never "been sworn in by the United States", and when he refused to take the oath at Fort Thomas, Kentucky, he was confined in the guard house for three weeks. He told his company commander in the United States that he would not fight and "They brought me on the boat a prisoner, with my hands handcuffed and my legs handcuffed together". (R. 14,17) He had been a conscientious objector during the time he had been in the Army (R. 15). He testified, "my draft board throwed me in on account of I wouldn't vote for the man on the draft board" (R. 17). He was a member of a cannon company (after his arrival overseas) and although his duty was to load a gun he never did so. Instead, "I hit for my hole". When "They would come to get me out of my fox hole *** I wouldn't get out". He did, however, assist in carrying ammunition. When asked by a lieutenant why he would not load the gun accused replied that he "wouldn't kill". (R. 15,16) He informed the sergeant of the cannon company that he did not believe in fighting and killing, that he "was not going up on the lines", and that he was going absent without leave "to keep from going up there". Although the sergeant replied that

he would be court-martialed and would receive a dishonorable discharge, accused went absent without leave, was convicted of desertion and was confined in the stockade. (R. 14,16) Before being sent to the stockade the judge advocate "at the lower 91st" told the men, including accused, that they would work under shell fire and that "some of us might get killed". Accused informed the judge advocate that he "was going to refuse". When the judge advocate told him he could be a litter bearer accused said "I wouldn't want to go through there with the dead. I would get killed". (R. 17) The prisoners in the stockade also told accused he would be working under shell fire (R. 16,17). He admitted that Lieutenant Johnson gave him a direct order "to go to work for the Engineers", that he replied that he "would refuse to go up under artillery", and that he did not in fact go to work. He further admitted that he had no understanding that he would be killing anyone when on the road. (R. 15) He had been on that road before but had never seen shells there "except one time, when we were at the Service Company, they threwed four or five shells in. I took off. That is when I went AWOL again" (R. 16).

Major Abraham L. Kauffman, Medical Corps, psychiatrist of the 91st Division, a witness for the court, testified that in his official capacity he saw accused on three occasions. Accused was not insane, had no medical or psychotic illness which would prevent him from cooperating in his defense and was mentally and legally responsible "to answer any charges that might be brought before him". (R. 18) He was "rather a stubborn individual, not too much endowed with cerebral goods" and the standard of his intelligence was 11 years, which was one year above the mental age of ten years, the Army minimum standard. When asked by Major Kauffman if he would like to be a litter bearer, accused replied in the negative, that "it was too dangerous". (R. 19)

4. It thus appears from the uncontradicted evidence that at the time and place alleged accused, a garrison prisoner, under a sentence which included confinement at hard labor, received a command from First Lieutenant Arber Johnson "to go to work repairing roads for the Engineers'", that accused replied "'Sir, I won't go'" and thereafter persisted in his refusal to obey the order. Lieutenant Johnson was prison officer of the stockade and accused's superior officer. The command was legal and proper and called for instant obedience. The circumstances clearly disclose an intentional defiance of authority as contemplated by Article of War 64 (NATO 2959, Nicholson). Accused's contention that he was a conscientious objector did not constitute a defense. There is no evidence that he was entitled to exemption from military service and the legality of his induction is presumed. Moreover, it was plainly indicated by the evidence, including his own testimony, that his refusal to obey Lieutenant Johnson's order was not the result of the scruples of a conscientious objector but the result of sheer cowardice. He admitted that he had no understanding that the work on the road involved his killing anyone. Once before when on the road, he "took off" when shells landed in his vicinity. He refused to be a litter bearer because "it was too dangerous" and he feared he "would get killed". When in the cannon company he never loaded his gun but "hit for

my hole" instead and refused to leave his foxhole. He went absent without leave from the cannon company with the announced purpose of avoiding going to the front lines, and was convicted of desertion.

5. The charge sheet shows that accused is 30 years of age, was inducted 16 September 1941, and had no prior service.

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

Edward W. Kriegel, Judge Advocate.
Major R. P. Brown, Judge Advocate.
Henry C. Glavin, Judge Advocate.

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

APO 512, U. S. Army,
7 May 1945.

Board of Review

MTO 5229-

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

v.

Technical Sergeant JAMES L.
REYNOLDS (35 010 227), Sergeant
JAMES BLAND (34 404 889),
Privates First Class JAMES
NORRIS (34 482 460), BENJAMIN
CAPELL (34 228 100), CLARENCE
CEPHAS (33 007 478), JOSEPH
YOUNG (16 096 728), EARNEST
BROWN, JR. (34 126 633), CARL
H. CORSEY (33 384 117), RAYMOND
BROWN (14 122 367), and Private
ALFRED DORSEY (33 731 456), all
of Company L, 370th Infantry
Regiment.

92D INFANTRY DIVISION

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 6 January 1945.
As to each accused: Dishonor-
able discharge, suspended, and
confinement for 20 years.
MTOUSA Disciplinary Training
Center.

OPINION by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

Original Examination by Hughston, Judge Advocate.

1. The record of trial in the case of the soldiers named above, having been examined in the Branch Office of The Judge Advocate General with the Mediterranean Theater of Operations, U. S. Army, and there found legally insufficient to support the findings and sentences, has been examined by the Board of Review and the Board of Review submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

2. Accused were tried in common upon separate Charges and Specifications. The Charge and Specification pertaining to each accused was as follows:

CHARGE: Violation of the 75th Article of War.

Specification: In that * * *, Company "L", 370th Infantry, did, at Sommacolonia, Italy, on or about 17 November 1944, misbehave himself before the enemy by refusing to advance with the third platoon, which, with accused, had then been ordered forward by Captain Clarence H. Brown, Jr., on a combat patrol or mission against the enemy, whose forces the command was then opposing.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification 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 for 70 years, three-fourths of the members of the court present concurring. As to each accused the reviewing authority approved the sentence, reduced the period of confinement to 20 years, ordered execution of the sentence as thus modified but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the MTOUSA Disciplinary Training Center as the place of confinement. The proceedings were published in General Court-Martial Orders Nos. 5 (Reynolds), 6 (Bland), 7 (Norris), 8 (Capell), 9 (Dorsey), 10 (Cephas), 11 (Young), 12 (Earnest Brown, Jr.), 13 (Corsey), and 14 (Raymond Brown), Headquarters 92d Infantry Division, 16 January 1945.

3. Because of the position which must be taken by the Board of Review in the case with respect to the legal constitution of the court-martial as will hereinafter appear, the evidence is not summarized or discussed.

4. The following transpired at the trial before arraignment:

"PROSECUTION TO ACCUSED: You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.

"DEFENSE: Sgt Bland desires to peremptorily challenge Maj Frederick R. Krug. Pfc Norris desires to peremptorily challenge Col Gasiorowski.

"PRESIDENT: The two members challenged will be excused.

"TRIAL JUDGE ADVOCATE: By command of the appointing authority, the accused in this case are ordered before a joint trial. Now, does the accused wish to exercise his right, or their right, to one peremptory challenge against any member except the law member?

"DEFENSE: The accused desire to peremptorily challenge Maj Frederick R. Krug, sir.

"PRESIDENT: Maj Krug will be excused.

"(Maj Frederick R. Krug, the challenged member, thereupon

withdrew from the courtroom.)

"TRIAL JUDGE ADVOCATE: Do the accused desire to challenge any member of the court for cause?

"DEFENSE: The accused do not, sir.

"The accused were then asked if they objected to any other member present, to which they replied in the negative" (R. 3,4).

It is not affirmatively shown in the record of trial that Colonel Gasiorowski, challenged by accused Norris, withdrew from the court when challenged and ordered excused. The sequence of events, together with the statements by the trial judge advocate, defense counsel, and president of the court, show beyond question that this officer did in fact sit as a member of the court which tried accused.

5. The similar Charges and Specifications upon which accused were tried did not contain any allegation of joint action on their part. Regardless of the declaration by the trial judge advocate that "By command of the appointing authority" accused were "ordered before a joint trial", the trial was in all respects common and not joint, that is, it was not a trial of the several accused upon charges of an offense alleged to have been committed jointly. Even assuming that he intended to do so, the appointing authority was without legal power to transform by fiat a common trial into a joint one, without amendment of the charges to allege a joint offense. Had the evidence justified it the Charges here might possibly have been amended to allege the joint but distinct offense of mutiny. The offense of "refusing" to advance with which each accused was charged was an individual act and was not, in fact, susceptible of joint commission in the absence of a mutinous element (See MCM, 1928, 5th subpar. of par. 27), and charges of joint action in committing this particular offense would have been legally inappropriate. No amendment of the Charges was ordered or made.

No accused objected to being tried in common with the others, and all, therefore, may be presumed to have consented thereto. However, each was entitled to be accorded every right and privilege to which he would have been entitled had he been tried separately (NATO 2373, DiMauro). Article of War 18 provides, in pertinent part, that

"Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause."

Expository of the above quoted provision is the further provision that "In a joint trial all the accused constitute the 'side' (AW 18) of the defense and are entitled to but one peremptory challenge" (MCM, 1928, par. 58d) (underscoring supplied).

As to whether or not the words "joint trial" as used in the Manual

include a common trial, a holding by the Board of Review in CM 195294, Fernandez et al, is pertinent. In that case three accused were charged separately and tried in common on like specifications alleging violations of Article of War 69. The trial judge advocate at the beginning of the trial announced in court that the convening authority had directed that accused would "be tried jointly". The Board stated:

"Examination of the decisions of Federal appellate courts touching the subject of peremptory challenges in cases of a common trial of separately charged defendants or separate charges against a single defendant, as distinguished from a trial of two or more criminal indictments consolidated as authorized by section 1024, Revised Statutes, shows a practical unanimity of judicial opinion to the effect that 'The parties in selecting the jury are severally entitled to a number of peremptory challenges according to the aggregate they would have possessed had the trials been separately had' (Zedd v. U.S., supra; Gallagher v. U.S., supra; Brown v. U.S., supra; Betts v. U.S. 132 Fed. 228). Conceding for the purpose of this case, as we are disposed to do in harmony with judicial opinion just cited, that 'Joint trial' as used in paragraph 58d, M.C.M., quoted supra, does not include the common trial had in this case, and that the 18th Article of War in its application thereto would require that each accused be permitted to exercise one peremptory challenge, and that the unchallenged statement of the trial judge advocate as to the right of peremptory challenge was error, nevertheless we are of opinion that, in the situation disclosed by the record of trial, the same does not constitute error injuriously affecting the substantial rights of the accused". (underscoring supplied).

In the Fernandez case, after the trial judge advocate had informed the several accused that they were "as a side" entitled to one peremptory challenge, defense counsel stated, "The accused desire to exercise that right in the case of Captain Wood". The challenged member then withdrew. Thus no particular accused asserted and was denied his right to an individual peremptory challenge, as in the case under consideration.

Paragraph 84f, Technical Manual 27-255, Military Justice Procedure, 1945, provides that:

"Only one peremptory challenge may be exercised by each side, i.e., the prosecution and the defense (AW 18). Two or more joint defendants have only one such challenge between them (par. 58d, MCM). However, each defendant in a common trial may exercise one peremptory challenge."

In view of the foregoing and in the light of the principle that only with their consent may accused persons legally be tried in common upon

charges not alleging joint offenses (Dig. Op. JAG, 1912-40, sec. 395 (33); Zedd v. U.S. 11 F. 2d 96, as digested under 18 USCA, 557), it is the opinion of the Board of Review that in a common trial each accused is entitled under Article of War 18 to one peremptory challenge - to the same right of challenge to which he would be entitled were he tried separately. It is the opinion of the Board that an order for a common trial and consent thereto cannot deprive the accused persons of their right to their individual peremptory challenges. It is the further opinion of the Board that consent to common trial cannot of itself be construed in reason as a waiver of the right to challenge in the absence of a clear indication of a desire to waive the right. There was in this case a clear indication that accused Norris did not intend to waive his right to his peremptory challenge.

6. The phrase "Each side shall be entitled to one peremptory challenge" was added to the 18th Article of War by the Code of 1920 (MCM, 1921, pp. 492, 498,499). Doubtless the amendment allowing each side one peremptory challenge was impelled by a desire to add to court-martial procedure a right similar to the right of peremptory challenge of jurors existent in civil trials (See CM 195294, Fernandez et al). The Manual for Courts-Martial restates in substance the principles governing the exercise of the right to peremptory challenge of jurors in a civil tribunal. It is not inappropriate to consider these principles as being generally applicable to courts-martial.

Some of the general principles applying in civil state tribunals have been stated in part as follows:

"The right of peremptory challenge is a substantial right, and its freest exercise should be permitted. Within the number allowed by law the right is absolute, and cannot be abridged or denied by any arbitrary rule of court as to the mode of impanelling a jury. The right may, however, be controlled either by a fixed rule, or by any reasonable limitation imposed in any case, so long as the right is not taken away" (35 C.J. 405,406). (Underscoring supplied)

The right to peremptory challenges in trials in Federal courts (28 U.S.C., 424) has been construed similarly (see annotations and notes 28 U.S.C.A., 424; and 35 C.J. 408). There appears to be no exception to the proposition that the right is one of the most important secured to an accused, and that any system that "embarrasses the full, unrestricted exercise *** of that right, must be condemned" (Pointer v. U.S. 151 U.S., 396, as digested under 28 U.S.C.A., 424).

7. The exercise of peremptory challenge may of course be waived. Did the action by defense counsel, following the declaration by the trial judge advocate in substance that accused had but one peremptory challenge between them, in peremptorily challenging Major Krug, and the later statement by accused Norris that he did not object to any other member present, amount to a waiver by Norris of his right to his peremptory challenge? The answer is no.

It is only reasonable to conclude that the statement by the trial judge advocate and the apparent acquiescence by the court, effectively and with finality denied and were intended to deny Norris his right to the peremptory challenge which he had previously asserted. As accomplished, moreover, the denial of the challenge of Colonel Gasiorowski and the declaration of the related rule of law in effect emanated from no lower a military source than the appointing authority. This being so, it was the military duty of counsel and accused Norris to conform to the ruling. Soldierly acquiescence by juniors in a ruling by their military superior can hardly be construed as a waiver of any previously asserted right to which the ruling pertains. Voluntariness is a vital element of waiver (67 C.J. 298).

What is here said concerning the possible waiver of his rights by Norris is equally applicable to any suggestion of waiver by the other accused who through the declaration by the trial judge advocate were deprived of their right of peremptory challenge.

8. There remains for consideration the question as to the legal effect of the denial of the peremptory challenge by accused Norris of Colonel Gasiorowski. The following from Technical Manual 27-255, Military Justice Procedure, 1945, states the governing principles:

"Any member of the court may be challenged peremptorily except the law member (AW 18; par. 58d, MCM). No ground or reason for such a challenge need exist. It is simply an arbitrary right to remove a member from the court. When peremptorily challenged, the member must be excused at once by the president" (par. 84f).

A peremptory challenge being "an arbitrary right to remove a member from the court" and it being mandatory that the challenged member "be excused at once", the legal effect of a peremptory challenge by an accused who has the right to exercise it, is to remove the member from the court-martial and disqualify him for that trial. The disqualification is complete by virtue of the statute conferring the right to the challenge. His incompetency or ineligibility does not differ in its legal aspects from the statutory incompetency or ineligibility of an accuser, a witness for the prosecution or a member who sat at a previous hearing. As in these instances (Dig. Op. JAG, 1912-40, secs. 365 (7), (8) and 408 (7)), his presence on the court affects the legal composition of the court and is a jurisdictional defect. As stated in the Manual for Courts-Martial, 1928:

"The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: *** that the membership of the court was in accordance with law with respect to number and competency to sit 'on the court' (par. 7).

That the legal effect of a peremptory challenge in removing a member from the court is analogous to the effect of a challenge directed against the

accuser appears from the Manual for Courts-Martial, 1928, which provides:

"Where a member is challenged on the ground that he is the accuser and admits the fact, or where a member is peremptorily challenged, or where, in any case, it is manifest that a challenge will be unanimously sustained, the member may be excused forthwith if no objection *** is made or raised" (par. 58f).

The only conceivable objection to a peremptory challenge would be that the challenged member was the law member of the court or that accused had previously exercised his right to peremptory challenge.

The rule of the Federal civil courts in criminal cases appears to be similar. In a case where a defendant was entitled by statute to 20 peremptory challenges it has been held as follows:

"Defendant held denied constitutional right of trial by jury where, having challenged 19 jurors, he was denied right to exercise remaining challenge on theory he had waived right to challenge particular jurors by failure to do so when requested to before box was filled" (Avilla v. U.S. 76 F. 2d 39, as digested under 28 U.S.C.A., 424).

Because of the denial of the peremptory challenge and the consequent participation in the trial by Colonel Gasiorowski, it is the opinion of the Board of Review that the court was not legally constituted and that its proceedings were null and void.

9. The court not being legally constituted, it was without jurisdiction to proceed in the case of any of the accused. To hold otherwise would be to indulge in an untenable legal fiction that in a common trial the court may be illegally constituted as to one or more accused and legally constituted as to another. Regardless of the number of accused on common trial there is only one case and one court. It has been stated that:

"While, in the absence of statute, each defendant is entitled to the full number of challenges to which he would be entitled if tried alone, a challenge by one will operate to exclude the juror as to all" (35 C.J. 408).

The legal effect of the peremptory challenge by Norris was to remove completely the challenged officer as a qualified member of the court for the trial of the case. The officer's participation vitiated the proceedings as to all accused.

10. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence as to each accused and that all rights, privileges and property of

(92)

which accused have been deprived by virtue of the findings and sentences
should be restored.

Edward H. Miller, Judge Advocate.

William R. Brown, Judge Advocate.

Henry C. Reenish, Judge Advocate.

MTO 5229 1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
7 May 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. There is transmitted herewith for your action under the fifth subparagraph of Article of War 50 $\frac{1}{2}$ the record of trial by general court-martial in the case of Technical Sergeant James L. Reynolds (35 010 227), Sergeant James Bland (34 404 889), Privates First Class James Norris (34 482 460), Benjamin Capell (34 228 100), Clarence Cephas (33 007 478), Joseph Young (16 096 728), Earnest Brown, Jr. (34 126 633), Carl H. Corsey (33 384 117), Raymond Brown (14 122 367), and Private Alfred Dorsey (33 731 456), all of Company L, 370th Infantry Regiment, together with the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused. I concur in the opinion of the Board of Review and recommend that the findings and sentences be vacated and that all rights, privileges and property of which accused have been deprived by virtue of the findings and sentences be restored. There is inclosed herewith a form of action designed to carry this recommendation into effect should it meet with your approval.

H. D. Hoover

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

2 Incls.

- Incl. 1 - Form of Action
Incl. 2 - Record of trial

(Findings and sentences vacated. GCMO 75, MTO, 17 May 1945)

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

APO 512, U. S. Army,
21 February 1945.

Board of Review

MTO 5248

U N I T E D S T A T E S)	34TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private ORLANDO L. MARCIANO)	APO 34, U. S. Army, 13 December
(31 120 591), Company D,)	1944.
168th Infantry Regiment.)	Dishonorable discharge and
)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 75th Article of War.

Specification: In that Private Orlando L. Marciano, Company "D", 168th Infantry Regiment did near Venafro, Italy on or about 9 November 1943, 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 16 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, 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 9 November 1943 the 1st Battalion, 168th Infantry Regiment, of which accused was a member and assigned to the first platoon of Company D, had just been relieved from contact against the "German enemy" by the 2d and 3d Battalions of the regiment. The 1st Battalion was in an assembly area, "in regimental reserve" near Venafro, Italy, and was reorganizing and obtaining equipment. (R. 5,6) On that date some artillery fire was passing over Company D area and "on our flanks" (R. 6).

Accused's platoon leader testified that he checked the platoon on the night of 9 November after the company was assembled, and also on "the morning after we were in this area", and found accused missing. The platoon leader was with the company continuously from 9 November 1943 to 2 February 1944 and from 1 March 1944 to 5 July 1944 and he did not see accused with the company at any time during those periods. Accused did not have permission to be absent. Accused had been in combat in Italy approximately a month and a half. (R. 5-7) A staff sergeant of accused's company testified that he was with the first platoon continuously from 2 February 1944 to 5 June 1944 and from 5 July 1944 to 16 November 1944 and that he did not see accused with the company at any time during those periods (R. 7,8).

It was stipulated that the morning reports of accused's company contained the following entries:

"9 November 1943 31120591 MARCIANO, Orlando L. Pfc
Fr dy to AWOL 0530 hrs.

5 December 1943 31120591 MARCIANO, Orlando L. Pfc
Fr AWOL to drpd fr rolls Cir 215

11 September 1944 TO CORRECT M/R of 5 Dec. 43.
31120591 MARCIANO, Orlando L. Pfc.
Fr AWOL to drpd fr rolls Cir 215
SHOULD HAVE READ:
Fr AWOL to drpd fr rolls as an
absentee per Cir 113 Hq NATOUS.

17 November 1944 31120591 MARCIANO, Orlando L. Pfc.
MCO - 010 MOS - 504 DUTY - 504
Reasgd not jd fr drpd fr rolls as
an absentee per Cir #36 Hq MTOUSA
& placed in conf Regt Stockade
1230 hrs 16 Nov 44" (R. 8,9).

Accused elected to make the following unsworn statement through his counsel:

"Private Marciano's home is in Providence, Rhode Island.
He was inducted in Providence, 13 June 1942. He had

worked as a stock clerk in civilian life. He joined the 34th Division in February 1943 in North Africa and has been a member of D Company all the time, with the 34th Division. He was in combat in North Africa from the time he joined until he was wounded on April 27th in the vicinity of Hill 407. He was hospitalized as a result of that wound until approximately the 1st of August 1943. He joined the company which was then out of combat and went into combat with them on October 13th and remained in combat with them until November 9th when they had pulled back in regimental reserve and he left the organization. At the time he was in the hospital for his wound, he was also operated on for appendicitis. Prior to November 9th he had asked his sergeant for permission to go back for medical examination as his side was still bothering him, but it was not granted. He learned his unit was going to be relieved soon, so he decided to stick it out until they were relieved, but found out that they were not going to be relieved and until they pulled back in this regimental reserve, could not get permission to go back, and so left. He had been in the hands of military authorities since August 23rd in the PBS Stockade and the Fifth Army Stockade, before returning to the 34th Division Stockade" (R. 9).

4. It thus appears from uncontradicted evidence that at the place and time alleged accused absented himself without leave from his organization soon after his battalion had been relieved from contact against the "German enemy" by two other battalions of his regiment. His organization was in a reserve position, reorganizing and obtaining equipment. Artillery fire was passing over and landing on its flanks. He did not return until 16 November 1944, more than one year later. From the facts and circumstances in evidence the court was fully warranted in finding that accused ran away from his organization while it was engaged with the enemy as alleged (MCM, 1928, par. 141a).

5. Attached to the record of trial is a report of a psychiatric examination of accused, dated 17 November 1944, containing the following:

"Soldier claims he was overcome by the sight of blood and horror all about him and did not know what he was doing when he went AWOL 9 months ago. However, he knew what he was doing when he deliberately stayed AWOL for 9 months. In my opinion soldier knows right from wrong and despite more than average battle anxiety that helped him, to go AWOL, he could have adhered to the right within a day or two of his act and turned himself in."

6. The charge sheet shows that accused is 24 years of age and was inducted 13 June 1942. No prior service is shown.

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

Elmore K. Knobbe, Judge Advocate.

James P. Lom; Judge Advocate.

Henry C. Remick, Judge Advocate.

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

APO 512, U. S. Army,
7 March 1945.

Board of Review

MTO 5257

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, 21 December 1944.
Private THOMAS F. WHELAN (12 091 742), Service Company, 351st Infantry.	}	Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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 Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Thomas F. Whelan, Service Company, then a member of Company E, 351st Infantry, did, near Carinola, Italy, on or about 14 April 1944 desert the service of the United States and did remain absent in desertion until he surrendered himself near Carinola, Italy, on or about 18 April 1944.

Specification 2: In that Private Thomas F. Whelan, Service Company, then a member of Company E, 351st Infantry, did, near Carinola, Italy, on or about 21 April 1944 desert the service of the United States and did remain absent in desertion until he surrendered himself near Carinola, Italy, on or about 5 May 1944.

Specification 3: In that Private Thomas F. Whelan, Service Company, 351st Infantry, did, near Carinola, Italy, on or about 11 May 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Naples, Italy, on or about 9 November 1944.

He pleaded not guilty to and was found guilty of the Charge and Specifications. Evidence was introduced of three previous convictions, one by summary court-martial for being drunk in camp and for absence without leave in violation of Articles of War 96 and 61 respectively, 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. He was sentenced to be hanged by the neck until dead, all members of the court present concurring in the findings and in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, Mediterranean Theater of Operations, approved "only so much of the findings of guilty of Specification 1 of the Charge as involves a finding of guilty of absence without leave from 14 April 1944 to 18 April 1944, in violation of Article of War 61"; only "so much of the findings of guilty of Specification 2 of the Charge as involves a finding of guilty of absence without leave from 21 April 1944 to 5 May 1944, in violation of Article of War 61"; and only "so much of the findings of guilty of Specification 3 of the Charge *** as involves a finding of desertion as alleged terminated by surrender", confirmed the sentence but commuted it to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of the natural life of accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. As to Specification 1 of the Charge, the evidence shows that at reveille formation on 14 April 1944, accused, then a rifleman in Company E, 351st Infantry, at Carinola (Italy) was reported absent by his first sergeant. The company commander, first sergeant and two noncommissioned officers looked for accused but did not find him. (R. 4,5) About 18 April (1944) accused "just came back to the company one afternoon; just walked back into the company area". He was asked by the company commander where he had been and replied, "oh, that he had just taken off". The company commander who was trying to operate at full strength, told accused that he would not "try him by Court-Martial and wouldn't press any Charges". On May 11(1944) the company was going to attack and he told accused to "hang around three days, we would go again" (R. 5,7). Accused did not have any authority to be absent from 14 April to 18 April. Between those dates the company was engaged in tactical training in the Carinola rest area and the division was "on the line" (R. 5-7).

An extract copy of the morning report of Company E, 351st Infantry, introduced in evidence without objection, contained the following entries:

"April 1944

- 19 - 12091742 Whelan, Thomas F. Pvt Dy to AWOL
0600 hrs 14 Apr 44
- 20 - 12091742 Whelan, Thomas F. Pvt AWOL to dy
as of 0600 hrs 20 Apr 44 ***

May 1944 ***

- 7 - 12091742 Whelan, Thomas F. Pvt To correct M/R
20 April 44 as reads AWOL to dy as of 0600 hrs 20
Apr 44 should read AWOL to abs in hands of mil
auth Caserta, Italy as of 2235 hrs 18 Apr 44; fr
abs in hands of mil auth to dy as of 0600 hrs 20
Apr 44" (R. 6; Ex. A).

It was stipulated that accused voluntarily returned to military authorities near Carinola, Italy, on or about 18 April (R. 10; Ex. C).

As to Specification 2 of the Charge, the evidence shows that at reveille formation and again at roll call or drill call at 0800 hours, 21 April 1944, accused, still a member of Company E, 351st Infantry, at Carinola (Italy) was reported absent by his first sergeant. Accused's company commander testified that he next saw accused the 5th or 6th of May (1944) and that he did not have any authority to be absent from 21 April to 5 May. Between those dates the company was still in training at Carinola (Italy) and the division was still "on the line". (R. 5-7)

An extract copy of the morning report of Company E, 351st Infantry, introduced in evidence without objection, contained the following entry:

"April 1944 ***

- 21 - 12091742 Whelan, Thomas F. Pvt Dy to AWOL as
of 0600 hrs" (R. 10; Ex. A).

It was stipulated that accused voluntarily returned to military control near Carinola, Italy, on or about 5 May 1944 (R. 6,7,10; Ex. C).

As to Specification 3 of the Charge the evidence shows that on 10 May 1944 all of the members of Service Company, 351st Infantry, of which accused was then a member as a rifleman and "replacement", were in a status of restriction to the company area in the vicinity of Carinola (Italy), and that the men all knew the "push was going to start". At a company formation, accused and all other replacements had been told by the first sergeant that they were going to be assigned to a rifle company. Accused knew that he was going up to the front line. As soon as the replacements were called for they were going "right up to the front". (R. 7-9) Accused was absent at a roll call at 0800 hours, 11 May. The first sergeant searched the area for him, but did not see accused again until the 29th or 30th of November (1944) when he was at the organization stockade under guard. Accused did not have authority to be absent from 11 May. (R. 8) The "push" started

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at 2330 hours on 11 May. The company participated therein and was in combat from 11 May to 9 November 1944. (R. 8,10)

The first sergeant testified that on 10 May at the shower unit he had ordered accused to report back to the company but the latter attempted to "sneak away under the tent and hide away". Witness seized accused and told him again to report back to the company. When witness returned to the company accused was not there and the last time witness saw him was about "5:00 o'clock" 10 May. (R. 8) Witness further testified when recalled by the defense, that when accused was transferred to the Service Company, he had him put under guard and instructed the guard "not to let him get away" because "he was over the hill just before that" and witness had been ordered by a Captain Lanzendorfer to put accused under guard (R. 16,17).

An extract copy of the morning report of Service Company, 351st Infantry, introduced in evidence without objection, contained the following entries:

"May 1944

- 2 - 12091742 Whelan, Thomas F. Pvt Asgd to Co this date per par 5 SO 45 Hq 351st Inf dtd 2 May 44 now AWOL (Prev reported on M/R Co E this Regt)
- 5 - 12091742 Whelan, Thomas F. Pvt AWOL to dy as of 5 May 44
- 12 - 12091742 Whelan, Thomas F. Pvt Dy to AWOL as of 0800 hrs 11 May 44

June 1944

- 11 - 12091742 Whelan, Thomas F. Pvt AWOL to drpd fr rolls of this orgn per AR 615-300" (R. 8; Ex. B).

It was stipulated that about 9 November 1944 accused returned to military control at Naples, Italy (R. 10; Ex. C).

Accused testified that he heard a radio "speech by the War Department" saying "to enlist now, you men who enlist now have a chance to get into your specific branch". Three days later he went to a recruiting station in New York and enlisted for a specific branch. His first choice was the Air Corps ground crew (R. 11) and his second choice was that of aerial gunner (R. 11,12).

He testified further:

"after we went to Fort Jay and went through our physicals and everything else. Some major came over from New York on the other side of the water and came to this building and there he said, 'Hell, you men are lucky. You men enlisted and have your choice of twenty-seven different branches of the United States armed forces. Then he proceeded to swear us in. I think it was about sixteen of us.

* * *

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NAVY DEPARTMENT

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"I wasn't given any days of grace or anything. I was given a slip of paper outside and told to report at Pennsylvania Station the next morning at 7:30, at Pennsylvania Station, New York, and to be there and we would be shipped to Camp Upton, New York, and I had money on me and took a room in New York that night. The next morning I made the train out to Camp Upton, New York." "From Camp Upton I was grouped with a bunch of about five hundred soldiers and sent to Camp Gruber, Oklahoma." "When we arrived there, we were told we were told we were in the 88th Division." "I was under the impression I was being sent there just for *** Seventeen weeks of basic training." (R. 12)

In 1942 or 1943 he "tried seven repeated times" to avail himself of the privilege of receiving training in a specific arm or service of his choice and was "turned down" on each occasion.

"My first sergeant at the time discouraged me and he said to wait for the seventeen weeks of the basic, that there was no use going in to see the company commander, and that you have to go through the channels, but have to take the seventeen weeks of training. After the seventeen weeks was up of basic training, I went before ***st Lieu(t)enant Munston *** And he told me when I went before him that the 88th wasn't transferring men and to go to the air corps. He said that it would be a special job and an enlisted man would have to be highly regarded to go into the air force" (R. 13).

He did not know the division's policy at that time but he and three other soldiers in Company D were attempting to get out of "infantry". When he was home on furlough he told his brother that he "would like to get my branch of service" because "that is what I enlisted for". He knew that he "couldn't take" the infantry. Unbeknown to him his brother caused a letter to be written on his behalf by a congressman and the letter ultimately reached accused's organization. He was chided by his first sergeant and company commander for bringing political influence to bear upon the situation, and was told that he was in "hot water". Accused, who knew that the proper method was to proceed through military channels, did not anticipate that his brother would use such a procedure. (R. 13,14) Before the letter was received accused had attempted to broach the matter of transferring to another arm or branch of the service in the proper way through the company commander. Once while on maneuvers he had spoken to a Captain Carmin, regimental S-1, who told him to come to see him, and accused made several unsuccessful efforts to do so. Things became worse for accused.

"Well, I was kind of -- well, you know, I knew quite a bit about close order drill and things like that there. There would be a class out here and there and there would be a smutty remark made in front of all the men such as, 'Let the smart national guard boy scout get up and answer that question,' or something like that, and --" "I just felt

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like I would like to get out of the 88th Division or the 351st in particular." (R. 14)

Accused further testified that when he reported from Company E to the Service Company he was not under guard at the time and it was a normal transfer. After he reported, he was placed under guard by the sergeant who "called for the best guard, the best shooter that they had in his replacement, and he told the guard, 'If he even bats an eyelash, shoot him!'. The sergeant called him a "son-of-a-bitch" three times, said that accused had caused him a lot of paper work, and wanted to take off his shirt and fight accused. (R. 18) Accused testified that he was not afraid of the front lines, that he had been in combat and "on patrols, too". He was present at "the five-day stand at Cassino" and "the thirty-seven or eight day stand at Minturno". (R. 18)

The following stipulation was admitted in evidence for the defense:

"on 14 July 1942, the accused enlisted in the Regular Army and was informed that he might enlist for a specific arm or service with the assurance that he would be assigned thereto; that on 14 July 1942, War Department policies permitted this practice; and that over the period from the 14 July 1942 until the present, the accused has been a member of the 88th Infantry Division. *** on 14 July 1942, the accused enlisted specifically for the Air Corps Ground Crew with the understanding, as stated by the recruiting officer who signed up, that he would be assigned to that service" (R. 10; Def. Ex. 1).

Chief Warrant Officer John A. Modafferri, Headquarters, 88th Infantry Division, testified for the defense that he had handled the enlisted section of the Adjutant General's Section since the division was activated and was familiar with the administration and the specific policies and procedures from July 1942 until the present time (R. 10). In the early part of 1943 directives were received relating to assignment of enlisted men who enlisted for specific branches. The substance of one of the directives was that all enlisted personnel who enlisted for a particular arm or service were to be given an opportunity to transfer to that particular arm or service. Under division policy men in the 88th Infantry Division were given that privilege and some availed themselves of the privilege subject to "deadline date", that is, the date on which the men enlisted for the particular arm of the service. (R. 11)

Technical Sergeant Bialkowski, Company D, 351st Infantry Regiment, testified for the defense that he had known accused ever since the division was activated, and that for a period of about six months he was in accused's company. Accused tried to be a soldier and in comparison with other soldiers witness would rate him as "just average". Accused told witness "he was getting a little too old for the infantry and would like to get out of it and couldn't take hikes". (R. 15) Witness believed that accused

spoke to his company commander about a transfer and told "a few people" that he had "tried to transfer out" (R. 15,16).

4. It thus appears from uncontradicted evidence that at the place alleged in Specification 1 accused absented himself without proper leave from his organization and remained unauthorizedly absent until 18 April 1944, in violation of Article of War 61. It further appears from uncontradicted evidence that at the place alleged in Specification 2 accused again absented himself without proper leave from his organization and remained unauthorizedly absent until 5 May 1944, in violation of Article of War 61.

The uncontradicted evidence also shows that at the place and time alleged in Specification 3 accused absented himself from his organization without proper leave and remained unauthorizedly absent until he returned to military control at Naples, Italy, about 9 November 1944, about six months later. An intention to remain permanently absent may be inferred from accused's unexplained, prolonged absence, his failure to surrender to military authority while in the vicinity of numerous military installations in this active theater of operations, his former derelictions, his expressed dissatisfaction with his organization and branch of service, and from other circumstances in evidence (MCM, 1928, par. 130a). Moreover, the circumstances of accused's initial 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. His contention that he enlisted for a specific branch of the service only, was not a defense. His assignment to the Infantry was a matter of administration and entirely within the prerogative of the War Department.

5. Attached to the record of trial is a report of a psychiatric examination of accused, dated 16 December 1944, containing the following:

"Psychiatric examination reveals a 33 year-old individual with 8 years of schooling. He is contentious in a manner with a generalized dissatisfaction and resentment at authority. He has been unable to meet discipline and has an equivocal history of civilian delinquency, and claims addiction to alcoholic beverages. Civilian occupational record is unsteady. He has made persistent efforts at avoiding hazardous duty in an infantry organization by previously requesting a general court-martial and by attempting to capitalize on physical complaints. He committed his offense in order to escape further hazardous responsibility. Punishment is little deterrent value for this individual and he cannot be rehabilitated or affected by discipline in the military setting. His condition is diagnosed as Constitutional Psychopathic State-Emotional Instability-Chronic Alcoholism."

6. The charge sheet shows that accused is 32 years of age, and

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enlisted 14 July 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 the sentence.

Edmund L. K. Schaefer, Judge Advocate.
Walter G. Frazee, Judge Advocate.
Henry C. French, Judge Advocate.

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

APO 512, U. S. Army,
7 March 1945.

Board of Review

MTO 5257

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private THOMAS F. WHELAN)	Frassinetta, Italy, 21 December
(12 091 742), Service)	1944.
Company, 351st Infantry.)	Dishonorable discharge and
)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward R. Irion, Judge Advocate.
William G. Sargent, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 5257 1st Ind.
Branch Office of The Judge Advocate General, MTCUSA, APO 512, U. S. Army,
7 March 1945.

TO: Commanding General, Mediterranean Theater of Operations, APO 512,
U. S. Army.

1. In the case of Private Thomas F. Whelan (12 091 742), Service Company, 351st Infantry, attention is invited to the foregoing holding by

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MTO 5257, 1st Ind.
7 March 1945 (Continued).

the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 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 5257).



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

(Sentence as commuted ordered executed. GCMO 43, MTO, 13 Mar 1945)

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

APO 512, U. S. Army,
2 March 1945.

Board of Review

MTO 5416

U N I T E D S T A T E S)	34TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private ESTEL HESS (33 046 761).)	APO 34, U. S. Army, 30 December
Company K, 168th Infantry)	1944.
Regiment.)	Dishonorable discharge and
)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 Charges and Specifications:

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

Specification: In that Private Estel (NMI) Hess, Company "K", 168th Infantry Regiment, did, without proper leave, absent himself from his organization near Barberino, Italy from on or about 26 September 1944, to on or about 26 November 1944.

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

Specification: In that Private Estel (NMI) Hess, Company "K", 168th Infantry Regiment, did, near Ceppagna, Italy, on or about 3 January 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by Captain Anderson Q. Smith, to engage with the enemy, towit: the German Forces, which forces the

said command was then opposing and did not rejoin his organization until on or about 5 March 1944.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for "a 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. As to the Specification, Charge I, the evidence shows that on 26 September 1944, accused, a member of Company K, 168th Infantry (R. 9,10), was in confinement in the regimental stockade. On that date accused, together with other prisoners, was on a detail, accompanied by two guards. The guards made a check of the members of the detail immediately before returning to the stockade and accused was found to be missing. A search of the area was made but accused was not found. He did not have permission to be absent. One of the guards testified that he was with the organization continuously from 26 September 1944 to 26 November 1944 and did not see accused with the organization at any time between those two dates. (R. 8,9) The first sergeant of the stockade had a roll call on the morning of 27 September and accused was missing. He did not have permission to be absent from the stockade at that time. The sergeant was at the stockade from 26 September 1944 to 26 November 1944 and did not see accused in the stockade at any time between those dates. (R. 9,10)

It was stipulated that an extract copy of the morning report of accused's company contained the following entry:

"27 September 1944 33046761 HESS, Estel, Pvt
Fr Ab in Conf Reg'tl Stock to AWOL
1500 hrs 26 Sept 1944".

It was further stipulated that accused returned to his regiment 26 November 1944. (R. 10).

As to the Specification, Charge II, the evidence shows that on 3 January 1944 accused, then a member of Company K, 168th Infantry, was returned to his company, under guard by the military police, on the outskirts of "Ceppagna", near Venafro, Italy, at which time accused's company commander, Captain Anderson Q. Smith, 168th Infantry, assigned him to the weapons platoon, of which he had previously been a member. The officer testified he told accused "what the company was going to do, *** that they were going to the front to fight" and that he "intended for him to do his job along with anyone else". (R. 6,7) The same day, as the result of orders he received that day, the commander passed instructions to all members of the company that the company would move out about 1700 hours

and that it "would be going forward to engage the enemy at some soon date". Accused was present at that time. (R. 6) During the day a check was made of the personnel of the weapons platoon and upon receiving a certain report concerning accused, witness ordered a thorough check to be made by the platoon leader, the squad leader and the platoon sergeant "to insure that he (accused) was or was not in the area". As a result of that check witness ascertained that accused was absent. At about 1700 hours the company, with the rest of the battalion, moved out to a forward assembly area, in the vicinity of San Pietro, (Italy) and the next day "jumped off" in an attack against the enemy. The company commander was with the company continuously from 3 January 1944 to 14 February (1944) and did not see accused with the company during that period. Accused did not have permission to be absent. The officer next saw accused with the company on or about 15 April 1944 at the Anzio beachhead (Italy). (R. 7)

It was stipulated that an extract copy of the morning report of accused's company contained the following entry:

"4 January 1944 33046761 HESS, Estel, Pvt
Fr arrest of qrs to AWOL 1800 hrs
3 Jan/44."

It was further stipulated that accused returned to his regiment on 5 March 1944. (R. 10)

Accused elected to remain silent (R. 10).

4. It thus appears from uncontradicted evidence that at the time alleged in the Specification, Charge I, accused absented himself without proper leave from his organization and remained unauthorizedly absent until he returned to his organization on 26 November 1944, in violation of Article 61.

It further appears from uncontradicted evidence that at the place and time alleged in the Specification, Charge II, accused after having been informed by his company commander that his company was about to move forward and engage the enemy, on the same day absented himself without leave from his organization at Ceppagna, near Venafro. His company moved out that day at 1700 hours to a forward assembly area in the vicinity of San Pietro, and the following day "jumped off" in an attack against the enemy. Accused did not rejoin his organization until 5 March 1944, more than two months later. Inquiry discloses that San Pietro, where the forward assembly area was situated, is about 7.8 kilometers southwest of Ceppagna. It is a matter of common knowledge in this theater of operations that these towns were in an area which was the scene of active combat in January 1944. In consideration of the general tactical situation in that area, and the fact that on the day of accused's absence his company moved but about five miles to the vicinity where it attacked the enemy on the following day, it may be inferred that the company was in close tactical support or reserve relationship to troops in combat. The court's finding that accused's misbehavior occurred before the enemy as alleged was warranted (MCM, 1928, par. 141a).

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5. It was alleged in the Specification, Charge I, that accused absented himself near Barberino, 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 (Dig. Op. JAG, 1912-40, sec. 416 (10); NATO 3213, Boros; MTO 4957, Millican).

6. It was alleged in the Specification, Charge II, that the alleged offense was committed near Ceppagna, Italy, whereas the evidence discloses that it occurred on the "outskirts" of Ceppagna, Italy. Undoubtedly "Ceppagna" is a misspelling of "Ceppagna" and there being no suggestion anywhere in the record that accused was misled or surprised thereby and further, since the situs was not of the essence of the offense charged, it cannot be said that accused's substantial rights were injuriously affected by this slight variance.

7. Attached to the record of trial is a report of a psychiatric examination of accused, dated 12 December 1944, containing the following:

"This soldier began his erratic career at the age of 13, when he stole a still from a neighbor and began making moonshine and bootlegging it through a lady friend. He began drinking at that time and at present is a chronic alcoholic, drinking all he can get. He had withdrawal symptoms while in the stockade. At the age of 16 he was involved in several shady affairs with other men's wives. He was AWOL 8 or 10 times in the U.S. and says he was court martialed 7 times. Overseas he has had about 20 days combat since December, 1943 due to AWOL and stockade confinement.

"This soldier has no sense of values and feels no moral obligation. He may be called morally blind. He cannot postpone gratification of his desires and completely lacks a sense of duty, foresight and prudence. He feels no guilt or shame and cheerfully accepts the court martial proceedings awaiting him. In my opinion, he knew the difference between right and wrong and was able to adhere to the right at the time of the alleged offense. There is no known medical reason why this soldier should not be brought to trial."

8. The charge sheet shows that accused is 24 years of age and was inducted 16 April 1941. No prior service is shown.

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

Elwood H. Largay, Judge Advocate.
William G. Bass, Judge Advocate.
Henry C. Henrich, Judge Advocate.

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

APO 512, U. S. Army,
19 March 1945.

Board of Review

MTO 5428

U N I T E D S T A T E S	}	FIFTH ARMY
v.		Trial by G.C.M., convened at APO 464, U. S. Army, 19 December 1945.
Technician Fifth Grade EDWARD W. COLEMAN (35 268 811), Company B, 1554th Engineer Heavy Ponton Battalion.	}	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 Charges and Specifications:

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

Specification: In that Technician fifth grade Edward W. Coleman, Company B, 1554th Engineer Heavy Ponton Battalion, did, at Sesto, Italy, on or about 1 December 1944 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician fifth grade John E. Fant, a human being by shooting him with a carbine.

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

Specification: In that Technician fifth grade Edward W. Coleman, Company B, 1554th Engineer Heavy Ponton Battalion, did, at Sesto, Italy, on or about 1 December 1944 with intent to commit a felony, viz. murder, commit an assault upon Private first class Claude W. Jefferson, by willfully and feloniously shooting the said Private first class Claude W. Jefferson

in the back with a carbine.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave in violation of Article of War 61. 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 shortly after the noonday meal, 1 December 1944, accused, Technician Fifth Grade John E. Fant (deceased); Private First Class Claude W. Jefferson and several other soldiers, all members of Company B, 1554th Engineer Heavy Ponton Battalion, were engaged in playing dice on a blanket on the first step on the rear of a statue located in the center of their bivouac area (R. 6,7,13,19,24,30,32,35) at Sesto, Italy (R. 6,19). Accused, who was "running the game" (R. 14), said he was broke, and as each player's turn at the dice came around he "cut the dice for fifty cents" (R. 7,10,14). One witness testified that "when people run a dice game they generally cut for the use of the blanket and the dice" (R. 7). When Jefferson got the dice he shot a dollar, passed twice, drew down two dollars and said, "Shoot the two". Accused then picked up the money and said, "You don't have but a dollar and a half", at which point Jefferson went to accused and attempted to jerk the money out of his hand (R. 14,20). Accused jumped back, reached in his pocket and pulled out a knife, which was knocked to the ground by some of the other soldiers who intervened and held him. Jefferson picked up the knife and started toward accused, but was restrained by other soldiers who seized him and took the knife from his possession. Both accused and Jefferson were then released, and the dice game was resumed by some of the original players, including Fant. (R. 7-9,14,15,20,30-32,34,37).

Accused did not re-enter the game, but ran to his tent, which was about 90 feet from the monument, obtained a .30 caliber carbine and returned in five minutes or less to a point estimated from eight to thirty-six feet from the monument, where the dice game was still in progress (R. 8,10,15-17,21,23,24,28,35). He operated the bolt of the carbine, pointed it toward the group of soldiers in the game, told them to get out of the way, and said that he would shoot anyone who came toward him (R. 8,14,16,21,24,31,33,35). He then raised the carbine to his shoulder, pointed it at Jefferson, who was standing on the third or top step of the monument and fired (R. 8,10,21,23,32,35,36). The shot

struck the monument near where Jefferson was standing (R. 10,24). Jefferson ran around the monument toward the company supply tent. Accused then fired a second shot at Jefferson and ran after him with the carbine (R. 8,21,23). The second shot struck Fant on his left side while he was on his knees in the dice game. He seized himself, fell to the ground and commenced to bleed from the mouth (R. 9,21,22,24,26,28). Jefferson continued to run, tripped over a tent rope at the corner of the orderly tent, stumbled and fell to the ground (R. 24,33,37). Accused, who was still pursuing Jefferson, again fired his carbine at him and wounded him in the hip while he was on the ground (R. 15,17,22,25,33). Jefferson then got up and staggered into the company supply tent (R. 9,24, 25,29,38). Accused went to the door of the tent where he was overtaken by a noncommissioned officer who took the carbine from his possession (R. 28,36). The carbine had one round of ammunition in the chamber and an unknown number in the clip (R. 28,30). Upon being disarmed accused said, "I don't care nothing about some of the guys around here" (R. 29, 36). He was angry and cursing, and said "he was sorry he killed Fant and wished he had killed Jefferson, the one he was shooting at" (R. 36, 37). He was then taken to the company commander, who shortly before had heard two or three shots in the company bivouac area, and who asked "Who shot who?" Accused stepped forward and said "I shot two men, Fant and Jefferson", and added that "he was sorry he shot Fant, but he was glad he shot that mother-fucker Jefferson" (R. 40-42).

Captain George W. Hill, Medical Corps, 1554th Engineer Heavy Ponton Battalion, examined Fant during the early afternoon of 1 December 1944 at the battalion aid station and found

"the man very severely wounded. He was unconscious but he was still living. His clothes were covered with blood and on examination I found that he had a penetrating bullet wound on the anterior side of his chest. His right chest anteriorly * * * It was a penetrating wound and he was apparently bleeding very rapidly interiorly and he died while we were attempting to give him plasma" (R. 39).

Captain Hill testified that in his opinion the wound was caused by a .30 caliber carbine projectile (R. 40). He examined Jefferson at the battalion aid station at about the same time and found a bullet wound in the lower lumbar region of his back. He probed the wound but could not locate the bullet, applied a dressing and dispatched Jefferson by ambulance to the 15th Evacuation Hospital. He was of the opinion that the wound could have been caused by a .30 caliber carbine projectile (R. 39).

Accused, after being advised of his rights (R. 42-43), testified that he had been a member of the 1554th Engineer Heavy Ponton Battalion since its organization (R. 43). After losing all his money, ten dollars, in the dice game, he began to take a share out of each pot as was the usual custom for the use of the blanket which he had furnished. When Jefferson got the dice he put up a dollar, "made a couple of passes" and then told accused to throw him two dollars out of the pot. Accused did so and said "You got a

dollar and a half here now". Jefferson mumbled about it a couple of times and accused gave him a hundred lire note. While accused was attempting to get another hundred lire note changed to two 50 lire notes, Jefferson got "hot" and "was practically over me". Accused reached in his pocket and drew out a "G. I." knife because "I knew I wasn't any good with my fists" and Jefferson was "pretty good with his dukes" (R. 43). Before accused arose to his feet the knife was either knocked from his hand or he dropped it. Jefferson picked up the knife and soldiers seized both him and accused. Because it appeared to accused that Jefferson was not being held "very good", and it was possible for him to get loose and attack accused with the knife, the blade of which was then open, accused went to his tent and obtained his carbine (R. 44,47,48). He planned to give Jefferson "a run around the park to scare him" (R. 47). There was a clip in the carbine and when he left his tent accused did not load the weapon but merely rattled the bolt (R. 44) "in shoving it back because I wanted Jefferson to hear it" (R. 45). He wanted to scare Jefferson and make him think something was going to happen, in the hope that the latter would not bother him. Accused told the group to get out of the way and came to a place 15 feet or less from the monument. Jefferson started toward him and accused stopped (R. 44-47). He had his hand on the trigger "knowing that the thing was not loaded, because I hadn't loaded it myself" (R. 45). Accused then slipped and "'bang, bang'—two shots were fired" (R. 45,46,48). Jefferson then ran to the right of the statue, then to the side of the orderly room and fell. He arose and ran into the supply tent and accused ran behind him as far as the tent door (R. 45,46) where he (accused) was seized (R. 47). Accused fired only two shots (R. 45, 46,48), and denied that he shot Jefferson when the latter was on the ground (R. 47). If he intended to shoot Jefferson, he could have emptied his carbine "right in his head and wouldn't have missed him" (R. 45), and "could have stopped him right in his tracks" (R. 46). He thought a lot of Fant and was "disgusted" with himself for having shot him (R. 46). Of his own accord accused reported to Captain Boehlke, his company commander, "the regular way a soldier should". He told him that he shot Fant and Jefferson, that he would rather have shot himself than to have shot Fant, but that he was not sorry "'that mother-fucker Jefferson got shot'" (R. 47).

4. It thus appears from uncontradicted evidence that at the time and place alleged accused shot and killed with a carbine, Technician Fifth Grade John E. Fant, the person named in the Specification, Charge I, and that he wounded Private First Class Claude W. Jefferson, the person named in the Specification, Charge II, by shooting him with a carbine.

The evidence shows that preceding the fatal assault upon Fant and the assault upon Jefferson, accused, Jefferson, Fant and other soldiers were playing dice at the foot of a public monument. Accused and Jefferson engaged in an altercation over a small amount of money. Accused drew a knife from his pocket and the knife was knocked to the ground by other soldiers. Jefferson picked it up and moved toward accused but was restrained by some soldiers who took the knife from his possession. The game was resumed by some of the original players, including Fant, while Jefferson stood on the top step of the monument overlooking the game. Fant did not become involved in the altercation. Immediately following the incident accused went to his tent about 90 feet away, procured his carbine which contained a clip, and returned to a spot a few feet away from the group.

He pointed the rifle at the men and told them that if anyone moved toward him he would shoot. There is evidence that he then placed the carbine to his shoulder, pointed it at Jefferson and fired. Jefferson began to run away from accused who fired a second shot at him. This shot struck and mortally wounded Fant who was, at the time, on his knees playing dice. Accused then pursued Jefferson, who was unarmed and endeavoring to escape. Jefferson tripped over a guy rope at the orderly room tent and fell to the ground. While he was on the ground accused again fired at him and wounded him in the hip. Jefferson arose, continued to run and fell into the company supply tent. Accused followed his victim with his carbine and was disarmed at the door of the supply tent by another soldier. Immediately after the shooting accused, who was angry and cursing, said that he was sorry he killed Fant and that he wished he had killed Jefferson, "the one he was shooting at". Accused testified that he fired the carbine and shot Fant and Jefferson, but claimed that he fired only two shots and that both shots were accidental because he slipped.

The evidence sufficiently shows that the assault upon Jefferson was committed with intent to murder. There was no legal excuse or justification for the shooting and under circumstances, if death had ensued, the homicide would have constituted murder. It is clear that when accused fired he was not in danger of losing his life or of incurring serious bodily injury at the hands of Jefferson who was unarmed. That accused entertained the requisite specific intent to murder Jefferson is clearly inferable from his violent conduct and deliberate use of a deadly weapon, the ruthless pursuit of his victim, the character of the injuries inflicted, and accused's declarations immediately after the incident (Winthrop's, reprint, p. 686; MCM, 1928, par. 149 1, p. 178; NATO 1031, Hawlett; NATO 1707, Faircloth; MTO 4270, Springs).

There is evidence that accused entertained the deliberate intent to kill Jefferson when he fired at him. Fant, an innocent bystander, was struck and killed by the second shot.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not" (MCM, 1928, par. 148a, p. 163; see also Winthrop's reprint, p. 673). (Underscoring supplied)

The findings of guilty of murder were fully warranted.

5. The charge sheet shows that accused is 29 years and eleven months of age. He was inducted 29 August 1942. No prior service is shown.

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

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the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Punishment by death or imprisonment for life is mandatory upon conviction of violation of Article of War 92. Penitentiary confinement is authorized for the offense of murder as alleged in Charge I and its Specification, 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.

Howard H. Ferguson, Judge Advocate.
Malvin G. Brown, Judge Advocate.
Henry C. Reznick, Judge Advocate.

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

APO 512, U. S. Army,
19 March 1945.

Board of Review

MTO 5428

U N I T E D S T A T E S)	FIFTH ARMY
v.)	Trial by G.C.M., convened at
Technician. Fifth Grade EDWARD)	APO 464, U. S. Army, 19
W. COLEMAN (35 268 811), Company)	December 1945.
B, 1554th Engineer Heavy Ponton)	Dishonorable discharge and
Battalion.)	confinement for life.
)	U. S. Penitentiary,
)	Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward W. Coleman, Judge Advocate.
Walter R. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 5428 1st Ind.
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
19 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Technician Fifth Grade Edward W. Coleman (35 268 811), Company B, 1554th Engineer Heavy Ponton Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is

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MTO 5428, 1st Ind.
19 March 1945 (Continued).

legally sufficient to support the 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 5428).



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

(Sentence as commuted ordered executed. GCMO 53, MTO, 19 Mar 1945)

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

APO 512, U. S. Army,
 20 March 1945.

Board of Review

MTO 5430

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private First Class FRED)	Naples, Italy, 31 October 1944.
DAVIS (34 048 861), 3431st)	Dishonorable discharge and
Quartermaster Truck Company,)	confinement for life.
117th Quartermaster Battalion)	U. S. Penitentiary,
Mobile.)	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 Charges and Specifications:

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

Specification: In that Private First Class Fred Davis, 3431st Quartermaster Truck Company, 117th Quartermaster Battalion Mobile, did, at Fertilia, Italy, on or about 8 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Oliva Gilda.

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

Specification: In that Private First Class Fred Davis, 3431st Quartermaster Truck Company, 117th Quartermaster Battalion Mobile, did, at Aversa, Italy, on or about 8 August 1944, knowingly and willfully apply to his own use a Truck, two and one-half (2½) ton, six by six (6x6), cargo, GMC of the value of about three thousand dollars (\$3000.00), property

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of the United States, furnished and intended for the Military service thereof.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 8 August 1944 accused was a member of 3431st Quartermaster Truck Company, and assigned as a truck driver to a detail at the 850 Gas dump on route P, "out from Aversa", Italy. On that day he arrived at the dump with a loaded GMC 6x6 United States government truck. No relief driver was available and at about 1730 hours the sergeant in charge of the detail ordered accused to take the truck to the port at Naples which was about 12 miles from the dump, have it unloaded and then to return to the battalion area, which was nine miles from the port. Accused was not authorized to use the truck for any other purpose. The road from the dump to the port passed through Aversa. The sergeant was on duty at the dump until 0600 hours the following day and he did not see accused during that period. (R. 6-8)

At about 2100 hours 8 August 1944, a colored soldier was driving a large American Army truck in the direction of and near Aversa, and stopped on the road where some Italian civilians, an Italian officer, an Italian soldier and an Italian sailor were waiting for a ride in the direction of Rome. This group included Oliva Gilda, 19 years of age, her "sister cousin" Francescangeli Evelina, her sister Oliva Elandina, her friend Antonini Lucia, and Angeli Attilio, a law student. The truck, which was stopped by the women (R. 9,10,12,13,17,25,28), was driven by accused (Ex. 1). The group asked him for a ride to Rome but no one got on the truck because he said he would take only the women, who refused to go alone. He started to leave, but returned and the entire group boarded the truck. He drove to a petrol point at Fertilia where he met and talked to some other colored soldiers who were in another truck. Some of the other passengers, including the Italian officer, left the truck at this point. The other passengers, including the group hereinbefore named, however, were taken over to the other truck where they were told by one of the colored soldiers that they would take the women to Rome if the women did as the soldiers wished. (R. 10,13-15,26,28; Ex. 1) The women refused and commenced to cry, but were pushed along with Attilio and the others, and were told to get on the other vehicle, and that they were to be taken to prison (R. 10,14,26). One soldier said, "*** either you come with us to Rome or we will take you and put you in jail, we are police" (R. 26). One of the soldiers had a dagger, one a pistol and another a flashlight

(R. 11,26). The Italians were forced to enter the other truck which, followed by accused in his own vehicle, was driven to Aversa where it turned off on a road leading to the country. After 15 or 20 minutes both trucks stopped in an isolated spot. There were two colored soldiers in each vehicle. One soldier threatened the passengers with a stiletto saying "Keep quiet, stay still". (R. 11,26; Ex. 1)

After the vehicles stopped the four soldiers had a conference and then said they wanted to take the women with them. The women at first refused, but were told that if they continued to refuse they would be killed. They were threatened with a knife and revolver. When it appeared to them that they were going to be taken by force, Francescangeli Evelina, and Gilda's sister, Oliva Blandina, who were married, offered to go with the soldiers in order that no harm would befall the two younger unmarried women, Gilda and Antonini Lucia. Three of the soldiers then took the two married women a short distance away and forcibly put them on the ground. One soldier remained near the vehicles. Cries were heard coming from the women such as, "My God" and "Mother of Mine". After 15 or 20 minutes they brought the two women, whose dresses were disarrayed, back to the truck (R. 11-13,25-27; Ex. 1). Gilda was still on one of the vehicles. Accused and one of the soldiers approached her and accused boarded the truck while the other soldier stayed on the ground. Gilda drew back and said, "Don't take me, I am a signorina, your sister, don't do me any bad". (R. 12) She did not want to go but accused picked her up bodily and threw her from the truck to the ground (R. 12,13,27,45). She continued to resist and accused slapped her several times. He and one of the other soldiers then took her to the place where the other women had been taken and accused put her on the ground. (R. 12,13,16,27) The male passengers wanted to defend her, but were threatened by the soldiers and were told not to "move or else" (R. 17). Gilda was heard to give cries of "grief and pain" (R. 12,16,27).

Gilda testified that after Evelina and witness' sister Elandina returned to the truck, accused and another soldier approached the vehicle she was on and accused said, "Gilda come with me" (R. 27). He had heard Gilda's sister call witness by name (R. 29). After accused threw witness from the truck by force he and another soldier took her about 30 meters away. She was crying and did not want to go on. Both soldiers slapped and pushed her, "scared" her with a dagger and took her further away. Accused then threw her on the ground and picked up her dress. She resisted but he then tore her panties, seized her legs, inserted his penis in her vagina and "had his own way". He remained with her five minutes, and she did not consent to the act of intercourse. After accused left her she returned and entered the truck in which accused was also present. She remembered him by his front gold teeth and also well remembered his face. (R. 27,28,45)

When she returned to the vehicle, the rear of her dress was lowered and dirty and her shirtwaist was out. She was so weak Attilio had to help her into the truck. Accused's jacket was open, his belt was unbuckled and his pants were "sort of half on and half off". (R. 16,17) During the time accused and the other soldier were with Gilda, the third soldier was in the street, and the fourth remained near the trucks watching the other passengers.

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One of them had a revolver (R. 17). Attilio, at some time during the incident, made certain marks with his knife on the seats of each truck. One of the vehicles was marked "PBS 1170" on the front and "1500" on the right door. Attilio also recognized accused "because of his teeth". (R. 15,16) After the incident the three other colored soldiers entered another truck and departed. Accused drove the Italian passengers in his truck back to the main highway and there ordered them to get off (R. 16,17; Ex. 1). His vehicle bore the mark "PBS 1500" (R. 16).

Gilda further testified that a few days after 8 August 1944 she attended an identification parade in which there were eight or nine colored soldiers, and identified accused as the soldier who had intercourse with her. "As soon as I saw him I knew him right away". (R. 44)

Manifredi Jafrancesco fu Giuseppi, a physician for the Italian police, testified that he examined Gilda about 0900 hours, 9 August 1944 (R. 23,24) and the examination disclosed that she "had recently been raped" (R. 23). In witness' opinion the girl was a virgin about 24 or 48 hours previous to the examination. He also found a few bruises on her body. (R. 25)

On 9 August, as the result of information he received, Captain Warren A. LeVan, 135th Military Police Company, went to the 850 Gas Dump and searched for a 6x6, two and one-half ton GMC truck marked with "1500" on one of the side doors, and with "three cut marks on the seat". He found that the vehicle was assigned to accused's company and it was later discovered at the 99th Quartermaster Railhead. (R. 18,22) It was identified by Attilio, who had marked it (R. 15,16). The duty roster of accused's company showed that the vehicle was not assigned to anyone between 1900 hours, 8 August, and 0700 hours, 9 August 1944, and it was supposed to have been in the truck park. Captain LeVan then interviewed accused who, according to the duty roster, had been the driver assigned to that day's shift. Accused told him that he had reported back to his organization with a full load, found no driver to relieve him, and volunteered to drive the loaded vehicle to the docks. After unloading at the docks, he went to the 99th Quartermaster Railhead, remained there for a while and then went to his organization. (R. 19) Captain LeVan testified that accused, who was later in a line-up with five other colored soldiers, all approximately the same height and size, was identified by "two of the women" and Attilio, "the three main people". Their identification was immediate and spontaneous. The three civilians were then taken outside while accused changed his uniform and place in the line-up. Thereafter the three civilians again picked accused out without the slightest hesitation. He was placed under arrest and taken to the Aversa Military Police Station. (R. 20-22)

On 10 August, First Lieutenant Noble O. Shepherd, 135th Military Police Company, interviewed accused, advised him of his rights under Article of War 24, informed him that he could make a statement if he desired and that anything he said in the statement would be used for or against him should the investigation result in a trial by court-martial (R. 29). Accused then made a statement which was identified by Lieutenant Shepherd at the trial and admitted in evidence over the objection of the defense (R. 29,30; Ex. 1).

As accused subsequently testified in substantial accord with the statement, it is not set forth herein.

For the defense Antonini Lucia, of Isola Liri, Frosinone, testified that she was a single woman 24 years of age, that she was with Gilda, Blandina, and Evelina on the night of 8 August 1944, and that they were going to Rome. Near Aversa she and Gilda signalled the driver of an American truck (accused) to stop. They boarded the truck with about 11 civilians and after being forced to board the other vehicle at the gas point, all the civilians were taken into the country where both vehicles stopped. One colored soldier forced witness to get off the truck and then accused struck and slapped her. First accused and then the other soldier had intercourse with her without her consent and against her will. She was screaming and frightened. One held her legs apart and her hands back, while the other "had his own way". Witness further testified that thereafter she did not again board the truck because one of her companions fainted, and that "we" went to a civilian's house where the police subsequently arrived. (R. 31-34)

Gilda's sister Oliva Blandina, of Isola Liri, Frosinone, testified that she (witness) was married, that she was with Gilda near Aversa on the evening in question and that they were trying to get a ride to Rome. A truck (accused's) stopped but when they saw the driver was colored, they were afraid to board the vehicle. The driver told them not to be afraid, that the men could accompany them, and the four women and about five men boarded the truck. At the gas point all the passengers, except the Italian officer, were forced to board the second truck and were taken to the country where both vehicles stopped. A soldier who had a dagger, told witness to get off the vehicle. Asked if she had sexual connection that night with any of the colored American soldiers, witness testified "Yes, they took me and another woman violently". Witness identified accused as a soldier who had intercourse with her that evening. The Italians were then taken in one truck (accused's (Ex. A)) to the highway and left on the road. (R. 34-36)

Accused testified that he was married and had two children (R. 40). On 8 August 1944 he was a truck driver on a gas hauling detail from 850 Gas Dump to the port between 0600 and 1800 hours. On that date at 1800 hours he reported to his company and asked a sergeant whether the relief driver for his truck was there. The sergeant replied that he was not and to take the load to the port and unload it. (R. 37) Between 1930 hours and 2000 hours accused left the company, finished unloading around 2100 hours and returned with his empty truck to the 850 Gas Dump to obtain gasoline for the next day. On the way to the dump an Italian officer stopped him and asked if he were going to Rome. Accused replied in the negative, told him where he was going, and said that the officer could ride that distance. He gave the officer permission to board the vehicle but the other people got on his truck without his consent. He took the group to the gas dump and "pushes them off". At that time another truck drove up going toward Aversa. A colored soldier from the other truck, whom he did not know, threw a light in accused's face and asked him what he was doing there. Accused replied that he was letting the people off his truck. This soldier then asked the passengers if they

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had passes which authorized them to ride on the vehicle. Some showed him typed passes signed by an officer but others had no passes. The colored soldier told them he was a military policeman patrolling the road (R. 38), took the passengers over to his truck, and they boarded that vehicle. When the gas checker told accused to move because a truck convoy was arriving, he turned his truck around and headed toward Aversa. He then saw the other truck go up a side road with the civilians and he followed it. He followed the truck because he knew that people on the highway seeking rides to Rome could be "propositioned" and that in return for transportation to Rome one could have intercourse with them. He had seen it done before. (R. 39) He knew when he followed the truck "what the setup was", because he knew what one could do on the road (R. 41). When the first truck stopped accused stopped behind it. The driver of the other truck asked one of the male civilians on his truck how many women were going to get off. This "pisan!" (R. 39) told two of the women to get off and two did so. One woman went to one side of the road with the driver of the other truck and the other woman accompanied accused to the other side of the road. Accused had intercourse with her without the use of force and remained with her about 20 minutes. He offered her a box of K rations which she refused, and finally gave her \$2.00 and the K rations. Accused and his woman then returned to the truck where another soldier, whom he did not know, walked over and told the woman to come with him. When she refused the soldier slapped her and she started to cry. Accused told the soldier not to slap her and to let her alone. The soldier then took her by the hand and led her across the road while accused remained at the truck. When "all of them was finished" they returned to the trucks, and the driver of the other truck left after he made all the civilians get off his vehicle. Accused, as a favor to the civilians, took them back to the highway where he let them off and from there he went to his camp. (R. 39) He knew when he followed the other truck to the country that he was taking the truck there without authority, and that he was to return to the battalion area after he obtained his gasoline at the dump. Four colored soldiers were present at the scene of the incident, including accused. He did not see a pistol, knife or dagger in the possession of any of the other three soldiers who had represented themselves to be military policemen. They had no pistols, belts or military police brassards and accused knew that they were not military policemen. (R. 39-42)

Accused further testified that the woman he had intercourse with was "The little woman with the gray looking dress on *** It was the one said she was 24 years old" (R. 39). Gilda, Elandina and Lucia then entered the court room and accused identified Lucia as the woman with whom he had intercourse that evening (R. 39,40). The trial judge advocate requested that the record show that Lucia was wearing a brown dress and that Gilda was wearing a gray dress with a blue sweater vest (R. 40).

4. There is thus direct and positive evidence that near the place and at the time alleged in the Specification, Charge I, accused forcibly and without her consent had unlawful sexual intercourse with Oliva Gilda, age 19, the woman named in the Specification. He entered the truck in which she was seated and asked her to leave the vehicle. When she refused to do so,

despite her entreaties he picked her up bodily and threw her from the truck to the ground. He and another soldier then took her to the place where the two married women were previously attacked. When she resisted and sobbed, they slapped and pushed her and threatened her with a dagger. Accused finally threw her on the ground. He picked up her dress, tore her panties, held her legs and despite her resistance inserted his penis in her vagina and had intercourse with her by force and against her will. Her testimony as to the fact of penetration was fully corroborated by the medical evidence. All of the elements of rape as alleged were fully established by the evidence (MCM, 1928, par. 148b; NATO 386, Speed; NATO 779, Clark, Massie). Accused contended that the woman with whom he had intercourse was Lucia, and although his testimony is rather vague as to her identity it is corroborated in some degree by that of Lucia and Blandina. The question whether accused had intercourse with Gilda by force and against her will was solely one of fact for determination by the court upon all the evidence.

The evidence also clearly sustains the findings of guilty of misapplication of a government motor vehicle in violation of Article of War 94 (Charge II and its Specification). Accused freely admitted that he used the vehicle in an unauthorized manner. The Specification alleged the vehicle to be a two and one-half, 6x6 cargo, GMC truck of the value of about \$3000.00. There was no proof as to its value but the court was fully warranted in taking judicial notice that an Army vehicle of that type had a value in excess of \$50.00.

5. The testimony of Captain LeVan that "two of the women" and Attilio, "the three main people", identified accused in a line-up of six colored soldiers prior to trial, was hearsay in character and inadmissible (NATO 1267, Denson; Bull. JAG, January 1945, sec. 395 (3)). Witness' testimony was limited to the simple fact of identification of accused and contained no hearsay declaration that accused attacked Gilda. Gilda herself, however, testified that she identified accused a few days after the incident at an identification parade in which eight or nine colored soldiers were present and during the trial she also positively identified accused as her assailant. Three other witnesses at the trial identified and placed accused at the scene of the offense at the time it was committed, and accused testified that he was present. In view of the positive testimony in this regard it cannot be said that the substantial rights of accused were injured by the court's consideration of the incompetent testimony, within the meaning of Article of War 37.

6. The charge sheet shows that accused is 27 years of age and was inducted 14 May 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 sentence. The mandatory penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape,

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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.

Edward K. Ferguson, Judge Advocate.
John G. Brown, Judge Advocate.
Henry C. Meinch, Judge Advocate.

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

APO 512, U. S. Army,
20 March 1945.

Board of Review

MTO 5430

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private First Class FRED)	Naples, Italy, 31 October
DAVIS (34 048 861), 3431st)	1944.
Quartermaster Truck Company,)	Dishonorable discharge and
117th Quartermaster Battalion)	confinement for life.
Mobile.)	U. S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Elwood V. Kerney, Judge Advocate.
Walter R. Remick, Judge Advocate.
Henry C. Irion, Judge Advocate.

MTO 5430

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
20 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private First Class Fred Davis (34 048 861), 3431st Quartermaster Truck Company, 117th Quartermaster Battalion Mobile, attention is invited to the foregoing holding by the Board of Review that the record

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MTO 5430, 1st Ind.
20 March 1945 (Continued).

of trial is legally sufficient to support the 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 5430).


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

(Sentence as commuted ordered executed. GCMO 54, MTO, 20 Mar 1945)

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

APO 512, U. S. Army,
13 April 1945.

Board of Review

MTO 5529

U N I T E D S T A T E S	PENINSULAR BASE SECTION
v.	Trial by G.C.M., convened at
Private CLYDE T. WATTS	Leghorn, Italy, 11 November
(38 226 205), 4181st	1944.
Quartermaster Company	Dishonorable discharge and
(Service).	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 Clyde T. Watts, 4181st Quartermaster Company, (Service), did, at Venturina, Italy, on or about 15 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Agostino Filippo, a human being, by striking him on the head with a wooden club.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave in violation of Article of War 61. 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.

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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 for the prosecution shows that on 15 September 1944 accused, a member of the 4181st Quartermaster Company, was seen with a bicycle approaching an Italian soldier at an Italian camp at or near Venturina (Italy) (R. 10,13,14,19). A knife fell out of accused's pocket and was picked up by a small Italian boy who gave it to the Italian soldier. Accused asked the soldier to return the knife but the soldier, apparently noticing that the brake on the bicycle was broken, refused and either waved the closed knife about or put it in his pocket. (R. 11,12,15,17) Accused refused to pay for the damage to the bicycle (R. 15). The Italian soldier held the bicycle and leaned over to examine the brake. While he was in this position and engaged in examining the brake, accused picked up a wooden club and struck him in the back of the head. Accused then threw the club in the road and ran. (R. 15-19) The club was identified and introduced in evidence. Upon measurement it was found to be 42 $\frac{1}{2}$ inches long and 3 $\frac{1}{2}$ inches in diameter. (R. 18) The Italian soldier did not open the knife (R. 12,16).

Second Lieutenant Antonio Minerbin, 4th Company, 1st Battalion, 548th Infantry of the Italian Army, testified that on or about 15 September 1944 he was stationed at Venturina, Italy, and saw Private Agostino Filippo who was a member of his organization "wounded at the base of the head". Agostino was in a tent of "an Italian outfit" when witness saw him. (R. 7) Witness testified further that the tent was "right near where the incident happened" (R. 8) and that Agostino was unconscious. After the wound was cleaned and medicated, witness took Agostino to the Italian military hospital at Piombino, Italy. The following day witness returned to the hospital and found Agostino was dead. (R. 7)

Captain Ulisse Bucci, 152d Italian Camp Hospital, Piombino, Italy, testified that on or about 15 September 1944 an Italian soldier identified to him by Lieutenant Minerbin as Agostino Filippo, was brought to the hospital in a serious condition with a fracture of the base of his skull which resulted in his death about an hour after his arrival. This witness testified further that he made a careful examination of the soldier's entire body and that he had no other wounds. (R. 8,9)

The following statement, made by accused after having been advised that he did not have to make a statement and that anything he might say could be used for or against him in the event of a trial, was introduced in evidence without objection:

"Yesterday afternoon at about 1530 hours I was directing traffic at Dump Q-5-P-51, located at Piombino, Italy, about 4 or 5 miles away from the port on Highway #1, when an Italian civilian approached me and offered me a 'Signorina'. I said 'O.K.' and left my post following the civilian behind a house, located right off the road.

A girl, about 28 or 29 years of age was behind the house. Before I left my post, I had told Pvt. Thomas Bayman who was also directing traffic at the same point, that I would be back in about 5 minutes. Pvt. Bayman did not know that I was going to get a 'Signorina'. The aforementioned girl said it was O.K. for me to 'Foggi Foggi' her for the amount of three dollars. I gave three dollars to the girl. An Italian soldier who was present stepped in and told the girl not to go with me because I was 'No bono'. The Italian soldier got in an argument with me. He suddenly opened up a pocket knife, and came after me with the open knife. I backed up and got ahold of a club which was laying in a ditch. I hollered at the Italian soldier to stop, he kept coming towards me and I hit him with the club over the head. Some more Italian soldiers ganged up on me and I started to run. While passing Bayman I yelled at him that the Italians were coming after me. I ran to the dump entrance where a guard was standing, Bayman came right after me to the dump. I did not see P(v)t. Bayman threaten the Italian soldiers at any time with a gun. An Officer arrived at the Dump entrance and asked the Italians something, they pointed at Bayman. The officer told Bayman to get in the jeep. While Bayman was getting into the jeep the Officer took a 45 cal Automatic pistol away from him. I had never before seen Bayman in the possession of the said pistol. I stayed at the dump from there on, when the first Sgt. came and placed me under arrest" (R. 19-21; Ex. 2).

For the defense Second Lieutenant Serafino Bardini, 107th Company, 27th Battalion, 8th Group (Italian), stationed at Venturina, testified that about 1600 hours 15 September 1944 he was "near the kitchen" when his attention was called to an incident happening on the road. He turned and saw an American colored soldier strike an Italian soldier, "who had a bicycle in his hands" (R. 22), on the head with a club. Witness testified further that after receiving the blow the Italian soldier fell backwards pulling the bicycle over on top of him. The American soldier then threw the club into an adjoining field. (R. 22-24)

Private Aldo Manfredini, a member of Lieutenant Bardini's company, testified for the defense that about 1600 hours 15 September 1944 at his bivouac area at "Venturina, Piombino" (Italy) he saw an American colored soldier strike an Italian soldier with a club and that as a result of the blow the Italian soldier fell to the ground. Witness testified further that he saw a bicycle on the ground near by. Following the assault the American soldier threw the club in the road. (R. 24,25)

Private First Class Cecil Bush of accused's company, testified for the defense that on the afternoon of 15 September 1944 he was on duty checking trucks "at the Class I Depot" and could see accused who was at his post about 100 yards away, but he did not at any time that day see accused on a bicycle (R. 28).

Accused testified that on the day of the alleged offense he was directing traffic on the road "near that dump at Venturina". (R. 26) when an Italian civilian asked him if he wanted a "signorina". After replying in the affirmative he accompanied the civilian behind a house where the civilian showed him a girl. Accused asked "how much" and the civilian replied "three dollars". Accused "looked around" and "started to go" when an Italian soldier told the girl accused was "no buono" meaning "no good". The civilian told accused to "go ahead" so he gave the girl three dollars and the Italian soldier

"was telling her to come back. So, one word led to another and we had a little argument, and he opens his knife and he says, 'vai, vai'. I don't know what it means, and so when he opens his knife there wasn't anything to do but back up. I withdrew like this (indicating) and he was there (indicating) coming at me. There was a stick laying there and I picked it up and told him to stop, but he kept coming up on me so I hit him with the stick and then I started to run."

Accused testified further that there were "quite a few" persons there and they "ganged up after me". (R. 26) He denied that he had a bicycle or rode a bicycle on the day of the alleged offense but testified that he saw two bicycles over in a ditch as he passed (R. 27).

After the defense had rested and the prosecution and defense had presented arguments the court was closed, then reopened and accused was recalled as a witness by the court. He testified that the reason he did not run when the Italian soldier advanced upon him with a knife was because there were too many Italians "ganged up around". He testified further that after he hit the Italian soldier with a club the Italians fell back and he ran through an opening and that he would have run "at first" if there had been an opportunity. (R. 29,30) He threw away the club because he was not trying to kill anybody but "just trying to keep them off me". (R. 29) The nearest American was out on the main road about 200 yards away (R. 30).

Lieutenant Bardini was recalled by the court and testified that he saw four or five people about two or three meters from the two soldiers who were arguing, but he was unable to tell whether these people were soldiers or civilians (R. 31).

4. It thus appears from direct evidence, corroborated by accused's sworn testimony as well as his extrajudicial statement, that on 15 September 1944, at or near a camp of Italian soldiers located in or near Venturina, Italy, accused engaged in an argument with an Italian soldier. While the soldier was bending over examining the brake on a bicycle accused struck him on the back of the head with a wooden club, knocking him to the ground, then threw away the club and ran from the scene. The club which accused employed in the assault was about the size of a baseball bat.

It further appears that on or about the same date an Italian soldier,

Private Agostino Filippo, the person named in the Specification, was seen unconscious in a tent of "an Italian outfit" in or near Venturina. Agostino's only injury was a fracture at the base of the skull which shortly thereafter resulted in his death.

To sustain a conviction for murder the evidence must establish, among other facts, that the person alleged to have been killed is dead and that he died in consequence of an injury inflicted by the accused. Although it was shown that Private Agostino Filippo, the person named in the Specification, died as the result of a fracture at the base of the skull, there is no direct evidence in the record showing that he died as a result of an injury inflicted by accused. The record does, however, contain evidence showing that about the time Agostino was observed mortally wounded in a tent "of an Italian outfit" at or near Venturina, Italy, accused struck an Italian soldier in the back of the head with a club, then threw away the club and ran from the scene. The assault by accused was shown to have occurred near a camp for Italian soldiers at or near Venturina. It was further established that the blow was delivered at a time when the victim was bending over examining a brake on a bicycle and that the victim was knocked to the ground. The weapon employed in the assault was shown to have been a wooden club about the size of a baseball bat. It is but reasonable to infer that the victim of such an assault committed with the weapon and in the manner shown might well incur a fracture at the base of the skull. The doctor who examined Agostino testified that he examined the soldier's entire body and that he had no wounds other than the fracture at the base of the skull. In view of the fact that accused struck his victim with the club once only, it is reasonable to infer that no injury other than a possible fracture of the skull would have resulted from the assault. From these facts and other circumstances in evidence the court was warranted in concluding that Agostino was the Italian soldier assaulted by accused.

Accused testified that at the time he struck the Italian soldier the Italian was advancing upon him in a threatening manner with an open knife in his hand. Accused's testimony in this regard was uncorroborated and in direct conflict with evidence adduced by the prosecution showing that at the time the blow was delivered the Italian soldier was bending over examining a brake on a bicycle. The issue of self-defense raised by accused's testimony, was for the determination of the court. The court having, in the proper exercise of its prerogative, rejected accused's version of the incident, its action is final.

Rejecting accused's version, the homicide was entirely without legal justification or excuse. There was no legal provocation. Malice was properly inferable from the instrumentality employed, the deliberate, vicious and wanton manner in which it was used, and from other circumstances in evidence. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a).

5. The charge sheet shows that accused is 23 years of age and was inducted 21 September 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting

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

Edward H. Klings, Judge Advocate.
William P. Brown, Judge Advocate.
Henry C. Reisch, Judge Advocate.

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

APO 512, U. S. Army,
5 March 1945.

Board of Review

MTO 5558

U N I T E D S T A T E S)	34TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private ROBERT E. GIBSON)	APO 34, U. S. Army, 12 January
(36 587 628), Company A,)	1945.
133d Infantry.)	Dishonorable discharge and
)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 Charges and Specifications:

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

Specification: In that Private Robert E. Gibson, then Private First Class, Company "A", 133rd Infantry Regiment, did, without proper leave, absent himself from his organization near Margherita, Italy, from about 18 September 1944 to about 17 October 1944.

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

Specification: In that Private Robert E. Gibson, Company "A", 133rd Infantry Regiment, did, near Barchetta, Italy, on or about 31 October 1944, while in his company's kitchen area, misbehave himself before the enemy, by running away, at which time his company was then engaged with the enemy,

and did not return thereto until on or about 17 December 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 "a 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 50 $\frac{1}{2}$.

3. As to the Specification, Charge I, the evidence shows that on 18 September 1944, Company A, 133d Infantry, of which accused was a member and assigned to the third squad, second platoon, was in the vicinity of Margherita, Italy. Staff Sergeant Joseph Trevino, accused's squad leader, testified that on that day he saw accused at the battalion command post, that he asked accused if he were going up with him to the company and accused replied "No". About 15 minutes after the sergeant reported to his company that night, he was sent up to attack. Accused was not authorized to be absent at that time. Witness was with the organization from 18 September to 17 October 1944 and did not see accused during this period. (R. 6) Accused did not have permission to be absent (R. 7).

It was stipulated that the extract copy of the morning report of Company A, 133d Infantry, contained the following entry:

"1 Oct 44 36587628 GIBSON, Robert E. Pfc
Duty to AWOL 1300 hrs eff 28 Sept 44."

It was further stipulated that accused returned to his organization 17 October 1944. (R. 12)

As to the Specification, Charge II, the evidence shows that on 31 October 1944, Company A, 133d Infantry, of which accused was a member, was in a defensive position in the vicinity of Barchetta and Sassi, Italy, with no friendly units between it and the enemy. The company was receiving "a lot of S.P. fire, mortar fire, and small arms fire, and we had German patrols clashing with us at night trying to get into our lines". Accused's first sergeant, Harry T. Mercier, testified that he saw accused on 31 October when witness went back to the kitchen area. Witness testified:

"When we came back to the castle in the vicinity of Sassi, Italy, we stayed there that night, the next day I went back to the kitchen on business." (R. 8)

He also testified:

"The day was being prepared for getting ready to move up into the lines that night."

Companies B and C "were on the line and we were going up into their positions that night". (R. 9) Witness saw accused in the kitchen area and told him that "we were off the lines at present" and that the "C.O." wanted to see him (R. 8,9,12). He spoke to accused "about the circumstances of being AWOL" and accused stated "'I want to be AWOL and be court-martialed'" (R. 9). The first sergeant testified further that he was with the company continuously from 31 October to 17 December 1944 and he did not see accused with the organization at any time during that period although he had no permission to be absent therefrom (R. 12).

Private First Class John L. Hergenrolder, Company A, 133d Infantry Regiment, testified that he saw accused in the company kitchen area about 1500 hours 31 October 1944. Later a check was made of the area and accused could not be found therein. Accused was not seen with the organization between 31 October and 17 December 1944 although he had no permission to be absent therefrom. (R. 10)

It was stipulated that the extract copy of the morning report of Company A, 133d Infantry, contained the following entry:

"21 Nov. 44 36587628 GIBSON, Robert E. Pvt.
Duty to AWOL 1300 hrs eff 31 Oct 44."

It was further stipulated that accused again returned to his organization on 17 December 1944. (R. 12)

No evidence was introduced by the defense and accused elected to remain silent (R. 13).

4. It thus appears from uncontradicted evidence that at the time and place alleged in the Specification, Charge I, accused absented himself without proper leave from his organization and remained unauthorizedly absent until 17 October 1944, in violation of Article of War 61. The variation between the testimony that his absence occurred on 18 September and the morning report entry to the effect that he absented himself on 28 September was immaterial. The proof sustained the allegation that accused went absent "about 18 September 1944" and the defense did not assert that it was misled or prejudiced in any manner.

It further appears that at the time alleged in the Specification, Charge II, 31 October 1944, accused's organization had been in a defensive position in the vicinity of Barchetta and Sassi, Italy, and was to move into another front line position that night. There had been no friendly units between it and the enemy. Fire from self-propelled guns, mortars and small arms had fallen in the area and German patrols at night had attempted to infiltrate through the lines. The company apparently withdrew from the defensive position to a support position preparatory to reentering the front lines at a place occupied by other companies. Accused appeared at the company kitchen area, engaged in a discussion with his first sergeant about absence without leave, was told by the latter that the company was "off the lines" and that his commanding officer wished to see him. He said "I want

to be AWOL and be court-martialed", thereupon absented himself without leave and remained absent without leave until 17 December. It sufficiently appears that at the time of accused's dereliction he was "before the enemy" within the meaning of Article of War 75 (MCM, 1928, par. 141). The location of the kitchen area whence accused absented himself was not definitely shown. Since the remainder of the company was in the immediate presence of the enemy, it may be inferred however that the kitchen was not so far from the front in distance and tactical relationship as to remove it from "before the enemy". Accused's absenting himself under the conditions indicated amounted to a running away as charged.

5. Attached to the record of trial is a report dated 5 January 1945 of a psychiatric examination of accused, as follows:

"Soldier has been frequently AWOL because he didn't want to be in combat. No psychiatric disease found. Soldier feels that in one month of combat he did all he could. In my opinion soldier knows right from wrong and could have adhered to the right at the time of his act."

6. The charge sheet shows that accused is 20 years of age and was inducted 20 March 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.

Eduard K. Berg, Judge Advocate.

John P. Foy, Judge Advocate.

Henry C. Glavin, Judge Advocate.

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

APO 512, U. S. Army,
3 March 1945.

Board of Review

MTO 5561

UNITED STATES	34TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at
Private WALTER J. HARVEY (37 042 232), Company L; 168th Infantry Regiment.	APO 34, U. S. Army, 5 January 1945. Dishonorable discharge and confinement for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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 Specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Walter J. Harvey, Company "L", 168th Infantry Regiment did near Capriati, Italy on or about 1 November 1943, 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 29 December 1943.

Specification 2: In that Private Walter J. Harvey, Company "L", 168th Infantry Regiment did near Nettuno, Italy, on or about 30 March 1944, misbehave himself before the enemy by failing to rejoin the forward elements of his company which was then engaged with the enemy, to wit: the German Forces, when it was his duty to do so, and did not return thereto until on or about 6 November 1944.

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

3. As to Specification 1 of the Charge, the evidence shows that about 1300 hours 1 November 1943, Company L, 168th Infantry, began an attack against the German forces near Capriati, Italy. Shortly thereafter the company was heavily shelled and the attack "was held up until dusk, when it was supposed to have been resumed". (R. 6) Staff Sergeant Edward T. Podgorski, to whose squad accused was assigned, testified that he saw accused at the start of the attack but later found him missing. Accused had no permission to be absent. Witness was with the organization continuously between 1 November and 29 December 1943 and did not see accused with the organization. Accused was not authorized to be absent during this period. (R. 6,7)

It was stipulated that the extract copy of the morning report of accused's company contained the following entry:

"23 November 1943 37042232 HARVEY, Walter J. Pvt.
Erron drpd fr rolls MIA 1 Nov 43,
Should have read: Fr dy to AWOL
1 Nov 43."

It was further stipulated that accused returned to his organization 29 December 1943. (R. 10)

As to Specification 2 of the Charge, the evidence shows that during the period from 28 March through 30 March 1944, Company L, 168th Infantry, was in a defensive position on the Anzio beachhead near Nettuno, Italy, in direct contact with the enemy. There were no friendly units between the company and the enemy, and mortar, artillery and rifle fire from the Germans was falling in the area (R. 7,8). Captain Robert E. Barkley, then executive officer of accused's company, testified that on 28 March immediately following a very heavy concentration of mortar fire on the third platoon position, accused came to the company command post and said "he didn't feel it was possible for him to stand any more at that time". The company commander gave accused permission to go back to the kitchen area for two days. Accused did not return on 30 March 1944 when his two day rest period expired. Witness was with the organization from 30 March until the middle or latter part of April and did not see accused with the organization. Accused did not have permission to be absent during this period. (R. 8)

Staff Sergeant Wesley J. Rasmussen of accused's organization, the mess sergeant, testified that accused was in the kitchen area on 28 March where

he remained for two days on pass. When the time arrived for accused to return to the company, he said "he couldn't go back". About two hours later, witness looked for accused and he was not in the area. He did not have permission to be absent. (R. 9)

Technical Sergeant Robert E. Rinda, mortar section sergeant who knew accused, testified that except for three days in July he was with the company continuously from 30 March 1944 to 6 November 1944, and did not see accused with the organization during that period (R. 9,10).

It was stipulated that the extract copy of the morning report of accused's company contained the following entry:

"1 April 1944 37042232 HARVEY, Walter J. Pvt.
Fr dy to AWOL 2200 hrs 30 Mar 44."

It was further stipulated that accused returned to his organization on 6 November 1944. (R. 10)

Accused, through defense counsel, made an unsworn statement as follows:

"Through counsel the accused states he is 28 years of age. He has had an 8th grade education and he was 17 years old when he finished. He has a wife and mother that are dependent upon him, and that he came overseas with the 168th Infantry Regiment" (R. 10).

4. It thus appears from uncontradicted evidence that at the time and place alleged in Specification 1, accused left his organization without leave while it was in combat with and attacking the German forces. He did not return thereto until 29 December 1943. It further appears from uncontradicted evidence that at the time and place alleged in Specification 2, accused again without leave left his organization while it was engaged with the German forces and did not return thereto until 6 November 1944. At the time of his first absence his organization was in an attack, and thereafter became subject to such heavy shelling by the enemy that the attack had to be postponed until after dusk. It is clearly evident that on the occasion of this absence, accused's organization was before the enemy and engaged with it, and that accused's conduct in absenting himself without permission was misbehavior before the enemy within the meaning of Article of War 75 (MCM, 1928, par. 141). At the time of his second absence his organization was in a defensive position on the Anzio beachhead and all types of German mortar, artillery and rifle fire were falling in the area. There were no friendly units separating it from the enemy. Accused was given permission to go to the kitchen area for two days. At the conclusion of that period it became his duty to return to the forward elements of his organization. Instead of returning he stated that he could not go back and thereupon left his organization without permission. The relative location of the kitchen area where accused was last seen is not shown, but it is a matter of common knowledge of which the court could take judicial notice that the entire Anzio beachhead was in close proximity to the enemy and that all parts of the beachhead were subject to attack during March, 1944. The

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circumstances justify the conclusion that when accused absented himself he was in the presence of the enemy. His absenting himself amounted to a running away, as charged, as in the case of the prior absence.

5. There is attached to the Record of Trial a report of psychiatric examination of accused on 13 November 1944. That report states:

"Soldier gives a long story of going AWOL in April 1944 because his C.O. took him off a job that he thought he thought he was doing well i.e. transportation corporal-and sent to the line. Got mixed up in black market operations with civilians but released from blame after he helped M.P.'s to round up the gang. Broke arrest on way back to unit because he claims he was promised a transfer out of division. Soldier shows considerable resentment against authority. Denies similiar incidents in civilian life. In my opinion he knew right from wrong but didn't adhere to the right because of *** Constitutional pshchopasthical state- LOD-No, EPTS. Individuals of this sort are not self-bound by society's laws and are very little concerned about infractions of the same."

6. The charge sheet shows that accused is 33 years of age and was inducted 4 April 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.

Edward H. Johnson, Judge Advocate.
Malvina (R) Green, Judge Advocate.
Henry C. Kuehne, Judge Advocate.

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

APO 512, U. S. Army,
30 March 1945.

Board of Review

MTO 5875

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private THOMAS M. SHERROD)	Naples, Italy, 14 November
(34 382 831), Detachment of)	1944.
Patients, 37th General Hospital,)	Dishonorable discharge and
formerly of Company B, 337th)	confinement for ten years.
Infantry.)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 93d Article of War.

Specification: In that Private Thomas M. Sherrod, Company 'B', 337th Infantry, did, near Lariano, Italy, on or about 31 May 1944, unlawfully, willfully, and feloniously shoot himself in the foot 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 dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution is contained in two depositions introduced in evidence as Prosecution's Exhibits No. 1 and No. 2 (R. 8). Private First Class Herbert R. Scheive, a member of accused's company, deposed that on or about 31 May 1944, he was bivouacked near Lariano, Italy. On that date he and accused, who were runners between their company and the 1st Battalion of their regiment, were on their way to their company from the battalion. Deponent was about five yards ahead of accused who had left the battalion carrying his M-1 rifle over his shoulder. Deponent heard a shot, turned around and found accused with a bullet wound "through and through" his right foot on the upper surface near the junction of the ankle and the leg. He asked accused what had happened and the latter replied "'I have shot myself in the foot'". He appeared to be suffering "much pain". Two or three days before the incident all runners were particularly instructed that rifles would be cleared of ammunition. The instructions pertained with respect to "bivouac conditions only" and not to periods when the company was in direct contact with the enemy. On 31 May the company was not in direct contact with the enemy, and on that date deponent heard no small arms or mortar fire. The company bivouac area was within artillery range and artillery shells did fall into the area. About a week after the "big push" started on 11 May 1944, accused asked deponent to shoot him in the foot or leg and said he would pay him a reasonable amount for doing so. Deponent told accused he was "crazy" and refused. Accused renewed his request "along the same lines" on several different occasions, the last being about one day before the shooting. Accused repeated the request so many times that deponent had about concluded that accused must have considered it to be a joke. (Ex. 1)

Private Dennis L. Dunaway of accused's company deposed that about 19 May 1944, in the vicinity of Terracina, Italy, accused was nervous and asked deponent to shoot him. He thought accused was joking until the latter repeated his request and offered to pay deponent if he would shoot him in the leg or foot. Deponent had heard other men engage in similar conversation in a joking manner, but believed accused was serious in his request. (Ex. 2)

For the defense, Technical Sergeant Alton S. Wroolie of accused's company testified that accused was a runner, one of the "roughest jobs", and that on 31 May 1944 their company was in the line (R. 9) actively engaged with the enemy (R. 19). Witness did not remember which company of the 1st Battalion was then in reserve but testified that runners of the reserve company were supposed to have ammunition in their possession (R. 20). Witness testified further that he had heard other soldiers, purely in jest, ask their companions to shoot them and even offer to pay money for the service (R. 10,11). Witness himself was shot and another sergeant remarked that he was lucky and that he ought to have someone shoot him so he could go along with witness (R. 10).

Lieutenant Colonel Morton Hand, neuropsychiatrist at the 37th General Hospital, testified for the defense that he had examined accused and made an official report which was received in evidence as Defense Exhibit A (R. 11,12). In pertinent part it is stated in the report:

"This man has been suffering deep and intense conflicts arising from rigid moral conflicts that are opposed to those of war. In addition, he has suffered from lack of confidence in his sexual potency which has been present in his social life and led to 'numerous breakdowns'. He has tried to conform with the demands of patriotism and self sacrifice, and the self obliteration required to do his duty. His reactions in battle have been such as arise from moral conflicts and produce confusion and amnesia.

"DIAGNOSIS:

"Psychoneurosis, anxiety state, chronic, severe, manifest by apprehension, tremulousness, inefficiency in combat, cause unknown" (Def. Ex. A).

Witness testified further:

"This report is based on numerous examinations of the patient. The first examination was undertaken when it was requested by the ward officer because he had been acting peculiarly in the ward. This was previous to the time he knew he was under charges, or when he was informed of the fact that he was suspected of a self inflicted wound. I saw him thereafter, at the request of the investigating officer, on the 12th of August and obtained additional information. Subsequent to this, I also examined this man under pentothal hypnosis and obtained information which corroborated my previous findings and opinions. Thereafter, he was on another ward in the hospital and he reacted in an unusual fashion on that ward so that he came into conflict with some of the patients in his ward. I interviewed him for this difficulty, and also interviewed the men who had been objecting to some outburst of his, and acquired some additional information which corroborated my opinion that this man is an unstable individual not capable of distinguishing right from wrong in instances when his emotional conflicts rose to the fore and prevented his discerning right from wrong of his acts. I have some data of his production under hypnosis, and also a summary of the interview I obtained with him and some of his tentmates while he was a patient at the hospital" (R. 12).

Witness also testified:

"It is my opinion that Private Sherrod is not responsible for his actions, that he was not responsible for his actions in combat and at the time when he inflicted the wound upon himself. The reason I have for stating such

an opinion is based upon my experience and the experience of others with large groups of men who have been subjected to exciting symptoms, whether arising in combat or ordinary conflicts that arise in civilian life. It is my opinion this man's reaction, which culminated in the self inflicted wounded, was a subconscious or unconscious motivation which is very commonplace, and it occurs at an unconscious level in most men subjected to combat conditions; and it occurs more readily to individuals who, because they have been sensitized to motivation drives in civilian life are more likely to break down under combat strain. But various individuals as Private Sherrod are more susceptible to the escape mechanisms and drives that would lead them to seek redress from the anxiety they suffer" (R. 13).

On cross examination witness testified:

"Q. In the last paragraph you make this statement, 'This man is severely psychoneurotic and was not responsible for his act. If charges are pressed, I believe this soldier will suffer collapse and possibly become irreversibly incapacitated for any civil or military duty. I do not believe this man is capable of assisting in his own legal defense.' Do you still adhere to that conclusion that you do not believe he is capable of assisting in his own legal defense?

A. I do.

"Q. So far as it is possible, within your ability and experience as a neuropsychiatrist, insofar as it is possible for you to judge from your subsequent interviews with this patient, is it your belief he did not know the difference between the right and wrong at the time he shot or is alleged to have shot himself?

A. That is correct. I do not believe he knew the difference between right and wrong at the time he shot himself" (R. 13).

Witness was a member of a board of five medical officers which decided by a vote of three to two that accused was mentally competent to participate in his own defense, and that on or about 1100 hours, 31 May 1944 he had not lost the mental faculty to determine right from wrong and to adhere to the right (R. 13,14). The board was composed of professional members of the 37th General Hospital, none of whom were psychiatrists except witness (R. 15). Accused was later examined under pentothal hypnosis but did not admit that he shot himself intentionally. He stated that he picked up his rifle to test it and shot himself while testing the weapon. (R. 14,15) Accused stated before the board that he could not get himself to kill anybody (R. 15).

Accused testified that on 31 May 1944 his company and the entire battalion was in actual combat (R. 16,18) and that he was supposed to have ammunition (R. 17). While walking about five yards behind Private Scheive, he took his M-1 rifle off his shoulder, placed it against his left leg and pulled the bolt back to see if the weapon was loaded. The bolt "went out of" his hand, the gun was discharged, and his foot was hurt. He "just cleared" the rifle, thought he had the safety on, and "didn't think of letting it go off".

"I just pressed it in my hand and hit it in a quick movement, and when the bolt returned I don't know whether the shell hung in the bore and went off. I don't know what made it go off".

He did not know if he had his finger on the trigger at the time. (R. 17,18) Accused did not usually test his rifle with the muzzle resting on his foot (R. 17). Scheive was a personal friend of accused and they joked considerably, but accused did not recall asking Scheive to shoot him, nor did he recall having any such conversation with Private Dunaway (R. 18). He had heard several other members of the company talk jokingly about shooting each other in the ankles or legs. As far as he knew accused had made no such remarks and if he had, they would have been made in jest. (R. 19)

4. It thus appears from the evidence that at the place and time alleged in the Specification accused shot himself in the foot with an M-1 rifle. About a week after the "big push" started on 11 May 1944, accused asked a fellow soldier to shoot him in the foot or leg and offered to pay him for the service. He repeated the request so many times that this soldier had about concluded that accused considered it a joke. The last occasion was about one day before the actual shooting. About 12 days prior to the incident accused asked another soldier to do the same thing, repeated his request and also offered payment. Although the second soldier had heard such requests made before within the organization in a joking manner, he believed accused made the request seriously. Accused was nervous at the time. Accused contended the shooting occurred accidentally while he was testing the rifle. He placed the weapon against his left leg and pulled back the bolt. The bolt "went out of" his hand and the rifle was discharged. He admitted that he did not usually test his rifle in this manner.

The evidence concerning the shooting itself was entirely circumstantial. However, in view of accused's repeated requests to be shot, his offers of payment therefor, the fact that such conduct began about a week after the start of the "big push", the fact that his last request was made about the day before the incident, the testimony of Dunaway that accused was serious and nervous when he broached witness, and accused's admittedly unusual manner of "testing" his weapon, the Board of Review is of the opinion that the evidence was legally sufficient to justify the conclusion that the self-injury was willfully and maliciously done and to support the findings of guilty.

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A person may be guilty of committing the offense of mayhem on his own person in violation of Article of War 93. Scheive deposed that the bullet wound "was through and through" accused's right foot on the upper surface at about the juncture of the ankle and leg, and that accused appeared to be suffering "much pain". It is evident that accused suffered a "hurt" of a part of his body whereby he was rendered, at that time, "less able, in fighting, either to defend himself or to annoy his adversary". (MCM, 1928, par. 149b)

There was considerable testimony concerning accused's mental capacity at the time of the shooting and whether he was capable of assisting in his own defense at trial. A qualified psychiatrist who examined accused on several occasions testified that in his opinion accused was not capable of assisting in his own defense and that at the time of the shooting he did not know the difference between right and wrong. Prior to the trial, however, a board of five professional members of the 37th General Hospital, upon which the psychiatrist witness was the only member so qualified, decided by a vote of three to two that accused was mentally competent to participate in his own defense and that at the time of the shooting accused had not lost his mental faculties to determine right from wrong and to adhere to the right. The defense counsel stated in open court that the contention of the defense was that accused shot himself accidentally and that it did not base any contention on the medical testimony which, in the words of defense counsel, "may be extraneous to the case". With reference to mental capacity a question of fact was presented for the court's determination. The court had the opportunity of observing accused during the trial and of judging his mental capacity when he testified as a witness in his own defense. The conclusion of the court, reflected in its findings of guilty, was conclusive of the question.

5. The Table of Maximum Punishments (MCM, 1928, par. 104c) does not list the offense of mayhem but it has been held, by reference to Section 22-506, Code of the District of Columbia (act of 3 March 1901, 31 Stat. 1322, C. 854, sec. 807), that the maximum punishment which may be imposed for mayhem is dishonorable discharge, total forfeitures and confinement at hard labor for ten years (Bull. JAG, December 1943, sec. 454 (82a), pp. 467,468).

6. The charge sheet shows accused is 33 years of age and was inducted 12 May 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 the sentence.

Elliott M. Ward, Judge Advocate.
William R. Jones, Judge Advocate.
Henry C. Graig, Judge Advocate.

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

APO 512, U. S. Army,
27 February 1945.

Board of Review

MTO 5890

U N I T E D S T A T E S)	88TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private ALEXANDER M. VOLLAZO)	Monghidoro, Italy, 12 February
(32 397 904), Headquarters)	1945.
Company, 2d Battalion, 349th)	Dishonorable discharge and
Infantry.)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 58th Article of War.

Specification: In that Private Alexander M. Vollaro, Headquarters Company, Second Battalion, 349th Infantry, did, near Gioia, Italy, on or about 2 March 1944, desert the service of the United States and did remain absent in desertion until he returned to military control on or about 23 January 1945.

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

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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. Corporal Daniel W. Adams, an antitank gunner and a member of accused's organization, Headquarters Company, 2d Battalion, 349th Infantry, testified that on or about 2 March 1944 the unit was stationed near Gioia, Italy (R. 5). About that date the unit was on its way to the front lines (R. 7). Adams and accused were riding in a truck and when Adams reached the front accused was not present. That was the last the witness saw of him. (R. 6A) Adams further testified that accused was not present for duty on 2 March 1944 and did not have permission to be absent. He was also not present for duty between 2 March 1944 and 23 January 1945 and was not authorized to be absent during any part of this period. During accused's absence his unit "took part in breaking the Gothic Line, Hitler Line, Arno River crossing and the push to Rome". For the greater part of this period it was within range of enemy artillery and small arms fire. It had suffered a considerable number of casualties (R. 6). Prior to his absence accused was a mess sergeant (R. 7) and to witness' knowledge accused had never spent any time in combat (R. 6) nor had he been trained for duties other than those of a cook (R. 7).

An extract copy of the morning report of accused's company, was admitted in evidence the defense stating that there was no objection thereto. It contained the following entry:

"6 March 1944: Pvt. Vollaro, Alexander M. Fr dy to
AWOL 2 Mar. 44 2000 hrs" (R. 7; Ex. A).

Accused elected to make an unsworn statement to the court in which he said he was a private and a cook when he left his company on 2 March. Prior to that time he had been a staff sergeant. His reason for leaving the company was that he was going into the company as a soldier, for which he had no training, instead of being a cook, for which he was trained. (R. 8)

4. It thus appears from the uncontradicted evidence that at the time and place alleged in the Specification, accused absented himself without proper leave from his organization. He was then accompanying his unit on its way to the front lines. He had been a cook, and admitted in his unsworn statement that he went absent because he was going into the company as a soldier. He claimed that he was trained as a cook and not as a soldier. Accused was not present with his company between 2 March 1944 and 23 January 1945, a total of about 327 days, and it may be presumed that his initial absence without leave on 2 March as shown in the morning report, continued during this period. During his absence his unit participated in several severe engagements with the enemy and suffered a considerable number of casualties. There was no evidence as to the time, place and manner of his return to military control. An intention to remain permanently absent may be inferred from the circumstances of accused's initial absence, the prolonged, unexplained duration of such absence, and from his failure to surrender to military authority while in an active theater of operations. 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 11 February 1945, the day preceding the trial, containing the following:

"Psychiatric examination reveals no disease. Soldier is a 26 year-old individual with 3 years of high school education of Italian parents. His offense was prompted by differences with the 1st sergeant of his unit and the possibility of his transfer to line duty. He is oriented as to time, place and person; sensorium and perception clear. There is no medical reason for his lack of perseverance to his military duties. He is capable of combat duty but is held legally liable for his prolonged period of absence."

6. The charge sheet shows that accused is 26 years of age and was inducted 1 July 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 the sentence.

Henry J. Koenig, Judge Advocate.
William P. Dunn, Judge Advocate.
Henry C. Leinweber, Judge Advocate.



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

APO 512, U. S. Army,
5 April 1945.

Board of Review

MTO 5908

U N I T E D S T A T E S)	34TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private JOHN E. ROSSITER)	APO 34, U. S. Army, 2 February
(32 766 084), Company C,)	1945.
135th Infantry.)	Dishonorable discharge and
)	confinement for 15 years.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 75th Article of War.

Specification: In that Private John E. Rossiter, Company "C", 135th Infantry Regiment, did, in the vicinity of LaValle, Italy, on or about 15 October 1944, misbehave himself before the enemy, by failing to rejoin his company, then engaged with the enemy, when under a duty to do so.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave in violation of Article of War 61. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years,

three-fourths of the members of the court present concurring. The reviewing authority approved the sentence but reduced the period of confinement to 15 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. For the prosecution Captain Theodore L. Urbas, Company I, 135th Infantry, testified that on 15 October 1944 he was the commanding officer of Company C, 135th Infantry. The company was then in the vicinity of LaValle, Italy, had attacked the enemy that morning and had been repulsed. The Company was to attack again that evening. Enemy artillery, mortar, small-arms and machine gun fire fell in the company area that morning, and there were 34 casualties. About 1900 hours witness, his officers and platoon sergeants, were in the company command post discussing the attack which was to occur that evening. The "SP's" entered the command post with three men from regimental rear who were to join witness' company. Accused was one of the three men. (R. 8) Witness asked accused of which platoon he was formerly a member and the latter replied "it was *** the rifle platoon for a while". The sergeant and leader of this platoon were in the command post at the time and witness ordered the sergeant "to take him (accused) and attach him to his platoon". Accused then told witness

"this was as far as he was going and I could send him back to the stockade because he wasn't going any closer to the front line."

Witness ordered accused to join his platoon and asked him if he knew the meaning of a direct disobedience of an order. Accused replied

"yes, he did, that he has done it before, and that he just won't go up any further, that I could do what I wanted, to send him back to the stockade."

Witness attempted to reason with accused "but he seemed to have his mind made up". Witness "had no alternative but to send him back with the SP to the stockade". Accused did not join his platoon. (R. 9)

No evidence was introduced by the defense and accused elected to remain silent (R. 9).

4. Accused was originally charged with willfully refusing to obey the lawful command of Captain Urbas, his superior officer, to report to his platoon for duty, in violation of Article of War 64. Before arraignment the trial judge advocate moved that the Specification and Charge "be amended" to allege a violation of Article of War 75. Defense counsel stated that if the motion was granted the defense would not require a continuance further to prepare its case, and that the case for the defense would not in any way be embarrassed or hindered thereby. Thereupon the court granted the motion and accused was then arraigned upon a Specification in which it was alleged that he did "misbehave himself before the enemy, by failing to rejoin his company, then engaged with the enemy, when under a duty to do so", in violation of Article of War 75.

The evidence sufficiently shows that accused did not on the date alleged in the Specification, or at about that time rejoin his platoon which was then engaged with the enemy. Under ordinary circumstances the offense charged herein, failing to rejoin his platoon would, in effect, involve a wrongful omission by accused to perform certain physical acts, namely, leaving the command post, going to the place where the platoon was situated and becoming attached thereto, that is, actually joining the unit. The performance of these physical acts would necessarily involve time. In consideration of the foregoing, it might conceivably be maintained that accused was prevented from performing these physical acts because he was sent back to the stockade under guard by the company commander. It would be contended that although accused's willful disobedience itself necessitated the company commander's action, thereby rendering it impossible for accused to join his platoon, yet such willful disobedience did not in itself constitute a failure to rejoin the platoon, because the two offenses are entirely distinct in character.

In the instant case, however, both accused's platoon leader and the platoon sergeant were in the command post with the company commander and accused. Therefore, had accused, while in the command post, signified his willingness or acquiesced in the order to join his platoon sergeant, because of the immediate presence of his platoon leader and sergeant he would, for all practical purposes, be deemed to have joined his platoon then and there. The act of joining his unit would have been completed at that time. His actual departure from the command post with the platoon sergeant, going to the platoon and being formally attached thereto, would have been acts merely of a supplementary and administrative nature. Instead, while in the presence of the company commander and of the platoon representatives, he failed to signify his willingness to join and thereby failed to perform the act which would have constituted a joining of his platoon.

5. It is noted that accused was charged with failing to rejoin his company whereas the evidence showed that he was ordered to join his platoon. The variance is immaterial. The evidence shows that the company was engaged with the enemy, and indicates that the platoon was present with the company at that time and formed an integral part thereof. Accused was fully apprised of the nature of the offense alleged and could not possibly have been misled by the variance.

6. The charge sheet shows that accused is 21 years of age and was inducted 15 February 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 the sentence.

Edward H. Berg, Judge Advocate.
John P. Jones, Judge Advocate.
Henry C. Kinnard, Judge Advocate.



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

APO 512, U. S. Army,
13 March 1945.

Board of Review

MTO 5916

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Corporal DOUGLAS L. WEIR)	Rear Echelon, 92d Infantry
(37 099 221) and Private)	Division, 23 January 1945.
First Class CLARENCE D.)	As to each: Dishonorable
FARRAR (34 302 100), both)	discharge and confinement
of Company G, 365th)	for life.
Infantry.)	U. S. Penitentiary, Lewis-
		burg, 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 were tried jointly upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that, Corporal Douglas L. Weir, and Private first class Clarence D. Farrar, both Company G, 365th Infantry Regiment, acting jointly and in pursuance of a common intent, did, in the vicinity Querceta, Italy, on or about 10 November 1944, forcibly and feloniously, against her will, have carnal knowledge of Signora Navari Eva.

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

Accused Weir was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and sentence in his case. 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 his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

Accused Farrar was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, all members of the court present concurring. The reviewing authority approved the sentence, 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 10 November 1944, both accused were members of Company G, 365th Infantry Regiment (R. 14).

Navari Eva testified that about 0800 hours on 9 November 1944 both accused came to her house in Querceta, Italy. Accused Weir entered the kitchen with his "gun" in his hand, stopped, and without saying a word started to affix his bayonet to his gun. Accused Farrar remained at the door. Witness and her mother-in-law, who were the only persons present, became frightened and ran out of the house. Both accused then left. (R. 7) The following day, at noon, both accused returned to the house. Weir again entered the house and Farrar stopped at the door. Weir pointed his "gun" at witness who was seated on a chair holding her child. Witness became frightened and walked around the table with the child in her arms. Weir stopped her as she was going outside, tapped her on the shoulder, and indicated by signs that he wanted her to accompany him upstairs. She managed to leave the kitchen and enter the kitchen of the house next door where Weir followed her. Farrar again stood in the doorway holding his "gun" and did not allow witness' mother-in-law to enter. Witness tried to leave but Weir pushed her against a cupboard, struck her repeatedly and tried to drag the child from her arms. She told her mother-in-law, who at this time was standing at the window, to get help. Witness was screaming and trying to hold her child who was also screaming. Fearing the child might get hurt, she released him and he ran out the door which Farrar then closed. Weir put witness on the ground, held her by the shoulders and tore off her skirt and drawers. (R. 7,8) She struggled as much as she could but he continued to slap her as she called for help, and she did not have enough strength to resist successfully. Both his hands and arms were on her shoulders and he was "cutting my breath off". (R. 8) He then "raped me as he wished". She both saw and felt Weir's penis inserted in her. He suddenly arose and shortly thereafter departed, but witness continued to scream and call for help. At that time, an Army vehicle arrived, and Weir and Farrar were stopped as they were leaving. A soldier came to the house to ask her what was wrong.

and both accused were then taken away. (R. 8) Farrar stood at the outside door during the entire incident (R. 8,9). Witness positively identified both accused at the trial (R. 6,9).

Concetta Narari, mother-in-law of the victim, testified that on 10 November 1944, two soldiers came to her house. They frightened her and she, her daughter-in-law Eva and her grandchild went to a neighbor's kitchen. Concetta remained outside but Eva entered the kitchen. Witness saw one soldier slapping Eva and pressing her against a cupboard. Her daughter-in-law was calling to witness and telling her to get help. She attempted to go to Eva's assistance but the other soldier at the door, who had a gun in his hand, pushed her to one side and did not permit her to enter. Concetta then went to the road and stopped an American vehicle. (R. 10,11) She testified "I seem to recognize" accused Weir (R. 10) and she was "almost sure" he was the man who entered the kitchen with Eva. However, as her eyesight was "not too good" she "would not like to swear on it". She was "not sure" whether she recognized accused Farrar (R. 11).

Inise Lucchesi who lived next door testified she saw Eva, who was crying, enter witness' house. One soldier stopped at the door and the other pushed Eva into the kitchen. Witness, in response to Eva's request, ran for help and stopped an American vehicle on the road. Asked if she could identify accused she testified "I am not sure because I only saw them once". (R. 11,12)

Diana Nicoletti, who lived next door to Eva, identified both accused as the two soldiers who on 9 November came to the building in which both houses were located. Weir had his gun in his hand and ordered witness to enter the house. Farrar, who had a bayonet fixed on his weapon remained outside. Inside the kitchen Weir stared silently at witness who became frightened and ran from the house. (R. 13)

Staff Sergeant Milton Grayson, of accused's organization, testified that at about 1300 hours 10 November, in a small village, while he was driving from battalion headquarters to the company command post, he saw a woman who was talking loudly and running. He stopped the vehicle and met Weir and Farrar coming from the direction of the house "where the noise was coming from". Three or four people were crying and shouting. (R. 14) When he asked Weir what had happened the latter replied that he did not know and walked away. Witness could not understand the people but from their actions he understood they were trying to make a complaint—"Someone said she had been raped". (R. 15)

Each accused elected to remain silent (R. 16).

4. It thus appears from the uncontradicted evidence that at the time and place alleged in the Specification, accused Weir had unlawful carnal knowledge of Navari Eva, the woman named therein, by force and violence and without her consent. Proof of actual penetration was definitely established. There is ample corroboration of Eva's identification of both accused as the soldiers who were at the scene at the time of the commission of the offense. Upon the facts and circumstances disclosed, the court was clearly warranted in finding accused Weir guilty

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as charged.

As to accused Farrar the evidence also supports the findings of guilty. Admittedly Farrar did not have sexual intercourse with the victim. However, that both accused acted jointly and in pursuance of a common intent is amply shown by the facts and circumstances. It is clear that they were looking for a woman and that they invaded the victim's home with that intent. Farrar's conduct was one of countenancing and rendering active aid and assistance to Weir in the perpetration of the physical rape. With his firearm he stood guard at the door and prevented the victim's mother-in-law or any other person from going to her assistance. As an aider and abettor, Farrar was properly charged as a principal (NATO 1925, Cofield et al; NATO 385, Speed et al).

5. Prior to the arraignment a member of the court, Captain Lastrapes, announced that he had prior knowledge of the case because he "prepared it" but that he had formed no opinion. The defense then peremptorily challenged another member of the court and did not exercise any challenge for cause. The defense did not challenge Captain Lastrapes, who remained as a member of the court (R. 3). The defense apparently was satisfied with the qualifications of Captain Lastrapes as a member of the court. He was a competent member, the right of challenge was effectively waived and his presence on the court cannot be said to have injuriously prejudiced the rights of accused.

6. The charge sheet shows that accused Weir is 24 years of age and was inducted 26 September 1941. Accused Farrar is 34 years of age and was inducted 30 April 1942. No prior service of either accused 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 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.

Edward M. Kassab, Judge Advocate.
Major G. S. Jones, Judge Advocate.
Henry C. Reusch, Judge Advocate.

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

APO 512, U. S. Army,
13 March 1945.

Board of Review

MTO 5916

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

v.

Corporal DOUGLAS L. WEIR
(37 099 221) and Private
First Class CLARENCE D.
FARRAR (34 302 100), both
of Company G, 365th
Infantry.

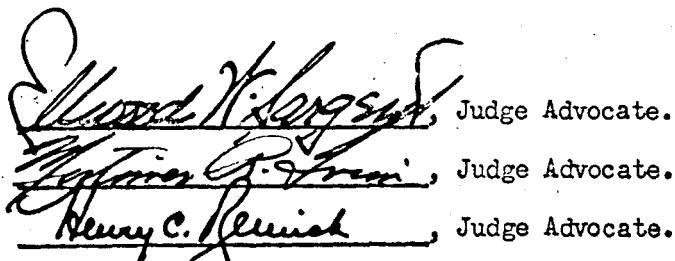
) 92D INFANTRY DIVISION

) Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 23 January 1945.
As to each: Dishonorable
discharge and confinement
for life.
U. S. Penitentiary, Lewis-
burg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined by the Board of Review and held legally sufficient to support the sentence as to Weir.



Edward W. Karg, Judge Advocate.
James G. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 5916

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
13 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Corporal Douglas L. Weir (37 099 221), and Private

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CONFIDENTIAL

MTO 5916, 1st Ind.
13 March 1945 (Continued)

First Class Clarence D. Farrar (34 302 100), both of Company G, 365th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence as to Weir, 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 as to Weir.

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 5916).



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

(Sentence as commuted ordered executed. GCOMO 47, MTO, 15 Mar 1945)

CONFIDENTIAL

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

APO 512, U. S. Army,
3 March 1945.

Board of Review

MTO 5917

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private First Class KINNEY)	Rear Echelon, 92d Infantry
JONES (34 120 505), Cannon)	Division, 17 January 1945.
Company, 371st Infantry.)	Death.

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 First Class Kinney Jones, Cannon Company, 371st Infantry, did, north of Pietrasanta, Italy, on or about 2 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Corporal Milton M. Winstead, Cannon Company, 371st Infantry, a human being by shooting him with a U. S. Carbine, caliber .30 M1.

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 and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The undisputed evidence for the prosecution shows that on 2 January 1945 the 3d Platoon, Cannon Company, 371st Infantry, of which accused and Corporal Milton M. Winstead (the deceased) were members, was stationed in a howitzer position at Ruosina (Italy) (R. 8,13,14).

Private Ellis Beard, Medical Detachment, 371st Infantry, testified that he was standing in the door of his sleeping quarters and saw accused and Winstead meet each other on the street. From a distance of from seven to ten yards witness heard the entire conversation that took place between the two men (R. 8-10), which consisted of the following statement by Winstead to accused, "'When you finish putting your equipment in your pup-tent, go relieve the man on the bridge'" (R. 9,10). Accused immediately began firing at Winstead from a distance of about three feet and fired about 13 rounds. Winstead did not threaten accused or speak to him in a threatening manner, and witness did not observe any action on the part of Winstead which might have aggravated accused. The shooting appeared to be on the "spur of the moment". Witness observed no evidence of abnormality on the part of accused or Winstead because of drinking, and knew of no previous difficulties or quarrels between the two men who appeared to get along well. The members of the company generally slept in buildings and witness did not know why accused was being placed in a "pup-tent". (R. 9,10)

Technician Fifth Grade Benjamin H. Belcher of accused's company, testified that he was working under a truck, heard a shot, looked around, and saw accused about 50 yards away, shooting Winstead. By the time Belcher got out from under the truck and on his feet, accused was running down the street. Accused fired about nine or ten shots and was still shooting when Winstead was lying on the ground. From the time witness first observed the shooting, Winstead, who was not armed, did not make any movement toward accused. (R. 6-8)

Private Robert Campbell of accused's company, testified that he was standing at "the fire" (R. 11), that he heard a "rifle fire", turned around and saw accused about 20 yards away shooting Winstead. Accused fired ten rounds or more. Campbell did not hear any conversation between the two men prior to the shooting, nor did he see Winstead make any kind of movement which would lead accused to believe Winstead was going to do him bodily harm. Accused and Winstead were believed to be friends and witness had not on any prior occasion heard either threaten the other. (R. 11,12)

Accused was identified at the trial by Belcher, Beard and Campbell as the man who shot Winstead (R. 7-9,11).

Winstead was taken to the 1st Battalion aid station (R. 13), where he was examined on 2 January by Captain Bruce P. McDonald, battalion surgeon. He was dead at that time and there were eight or ten gunshot wounds in his abdomen, chest, and back. The point of entry of each shot was apparently from the front. Captain McDonald testified that he was of the opinion that deceased was shot at close range because of the presence of powder burns. He was of the further opinion that the cause of death was a hemorrhage caused by multiple gunshot wounds. (R. 15,16)

No evidence was introduced by the defense. Accused elected to remain silent. (R. 16,17)

4. It thus appears from the uncontradicted evidence that on the date alleged, when accused and deceased met in the street, the latter told accused that when he finished putting his equipment in his pup-tent, he was to relieve "the man on the bridge". Accused immediately began to shoot deceased at a very short range and continued to fire after deceased was lying on the ground. He fired from nine to fifteen rounds. Deceased was unarmed and did not threaten or manace accused in any manner. There was evidence that the two men had been friends and that their relations had been good prior to the time of the fatal assault. There was no evidence of intoxication. Malice aforethought was inferable.

On searching for a motive for accused's conduct, the evidence presents a reasonable basis for an inference that accused either was angered at being ordered by deceased to "relieve the man on the bridge" or possibly by the fact that he was living in a shelter tent whereas the other members of the company generally lived in buildings. There was no evidence of legal provocation nor of any actions by deceased which required the use of self-defense. Callous indifference to the life of his victim or vicious malice characterized the behavior of accused. His violent, though possibly impetuous conduct, in the absence of any circumstance whatsoever which would in the slightest degree excuse or justify the shooting, fully warranted the court in finding accused guilty of murder. The possibly impetuous nature of his act was not a defense (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673; NATO 696, Pokorney; MTO 4750, Smith).

5. It is alleged in the Specification that accused employed a "U. S. Carbine, caliber .30 M1" in committing the offense. The only evidence concerning the nature of the weapon used by accused was the testimony of Campbell that he heard a "rifle fire", and the testimony of Captain McDonald that Winstead's death was the result of a hemorrhage caused by multiple gunshot wounds. One witness who took deceased to the First Battalion aid station testified that he was told deceased was shot with a carbine (R. 14). The evidence clearly established that accused shot deceased with a firearm and the evidence indicates that the weapon was a carbine or a rifle. The defense did not raise any issue as to the nature of the firearm used. Any variance or omission in this respect between the allegations and the proof is not substantial and accused was in no manner injured or misled thereby (AW 37; NATO 696, Pokorney).

6. It is also alleged in the Specification that the fatal assault was committed "north of Pietrasanta, Italy", whereas the evidence discloses that it occurred "at Ruosina" (Italy). The two towns are, in fact, about five kilometers apart. There is no suggestion in the record that accused was misled or surprised by this 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).

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7. The charge sheet shows that accused is 30 years and ten months of age, was inducted 17 January 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 penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Eduard V. Karpov, Judge Advocate.
William G. Brown, Judge Advocate.
Henry C. Reisch, Judge Advocate.

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

APO 512, U. S. Army,
3 March 1945.

Board of Review

MTO 5917

U N I T E D S T A T E S) 92D INFANTRY DIVISION

v.)

Private First Class KINNEY
JONES (34 120 505), Cannon
Company, 371st Infantry.)

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 17 January 1945.
Death.)

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward M. Sargent, Judge Advocate.

Malvina G. Irion, Judge Advocate.

Henry C. Remick, Judge Advocate.

MTO 5917

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
3 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private First Class Kinney Jones (34 120 505), Cannon Company, 371st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the

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MTO 5917, 1st Ind.
3 March 1945 (Continued).

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 5917).

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

(Sentence ordered executed. GCMO 36, MTO, 3 Mar 1945)

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GCMO 36
3 Mar 1945

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

APO 512, U. S. Army,
6 March 1945.

Board of Review

MTO 5918

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private JOHN H. MACK)	Rear Echelon, 92d Infantry
(34 042 053), Battery C,)	Division, 18 January 1945.
599th Field Artillery)	Death.
Battalion.)	

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 Specifications:

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private John H. Mack, Battery "C"
599th Field Artillery Battalion, did, at Pietrasanta, Italy,
on or about 31 December 1944, with malice aforethought,
willfully, deliberately, feloniously, unlawfully, and with
premeditation kill one Lombardi Ettore, a human being by
shooting him with a carbine.

Specification 2: In that Private John H. Mack, Battery "C"
599th Field Artillery Battalion, did, at Pietrasanta, Italy,
on or about 31 December 1944, with malice aforethought,
willfully, deliberately, feloniously, unlawfully, and with
premeditation kill one Lombardi Galleni Palmira, a human
being by shooting her with a carbine.

Specification 3: In that Private John H. Mack, Battery "C"

599th Field Artillery Battalion, did, at Pietrasanta, Italy, on or about 31 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Lombardi Carmela, a human being by shooting her with a carbine.

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 be hanged by the neck until dead. All members of the court present concurred in the findings and 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 and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on the night of 30-31 December 1944 the family of Ettore Lombardi (deceased), consisting of himself, his wife Palmira Lombardi (deceased), his daughter Carmela Lombardi (deceased), his sister Concetta Lombardi, and Cecelia, Angelo and Prego Lombardi, were occupying the lower floor of a two-family house at 48 Via Valleccchia, Arsici, Pietrasanta (Italy) (R. 12,13,17,20). On the upper floor were Ettore's nephew, Lutaldo Lombardi, and his niece, Diletta Lombardi, who lived there with their mother and grandmother. Diletta and her family went to bed between 2100 and 2200 hours. (R. 13,17) At about 0200 hours she was awakened by a knocking on her bedroom door and asked who was there. Someone outside replied "Paisano". (R. 13,17) Diletta then called to the family downstairs to see if they had let this person in the house and they answered "no", they had not let anyone in (R. 13,20). Diletta heard her uncle Ettore get up and go into the kitchen and heard the people downstairs say that the door had been broken open (R. 13,14). Palmira, Ettore's wife, also left her bed, went into the kitchen and lighted the fire there (R. 20). Then, upon hearing the intruder go back downstairs Diletta dressed and went downstairs (R. 14). Diletta's brother Lutaldo had been awakened by the knocking at his door, but did not immediately leave the room (R. 17).

When Diletta entered the kitchen she found her uncle and aunt, Ettore and Palmira, and accused who was standing beside the table with his carbine on the table. A candle was burning. She asked accused if he were alone, because it was very late, and he replied "'niente capito' (I don't understand)". (R. 14) She and her uncle then searched through the house to see if there were any other soldiers present, but found none. Meanwhile Carmela, Ettore's daughter, had come into the kitchen, and spoke to accused saying "Good morning". (R. 14,21) Diletta and her uncle returned to the kitchen where accused was standing and drinking wine. He was talking to Carmela. (R. 14) Then, Diletta testified:

"I went near the fire which Palmira had lighted, and listened to the soldier who was talking of washing his clothes and things like that. My cousin, Carmela, had already gone back to her room. We had been standing there just two or three minutes when I heard the first shot. I saw the

soldier turning with his gun toward my uncle and heard two shots, and at the same time made a dash for the door, but at the same time the soldier caught me. My uncle managed to fling himself on the soldier's shoulder and tried to drag him off me. The soldier let me go, and I heard two other shots while I dashed out the door" (R. 14).

Diletta "saw the first shot. I did not see him firing with his finger, but I saw the flame coming from the gun" (R. 15). She saw accused fire at Palmira and was not "sure whether he hit her, but I saw her falling as I ran out". She also "saw the soldier swing his carbine in my uncle's direction and heard the shot immediately afterwards, but did not see him fire". She believed that the first shot fired at her uncle hit him, "because when he was holding the soldier after flinging himself against him in an attempt to free me, I found my hands were stained with blood". (R. 16)

Lutaldo, who was upstairs in his room, heard some shots as he lay in bed and heard his sister Diletta scream. He jumped out of bed and met her rushing up the stairs. (R. 17) She said to him, "'Go back up, go back up, because he is killing everyone'" and "shooting at everybody" (R. 14,18). Before doing so Lutaldo "saw the accused coming out of the kitchen door, going toward the bedroom door of my uncle. He looked up the stairs toward my sister to see where she was going". The hallway where he saw accused was sufficiently illuminated for him to see accused because of the light in the kitchen, and also the light his cousin Carmela was carrying as she came out of her own room. (R. 18,21) He saw accused seize Carmela, then turned immediately and went upstairs (R. 18).

Concetta Lombardi, Ettore's sister, had meanwhile got up and dressed. Carmela who had returned to the room from the kitchen, secured a light and left. When Concetta reached the hallway she "met a soldier in the door with a gun". Carmela was beside her. Then, Concetta testified:

"The soldier knocked down and put out the light, caught hold of Carmela with his left hand, and with his other hand flung me to the side." "We were begging him to let us go. I was holding on to Carmella, saying, 'Paisano, Paisana, be good', but he was dragging her along." "They passed through the kitchen door. I could hear the door squeaking as they went through. They went through and outside."

Concetta then went into the kitchen and saw her brother, Ettore, lying on the floor. She tried to speak to him but he did not answer. She "started screaming and rushed upstairs". (R. 20,21)

A half hour or an hour after the shooting Diletta, Lutaldo and Concetta went downstairs and in the kitchen found the two dead bodies of Ettore and Palmira Lombardi and the outside kitchen door open. No one except members of the family entered or left the house the rest of the night. (R. 15,18, 21) The matter was reported to the police and to officers, and when they

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came to the house at about 0730 or 0800 hours Diletta and her brother identified the bodies of her uncle, aunt and cousin to them (R. 15,18,19).

Diletta identified accused in court (R. 14). She had seen him before the night of the offenses and there was sufficient light in the room for her to recognize him immediately. He wore trousers and shirt, and a helmet with two stripes and a "T". "He was smiling and talked as if he had no worries or was not angry in any way". (R. 16) Lutaldo also identified accused in court (R. 18). He had seen accused "the night before, because I had gone to the camp to take a small box to a friend of his". He did not see what accused "was wearing too well, but I saw him as he turned his face up, and saw that he had no jacket on", and "I saw that he had a gun". (R. 19)

Doctor Giovanni Bambini, Official Examining Inspector of the Province of Pietrasanta, was called by the Italian police, at about 1230 hours 31 December 1944, to investigate the deaths of three people at a house in the locality of "Arsici", Pietrasanta (R. 6-8). He testified:

"In the field I found, not really in the field but in a ditch adjoining the field, a young girl lying in the ditch. The first thing I noticed were two bullet wounds in her left forearm. I then examined her, undressing her, and found four bullet wounds on the left side of the chest and three on the right side of the chest, all with entrance and exit holes. Nine bullet wounds altogether were found on the body of that girl. The shots were not fired at point blank range, because there were no burns around the clothes. It must have been at least three yards distance. All the bullets had passed right through her chest, and the last two had gone through her heart so that death was instantaneous. I then undressed the girl completely and examined her thighs, but I could not make a thorough examination because the body was in the ditch."

Witness testified further:

"I then went back to the house, 'Coluccini', went into the kitchen, and first examined the woman who I was told was the mother of the dead girl. I found that she had one bullet wound in her head with an entrance and exit hole which had completely shattered her head. This wound had caused so much damage to the woman's head that there was gray matter coming out of the wound. On the body of this woman there was another bullet wound on the left side of the chest with an entrance and exit hole. These two wounds might have caused instant death. I then examined the man who I was told was the husband of the dead woman and the father of the girl. I first saw a bullet wound which had entered on the left side of the neck and had gone out shattering the jaw. It had also broken all the nerve

centers and had cut all the nerve centers of the neck. The body of the dead man also showed a bullet wound on the left side of the face with an entrance and exit hole. Both of these wounds caused instant death. The three corpses were not yet rigid and could not have been dead anymore than twelve hours before my examination" (R. 7,8).

In Doctor Bambini's opinion the deaths of the little girl, of the woman and of the man were caused by their wounds, which were made by a "gun of some description" (R. 8).

Major Harry S. Beckwith, Medical Corps, Regimental Surgeon, 371st Infantry, was asked by Lieutenant Logan at about 1330 hours on 31 December to examine bodies at 48 Via Vallechia, the Lombardi house in Pietrasanta, Italy. When he went to the house he entered a room that appeared to be the kitchen and "saw two bodies lying on the floor and a large amount of blood". He examined the bodies and testified:

"Right near the door was a woman who had been shot in the head. The bullet had entered the right side and gone out through the left temple. The other body was that of a man who was lying face-downwards on the floor; there were two points of entrance in his left upper back. The bullets had entered through the base of the left neck and just below the left collar bone. The two bodies were identified by the next of kin who named the dead as Ettore Lombardi and Gallena Palmira Lombardi. Ettore Lombardi died from hemorrhage. Gallena Palmira Lombardi died instantly." (R. 8,9)

The man and woman had been dead "from ten to twelve hours". He also examined, at a place about 500 yards west of the Lombardi house, "the body identified as Carmela Lombardi, the daughter to Ettore Lombardi, a girl of fourteen to sixteen years of age". He found as follows:

"She was lying on the ground on her back with her hands folded over chest, and on examining her at the spot where she lay, I found numerous bullet wounds in her back." (R. 9)

The body was removed to the mortuary and further examination made there by the doctors at the hospital and Major Beckwith:

"We found the entrance of seven bullets in the upper back, and the exit of six bullets on the front of her chest, with the exit of the seventh bullet at the base of the right neck just above the collar bone on the right side. There were two more bullet wounds in her right forearm. One at the wrist and one midway up the forearm which had caused a compound fracture" (R. 9,10).

The girl had been dead "ten or twelve hours" and death had been instantaneous. In Major Beckwith's opinion Ettore Lombardi and Carmela Lombardi died as "the result of more than one shot from a carbine"; Palmira Lombardi died as "the result of one shot through the head from a carbine" (R. 10). He found no bullets or residue of bullets in any of the bodies. Witness based his opinion that it was a carbine from which the bullets had been fired, by the size of the wounds. The bodies were identified to him by "their son". (R. 11)

Sergeant Peter Yaskell, 3131 Signal Service Company, a photographer, on 31 December 1944, between 0800 and 1000 hours, took photographs "at a little house on the outskirts of Pietrasanta". He testified that he

"stood up on a chair and I took this picture from the rear of the room (pointing to Exhibit 'A'). I took the other at an angle which would be almost a right angle to the other (pointing to Exhibit 'B'). This was taken outdoors; we had to go through an open field, about three-hundred yards, and I took this picture from a height (pointing to Exhibit 'C')."

The exhibits truly represented the objects photographed. Over objection by defense the three exhibits were admitted in evidence. (R. 12) Dilettia Lombardi testified that on Exhibit "A" were two "dead persons", Ettore and Palmira Lombardi, and on Exhibit "C" a "dead girl, Carmela Lombardi" (R. 15).

First Lieutenant John W. Logan, 92d Infantry Division, testified that during an investigation of the incident he warned accused of his rights under the 24th Article of War. Accused fully comprehended the Article. Lieutenant Logan informed him that "because I was an officer he did not have to answer any of my questions or make any statement" and "I told him that anything he said could be used against him". (R. 22,23) After the warning witness

"asked him why did he kill these people, and he said that he was just forced to do it; that two civilians had asked him if he wanted to get a drink of vino, and they brought him to the house where this took place; and after he got in the house the two civilians who brought him there looked like they were mad, and the woman had picked up a bottle and he shot her, and the man jumped on him, and he shot him. I asked him why he killed the girl, and he said she ran out of the house hollering and he killed her because he was afraid" (R. 23).

On 31 December 1944 Private Weston Hoffman, CIS, 92d Division Military Police Platoon, accompanied Lieutenant Logan on his investigation. He saw accused, identified by a witness from a group of men. Later he interviewed accused in the office of a Captain Gretakis where both Hoffman and Gretakis warned accused of his rights under Article of War 24 (R. 24,25), which is

"To warn a soldier that if he makes a statement, he makes

it of his own free will, voluntarily; too, he does not have to make a statement, and that in making it, anything incriminating can be used against him" (R. 25).

No promises or threats were made nor coercion used by either Hoffman or Captain Gretakis (R. 25). Hoffman was sure accused understood the explanation for "I asked him, and broke it down for him. I asked if he understood it" (R. 25). Accused thereupon made a statement which Hoffman took down in his own handwriting and read over to accused. Before any alterations were made on the document accused signed it and Hoffman affixed his signature as witness. (R. 24-26) The statement of accused, admitted in evidence without objection, is as follows:

"I went to my room after I had come from Pietrosanto around 11:00 Stewart trimmed my toe-nails. After Stewart trimmed my nails, He went on guard then the idea came to me to go to the house where the woman and girl lived, who had ac(c)used me of stealing their Cigarettes and 'get them'. I did not put on my leggings but put on my helmet liner only, I did not put on my steel helmet, I took my carbine and started for the house, I have been awarded an expert's medal for firing the M.I. rifle.

"I went to the house where the shooting occur(r)ed. I asked the woman for some vino and she got it. Why I went down there, I had been drinking at the place where I danced before. Why I did this shootings, these people had accused me of stealing some cigarettes. They had come to C Battery 599 F. A. and asked the Captain about this matter of Cigarettes and other items. The one that the woman and the little girl picked out, was 'Smitty,' The Captain did not pay them no mind. When they left, the Captain they seen me and said that I was the one that took their Cigarettes. I went to their house to 'get' the woman and the little girl. About 2330 on the night of the 30th of Dec. '44 I knocked on the door and the woman opened the door. I asked her for some vino She got the vino, but I didn't drink it and the little girl, she was in there and I shot the old man and the little girl ran out. Then I shot the woman. Then I chased after the little girl. When I got close enough I shot her. I followed her about 200 yds. I returned to my quarters and went to sleep" (R. 25; Ex. D).

About five days before the date of the offense alleged, when accused's battery was in a rest area, two civilians, a woman and a girl, accused two members of the battery of the theft of two packages of cigarettes and two dollars. Second Lieutenant Lee E. McCoy of the battery "brought her before a group of several men to see if she could identify any of them, and she did identify two of the men, as the ones who entered her house". Accused was not one of those men. (R. 27)

No evidence was introduced by the defense and accused elected to remain silent (R. 28).

4. It thus appears from the uncontradicted evidence, including accused's own pre-trial statements, that at the place and time alleged in the Specifications accused shot with a carbine and killed Ettore Lombardi, Gallena Palmira Lombardi and Carmela Lombardi, the persons named in the Specifications. Armed with the weapon he entered their house at about two o'clock in the morning, roused them from bed, and asked for "vino". The wine was given to him, and he stood for a few minutes talking in the kitchen. He then fired two shots from his carbine at Ettore, and there was evidence that Ettore was killed instantly. The bullets entered his left jaw and the base of the left neck, breaking the nerve centers. Accused then shot Palmira through the head, completely shattering it and causing gray matter to come out. Her death was instantaneous. Accused seized their daughter Carmela in the vicinity of the hallway and dragged her out the kitchen door. She left the house "hollering", and after proceeding about 200 yards he fired nine bullets in her body, seven of which pierced her upper back, and two of which went through her heart, killing her instantaneously. The shots were fired from a distance of not less than three yards. Her riddled body was found in a ditch a few hundred yards from her home.

The only inference possible from the evidence, including accused's own pre-trial statements, is that accused fired the fatal shots willfully, deliberately and with intention to kill. The victims were peaceful Italian citizens who had offered accused no provocation of any sort. Accused gave conflicting statements as to his motive. One was that he was "just forced to do it" when "two civilians", who had brought him to the house for a drink of vino "looked like they were mad". The woman picked up a bottle and he shot her. When the man "jumped on" accused, he shot him. The girl ran out of the house shouting and accused killed her "because he was afraid". The purported conduct of the victims as stated by accused, which was denied by eyewitnesses to the shooting, offered no provocation or justification sufficient to condone or excuse his homicidal use of firearms. In another statement accused insisted that "these people" had wrongfully accused him of taking cigarettes and he had gone to their house "to get" the woman and the girl. If true, this adequately explains accused's motive and convicts him out of his own mouth of the crime of murder.

The three victims were shot from close range through the head, the neck and the heart, the wounds causing instant death. The specific intent requisite to establish the offense of murder, malice aforethought, was abundantly evident from accused's deliberate, intentional and unlawful use of a deadly weapon in a deadly manner and the certain knowledge that his act would result in the death of the persons at whom he fired. The findings of guilty of murder are supported by evidence that accused deliberately and purposefully shot and killed Ettore, Palmira and Carmela Lombardi without provocation on their part. The facts and circumstances clearly exclude any theory of legal justification or excuse and the evidence is devoid of any matters of extenuation or mitigation.

5. Prosecution's Exhibits "A", "B" and "C" were admitted in evidence over objection by the defense that there was no evidence that the photographs were taken at the place of the alleged crime, that they had no

value whatever, and that the photographer was not competent to state that the persons in the picture were dead. The official Army photographer who took the picture did not identify the bodies shown in the exhibits and could only testify that between 0800 and 1000 hours on 31 December 1944 he took the pictures near "a little house on the outskirts of Pietrasanta". However, the bodies as shown in the exhibits were later identified at the trial by a witness for the prosecution as the bodies of the three deceased persons and there is ample, supporting, uncontradicted evidence as to their identity and the fact of their death. Whatever error, if any, was committed in admitting the photographs at that time was cured by the later testimony.

6. The charge sheet shows that accused is 34 years of age, was recalled into service on 23 January 1942, and had prior service of six months and 17 days.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Elwood M. Lang, Judge Advocate.
Walter R. Lewis, Judge Advocate.
Reeey C. Reusch, Judge Advocate.

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

APO 512, U. S. Army,
6 March 1945.

Board of Review

MTO 5918

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private JOHN H. MACK)	Rear Echelon, 92d Infantry
(34 042 053), Battery C,)	Division, 18 January 1945.
599th Field Artillery)	Death.
Battalion.)	

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward W. Wilcox, Judge Advocate.
Malvina P. Lamm, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 5918
1st Ind.
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
6 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private John H. Mack (34 042 053), Battery C, 599th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions

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MTO 5918, 1st Ind.
6 March 1945 (Continued).

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 5918).



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

(Sentence ordered executed. GCMO 37, MTO, 6 Mar 1945)

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

APO 512, U. S. Army.
 17 March 1945.

Board of Review

MTO 5919

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private LEE A. BURNS)	Rear Echelon, 92d Infantry
(38 520 648), 792d Ordnance)	Division, 19 January 1945.
(Light Maintenance) Company.)	Death.

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 Lee A. Burns 792d Ordnance (IM) Company did on or about 2300 27 November 1944, at the home of Fedora Sabatini Coste Festone Maggiano Street Pro. di Lucca Italy, forcibly and feloniously against her will have carnal knowledge of carla Sabatini.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification of the Charge, except the words "Coste Festone", substituting therefor the words, "Corte Testone Farnnetta", of the excepted words, not guilty, of the substituted words, guilty, and guilty of the Charge. Evidence was introduced of one previous conviction by special court-martial for wrongfully appearing in uniform with Technician Fourth Grade chevrons in violation of Article of War 96. 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 pursuant to Article of War 48. The confirming authority, the Commanding General, Mediterranean Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 27 November 1944, Fedora Sabatini and her daughter Carla Sabatini, a student 14 years of age, lived at Corte Testone Farnnetta, Maggiano, Province of Lucca, Italy, in the home of one Lorenzo Rinaldo, who was 87 years of age (R. 6,10,11,13-15,20). The house was about two blocks from the camp of accused (R. 41-42). Prior to 27 November accused had visited the house with Private Ben Esther of his organization and was known by both the girl and her mother (R. 21,22).

About 2200 hours on 27 November Captain Cecil B. Morris and Corporal Dewey Lewis, both of accused's organization, arrived at the Sabatini home. Accused, who was armed with a carbine, a soldier named Worthey and another soldier were removed from the house, in which both Sabatinis were present, and taken to their camp area where they arrived about 2215 hours. Accused was told not to leave the company area and to go to bed. Corporal Lewis saw him enter his quarters about 2240 hours (R. 32,35,40-44,47-50). Private Esther, testified that while in bed he saw accused and Worthey enter the sleeping quarters about 2230 hours. Accused got in bed and was straightening his blanket when Esther, who slept beside him, fell asleep. When Esther awakened later, accused was sleeping. Esther did not know at what time he subsequently awakened, and testified that it could have been at any hour during the night (R. 22-27).

The girl Carla and her mother testified that about 2245 hours that night (R. 9,11,15,18) accused came to the Sabatini house with three or four companions. They said they were military policemen and when the owner (Rinaldo) opened the door they entered, searched the entire house, and left. About a half hour later accused returned alone. The owner went downstairs and again opened the door while Carla and her mother remained in their bedroom (R. 7,11,15,19). Accused was armed with a "rifle of some description, quite long" (R. 19). After looking in the rooms he entered the bedroom occupied by the two women and ordered them to get out of bed. After Carla put on a coat over her nightdress he pointed his weapon and forced the two women and the elderly owner of the house to go downstairs to the kitchen, where Carla ran to the door and attempted to leave. Accused, "with his gun", forced her to return and to sit down in a corner of the kitchen. He also sat down, made Carla's mother sit beside him and required the old man to stand a few paces away.

Accused then approached Carla (R. 7,15), said "'figi figi'" (R. 12) and indicated to her, as she testified, that she "had to let him do as he wished with me, otherwise, he would shoot my husband--my wife--my mother" (R. 8). Carla ran to her mother who held her tightly, but accused dragged her away from her mother, put her "near to the table" and unbuttoned his trousers (R. 8,9,16). The owner

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of the house begged him to release the girl and accused fired a shot into the kitchen floor (R. 9,16). The mother was screaming for help and accused hit her several times on the head when she attempted to rescue Carla. He then lifted the girl's dress and attempted to insert his penis in her person "but he did not manage as the position seemed not to suit him" (R. 8,9,17). When the mother kneeled at his feet and asked him "to take me, but leave the child alone, as she was too young", he repeatedly hit the mother on the head. Then "with a gun" he forced the three people to go upstairs. Carla and her mother entered the bedroom first and the latter closed the door. Accused hit the door with the butt of his rifle and forced the mother to open it (R. 16).

Carla ran to the window, opened it and called for help but accused caught her by the hair, closed the window, dragged her to the bed and pinned her against it (R. 8,16,17). He held her legs in the air and attempted to insert his penis in her person. Carla tried to escape and he struck her on the head with his fist. Whenever he released her legs and held her arms, she flung down her legs but he again seized them and lifted them up. The mother, who was screaming, calling for help and knocking against the walls, begged him to let her daughter go, but he struck her with his fist and flung her aside. Carla struggled with all her strength for about 15 minutes but he finally succeeded, against her will, in penetrating her person. The girl both saw and felt the insertion of his penis which she testified, was by force and against her will, and the mother, who was only two paces away, also saw him insert his private organ in the person of her daughter. The owner of the house was present at the time (R. 8,10,11,13, 17,18). Carla testified that accused at first held his weapon in his hand while in the bedroom, but that she believed he later laid it on the bed where it was beside her during the attack (R. 12). After the intercourse Carla saw blood-stains on her nightdress (R. 10).

After accomplishing his purpose accused cleaned himself on Carla's night-dress, pointed his rifle at the three people and forced them to go to the kitchen where he made Carla open the door. He shoved her outside but then indicated that she was to return to the kitchen. She did so and closed the door. Shortly thereafter two shots were fired (R. 8-10,17). Accused departed about 0015 hours (R. 12). Both Carla and her mother were positive in their identification of accused at the trial (R. 7,11,13,14,18,19).

The next morning, 28 November, the mother, evidently accompanied by Carla, appeared at the orderly room of accused's organization (R. 29,34,35). An interpreter was summoned. A noncommissioned officer testified:

"*** this woman--apparently her daughter had been raped the night before, and she believed that he was in the company" (R. 29).

The mother had a piece of paper with accused's name on it printed in Italian. Accused and Worthey were summoned to the room and Carla's mother then pointed to accused and indicated that he was at her home the previous evening. Worthey stated that he (Worthey) was at the house that evening about 2100 hours or earlier (R. 29-33). On 30 November "a lady" (Carla's mother) appeared at the organization command post and Captain Morris called an interpreter. Later, accused was summoned and four soldiers, including accused, were present in the

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room. Captain Morris then pointed to each (of the other three) soldiers, asked if that soldier raped her daughter and the mother replied in the negative. When the captain pointed at accused, the woman called accused's name and said "he was the one" (R. 45-47).

On 4 December (R. 37), Captain Willard G. French, surgical ward officer, 170th Evacuation Hospital (R. 36), examined Carla (R. 37,38) and found a "slight slit" on part of the entrance to the vagina, and bruising on the left labia minora. He found a tear on the right side of the hymenal ring which appeared to have occurred "within the past few days" (R. 37). As the examination was conducted several days after the alleged offense, there would be no evidence of spermatozoa (R. 38,39). No bruises or scratches were found on the girl's body (R. 40). Captain French testified that he was of the opinion that "something was attempted to be put forcibly into the vagina" (R. 39), and that some object actually entered the vagina (R. 39-40).

For the defense Private Aldene Worthey of accused's organization (R. 51), testified that before 2100 hours 27 November, he and accused visited the Sabatini home and remained for about 15 minutes. There, witness saw two men, one of whom was elderly, and an old lady, but he did not see Carla. About 2210 hours witness and accused returned to the house and about the same time were taken to the camp area by Captain Morris and Corporal Lewis. Witness and accused, who slept in the same room, went to bed after 2230 hours and witness did not know whether accused thereafter left the room (R. 52-56).

Accused elected to remain silent (R. 56-57).

4. It thus appears from uncontradicted testimony that at about the hour and on the date alleged, accused, after previous visits to the house earlier in the evening, gained entrance to the home of the female named in the Specification, a virgin 14 years of age. Armed with a rifle, he intimidated the girl's mother, and an elderly occupant of the house, a man, seized the girl and attempted to have intercourse with her. He did not succeed at first. To prevent interference by the mother and the old man he fired his rifle, struck the mother repeatedly and thrust her about. The girl struggled with him and clearly resisted to the extent of her ability. By force he overcame her resistance and without her consent penetrated her person sexually. The testimony of the victim as to the fact of penetration was amply corroborated not only by the testimony of her mother who was only two paces away at the time, but also by the medical evidence. The findings of guilty of rape were fully supported by the evidence.

5. The testimony as to the identification of accused by Carla's mother through an interpreter on 28 and 30 November was hearsay in character and inadmissible (NATO 1069, Scott; NATO 1267, Denson; Bull. JAG, January 1945, sec. 395 (3)). However, the identification of accused in court by both the victim and her mother was positive and unequivocal, and the inadmissible evidence was merely cumulative in this respect. Under the circumstances it cannot be said that the substantial rights of accused were injuriously affected.

6. The charge sheet shows that accused is 31 years of age and was inducted 12 September 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. A sentence of death or imprisonment for life is mandatory upon a court-martial upon conviction of rape under Article of War 92.

Edward K. Ferguson, Judge Advocate.
William R. Brown, Judge Advocate.
Henry C. Reisch, Judge Advocate.

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

APO 512, U. S. Army,
17 March 1945.

Board of Review

MTO 5919

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private LEE A. BURNS)	Rear Echelon, 92d Infantry
(38 520 648), 792d Ordnance)	Division, 19 January 1945.
(Light Maintenance) Company.)	Death.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Ellwood V. Ferguson, Judge Advocate.
W. Irion, Judge Advocate.
Dewey C. Remick, Judge Advocate.

MTO 5919
Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
17 March 1945.

1st Ind.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Lee A. Burns (38 520 648), 792d Ordnance (Light Maintenance) Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

MTO 5919, 1st Ind.
17 March 1945 (Continued).

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

(MTO 5919).


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

(Sentence ordered executed. GCMO 51, MTO, 17 Mar 1945)

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

APO 512, U. S. Army,
 2 April 1945.

Board of Review

MTO 5920

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private CURTIS COOLEY)	Palermo, Sicily, 8 September
(36 520 487) and Private First)	1944.
Class CHARLES E. DEAN)	COOLEY: Dishonorable discharge
(35 306 938), both of 437th)	and confinement for life.
Engineer Company (Dump Truck).)	DEAN: Not guilty.
)	COOLEY: 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 were jointly tried upon separate Charges and Specifications as follows:

COOLEY

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Curtis Cooley, 437th Engineers Dump Truck Company, did, at Bocca di Falco, Palermo, Sicily, on or about 7 November 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Peter E. DiMaccio, Detachment, Twelfth Weather Squadron, a human being, by stabbing him with a knife.

DEAN

CHARGE: Violation of the 92d Article of War.
 (Finding of not guilty.)

Specification: (Finding of not guilty.)

Each accused pleaded not guilty to the Charge and Specification pertaining to him. Accused Cooley was found guilty of the Charge and Specification pertaining to him, and accused Dean was found not guilty of the Charge and Specification pertaining to him. No evidence of previous convictions was introduced. Cooley was sentenced to be hanged by the neck until dead. All members of the court present concurred in the findings and sentence as to Cooley. 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 as to Cooley 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 $\frac{1}{2}$. The acquittal as to Dean was published in General Court-Martial Orders No. 663, Headquarters Peninsular Base Section, 21 December 1944.

3. The evidence shows that on 7 November 1943 numerous civilians, for the purposes of protection, were living in a tunnel at Bocca di Falco, near Palermo, Sicily. The tunnel overlooked an airfield at Palermo and was also used by pedestrians when going to and from the airport. (R. 8,10,12)

Salvatore Di Lucca, of Bocca di Falco, testified that on the evening of 7 November 1943 (R. 12), he and Staff Sergeant Peter E. DiMaccio (the deceased) (R. 8,12) entered the tunnel "to enjoy ourselves". About ten minutes later accused Cooley and another colored soldier entered the tunnel. A civilian therein struck a small boy. When Cooley and his companion wanted to hit the civilian, DiMaccio told them not to strike him and that the matter was not their affair. An argument ensued during which DiMaccio slapped Cooley's companion and the two men began to fight. The companion struck DiMaccio about four times (R. 12,16) and the latter fell near the entrance to the tunnel, then arose and attempted to run away. At this time Cooley reached down, drew a knife or small dagger from the region of his inner left leg just above the ankle, and from behind stabbed DeMaccio first in the back and then in the left part of his neck. DiMaccio ran a few yards inside the tunnel, fell to the ground and died. Cooley and his companion ran away. (R. 12-16) Witness did not see a knife in the possession of Cooley's companion (R. 16). At the trial he identified accused Cooley (R. 12,13) as the assailant but was unable to identify accused Dean as Cooley's companion (R. 15).

Armando Collogio of Bocca di Falco testified that he saw a white American sergeant fighting with two colored soldiers in the tunnel on the night of 7 November 1943, and also observed the white soldier running into the tunnel, pursued by the two colored soldiers. Later, witness saw the white soldier lying dead in the tunnel. Witness was unable to identify the two colored soldiers. (R. 22,23) Francesco Benvante of Bocca di Falco, 14 years of age, testified that on the date alleged he saw about seven soldiers, including a white American soldier, arguing among themselves in the tunnel. The trial judge advocate asked that both accused stand and then asked witness

if he saw in the court room any of the soldiers who were involved in the argument. Witness identified accused Cooley. (R. 24-26)

As the result of a telephone call which he received between 2100 and 2200 hours that evening Major Ralph J. Thomas, 63d Fighter Wing, 52d Fighter Group, went to the scene and found deceased lying about 50 paces inside the tunnel (R. 8-11).

Captain John E. Fisher, Medical Corps, Squadron Flight Surgeon, 2d Fighter Squadron, 52d Fighter Group, examined deceased in the tunnel at 2120 hours that evening. He had a penetrating wound in the left side of his neck and one in the left side of his back. In Captain Fisher's opinion death was caused by intrathoracic hemorrhage which resulted from the stab wound in the neck. (R. 8)

On 17 January 1944 Major (then Captain) Robert J. Wilson, Corps of Military Police, Criminal Investigations Division, 6750 Headquarters Company, Fifth Army, interviewed accused and advised him of his rights under Article of War 24 "in very simple words" (R. 17). Accused then made a written statement which was given him to read. At this time it was "again" explained to him that the statement was voluntary on his part, that he need not sign it if he did not choose to do so, and that the statement could be used against him in the event of trial. The statement, which was signed by accused, identified at the trial by Major Wilson, and admitted in evidence without objection was, in pertinent part, as follows: (R. 16-19; Ex. 1)

"On 7 November 1943, at about 6. P.M., I returned to my company area from Palermo where I had been on pass. I turned my pass into the orderly room. I then stayed around the day room for a while. That night about 6:30 or 7:00 P.M. I left camp for Bocca di Falco and proceeded down the main road to that village. When I got to the little tunnel a little boy whose name I don't know went up the stairs that lead to the tunnel with me. I entered the tunnel and went to the rear of the tunnel where the shacks are. I went to Josephine Marro's shack. She is a prostitute. The boy showed me where her shack was. About 5 P.M. that night I had two glasses of wine and two small glasses of cognac. I went into one of the shacks. Josephine was not there. The little boy said he was going to get her. In the shack there were three little children and a lady whose name I do not know. I waited about fifteen minutes when I heard a noise outside. I went outside to see what it was. This was about 7:30 or 8 P.M. When I got outside in front of the shack I saw Charles Dean, a colored soldier from my outfit, tussling with a white American soldier whom I did not know. They were tussling in front of the shack. I stepped in between them. The white soldier punched at me. I was dressed in O.D.s, O.D. hat, and leggings. After he punched at me, I pulled out my knife from my left pants pocket. I opened the knife and with my right hand holding the knife I stabbed the white soldier in

the left side and left neck. I stabbed him only twice. When I stabbed him, Dean was not holding him because I parted them. When I parted them they were punching at each other. After I stabbed the white soldier he ran towards the tunnel and I did not see him anymore. Dean and I ran down the path away from the rear of the tunnel, which path leads down the hill through the fields to our camp area. Dean went as far as the gate about two or three hundred yards away from the shack. Then Dean left me. I do not know where he went. I continued to camp and went into the dayroom for a while and then I went to bed.

"I carried the knife back to my company area and threw it in the last latrine before I went to the day room.

"In the scuffle with the white soldier I cut my right hand at the edge of the palm and I now have a slight scar where I was cut."

For the defense it was stipulated that if certain witnesses were present "they would in testifying as to the general reputation of the witness, Salvatore Di Lucca, for sanity and truthfulness answer the following questions as follows":

"Q. Do you consider him mentally sound?

A. No.

"Q. To what extent do you consider him mentally unsound?

A. He is actually mentally deficient from the time he was a baby. He's a hermaphrodite.

"Q. Do you know that from your own eyesight?

A. His mother said so but I never saw him."

They would testify further that Salvatore Di Lucca

"is always quarrelling with his mother, is nervous, high-strung, and unreasonable; he steals his mother's clothes and sells them; he always tells lies and we consider him an inveterate liar."

The witnesses whose testimony was so stipulated were De Luce Libonia and De Luce Giuseppina, mother and sister-in-law respectively of Di Lucca, and five of his neighbors, namely, Grarone Celestina, Pesco Grazia, Di Monio Laura, Modica Angela, and Modica Caterina. (R. 26)

Each accused elected to remain silent (R. 27).

Agent John M. Lo Pinto, Criminal Investigations Division, Provost Marshal General's Office, testified for the prosecution in rebuttal that during his investigation of the incident he interviewed the witness Salvatore

Di Lucca for several hours on three different occasions, spoke to him each time in pure Sicilian dialect, and obtained a statement from him. Witness formed an opinion as to Di Lucca's mental ability. (R. 27-29) Witness then testified as follows over the objection of the defense:

"I thought I had taken enough psychology in school so that I would be able with my knowledge of criminal law and procedure especially where offenses of incompetency and embicility of witnesses brought up for ready opinion on the basis of 9 years of investigation work" (R. 28).

Witness was of the opinion that Di Lucca was "perfectly competent to observe what he sees taking place through his direct senses and then recount truthfully what he sees and saw" (R. 28). Witness further testified:

"He made a perfectly coherent statement to me in the dialect he speaks which I understand. I also tried to determine myself whether he had any inclination toward hallucinations or delusions. I examined him first on chronological sequence and then I went another time, I would go backward in the chronology, then I would jump around from one fact and then the other to see whether it would stand together and after that I concluded he was able to recount after observing it" (R. 28).

Witness had no knowledge of Di Lucca's reputation as to general veracity (R. 29).

4. It thus appears from uncontradicted evidence that at the place and time alleged Staff Sergeant Peter E. DiMaccio, the person named in the Specification as to Cooley, engaged in a fist fight with a companion of Cooley during which encounter Di Maccio was knocked down. When he arose and tried to run away, accused drew a knife or small dagger and stabbed him from behind, first in the back and then on the left side of his neck. Di Maccio ran a few yards in the tunnel, collapsed, and died shortly thereafter as a result of the wounds thus inflicted on him. There was no evidence that Di Maccio was armed. Accused, in his pretrial statement, contended that he parted Di Maccio and accused's companion, who were fighting each other, and that Di Maccio then "punched at me", whereupon accused pulled his knife from his pocket and stabbed Di Maccio twice. The truth of this contention as to the purported conduct of Di Maccio toward accused, which was not corroborated by the eyewitness Di Lucca, was a matter for determination by the court. Assuming it to be true, the degree of violence used against accused, as he described it, did not justify his resort to the homicidal use of the knife, and did not amount to legal provocation or excuse the homicide on the ground of self-defense (MTO 6040, Grant; MTO 5918, Mack). It must be concluded that the homicide was committed deliberately and with malice aforethought, and without legal provocation, justification or excuse. The evidence supports the findings of guilty of murder (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672-674).

5. As set forth above the defense sought to impeach prosecution's witness Di Lucca by stipulated testimony of relatives and neighbors to the effect that this witness was an "inveterate liar" and mentally unsound. Agent Lo Pinto testified in substance in rebuttal that he interviewed Di Lucca for several hours on three different occasions and had formed an opinion as to his mental ability, that Di Lucca's statement to witness was "perfectly coherent", and in witness' opinion Di Lucca was "perfectly competent to observe what he sees taking place through his direct senses and then recount truthfully what he sees and saw". Lo Pinto, after trying to determine whether Di Lucca had any inclination toward hallucinations or delusions, concluded "that he was able to recount after observing it" (the incident alleged).

The rule as to the competency of testimony of a nonexpert, or lay, witness bearing upon the issue of sanity, has been stated as follows:

"The admission of the testimony of nonexpert witnesses, where the issue is sanity or insanity of a witness, forms an exception to the general rule of evidence that witnesses can speak only as to facts. The opinion of such nonexpert witness is admissible only in connection with the facts upon which such opinion is based. Moreover, he must have such an acquaintance with the person as to be able to form a correct opinion of his mental state. Such opinions are admitted because it is impossible to convey by language to those who are not eyewitnesses of the facts such an understanding of the facts as to enable them to form a correct judgment, and the witness's own observations must convey the indefinable, almost imperceptible, actions which language cannot describe; but such nonprofessional witness cannot give an opinion founded upon hypothetical questions based upon facts not stated by him. The sufficiency of the acquaintance and observation that will entitle the nonexpert witness to testify is addressed to the discretion of the trial court, and such determination is final where the discretion is not abused" (Wharton's Crim. Ev., Vol. 3, sec. 1177, pp. 2025-2028).

Concerning the competency of one witness to bolster another it has been said:

"A sustaining witness cannot testify as to his individual opinion of the credibility of the impeached witness, based on his own personal knowledge of the witness, or dealings with him" (70 C.J., sec. 1134, p. 927) (Underscoring supplied);

and

"A witness whose evidence is predicated on some specific act or on personal dealings with the impeached witness and not on general reputation is incompetent, but, where it

appears that he also knows his general reputation, testimony as to the reputation may be drawn from him" (Ibid., sec. 1133, p. 926).

Such portion of Lo Pinto's opinion testimony as related to the general mental competency or sanity of the witness Di Lucca, was competent, but the admission in evidence of such portion of his testimony as related to the credibility of Di Lucca as a witness, based upon Lo Pinto's personal knowledge of Di Lucca or his dealings with him, was erroneous. However, in view of the uncontradicted evidence, including accused's own admissions in his pretrial statement that he twice stabbed a white soldier at the place and time alleged, it is obvious that such error could not have injuriously affected the substantial rights of accused.

With reference to the stipulated testimony concerning Di Lucca's reputation for veracity, the following is pertinent:

"Even though the reputation of an impeached witness is shown to be bad, his credibility is a question for the jury, for it is also the judge of the effect of impeaching evidence" (Wharton's Crim. Ev., Vol 3, sec. 1411, p. 2313).

With respect to the question of Di Lucca's mental soundness, the mental capacity of a witness is presumed, and the burden is upon the party denying such competency to overcome the presumption by proof. It is primarily the province of the court to judge the competency of witnesses before it (CM 158935, Bernau). The court in the instant case had full opportunity to observe Di Lucca's demeanor on the witness stand, to form its own opinion as to his mental capacity and to judge the truth of his testimony. An examination of all the evidence discloses no abuse of discretion by the court.

6. The offense was committed 7 November 1943. The charge against accused Cooley was preferred 22 December 1943 and the charge against accused Dean was preferred 23 February 1944. The charge against each accused was referred for trial on 21 April 1944 by the commanding officer, Island Base Section, and was re-referred for trial by the commanding officer, Peninsular Base Section, 29 August 1944. Accused were tried 8 September 1944 and the action of the reviewing authority as to accused Cooley was dated 18 December 1944. The action of the confirming authority as to accused Cooley is dated 19 February 1945. The record of trial was received by the Branch Office of The Judge Advocate General, Mediterranean Theater of Operations, 22 February 1945. The prolonged delay in this case appears to be partly explained by the delay in attempting to ascertain the identity of Cooley's companion, by the departure of Cooley and his unit for another location, requests for further investigation, problems as to the availability of witnesses and the determination of the court before which both accused were to be tried.

7. The charge sheet shows that accused Cooley is about 24 years of age and was inducted 22 August 1942. He had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused Cooley were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence as to Cooley. The mandatory penalty for murder is death or life imprisonment as a court-martial may direct (AW 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.

Edward W. Langford, Judge Advocate.
William P. Farni, Judge Advocate.
Henry C. Leenick, Judge Advocate.

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

APO 512, U. S. Army,
 2 April 1945.

Board of Review

MTO 5920

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at Palermo, Sicily, 8 September 1944.
Private CURTIS COOLEY)	COOLEY: Dishonorable discharge and confinement for life.
(36 520 487) and Private First)	DEAN: Not guilty.
Class CHARLES E. DEAN)	COOLEY: U. S. Penitentiary, Lewisburg, Pennsylvania.
(35 306 938), both of 437th)	
Engineer Company (Dump Truck).)	

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

The record of trial in the case of the soldiers named above has been examined by the Board of Review and held legally sufficient to support the sentence as to Cooley.

Edward W. Irion, Judge Advocate.

John W. Sargent, Judge Advocate.

Henry C. Remick, Judge Advocate.

MTO 5920

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
 2 April 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Curtis Cooley (36 520 487) and Private First Class Charles E. Dean (35 306 938), both of 437th Engineer Company (Dump Truck), attention is invited to the foregoing holding by the Board

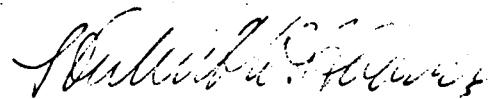
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MTO 5920, 1st Ind.
2 April 1945 (Continued).

of Review that the record of trial is legally sufficient to support the sentence as to Cooley, 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 as to Cooley.

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 5920).



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

(As to accused Cooley, sentence as commuted ordered executed.
GCMO 55, MTO, 2 Apr 1945)

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

APO 512, U. S. Army,
9 March 1945.

Board of Review

MTO 5921

U N I T E D S T A T E S	PENINSULAR BASE SECTION
v.	Trial by G.C.M., convened at
Private FRANK LAMSON	Naples, Italy, 14 November
(11 019 582), Detachment	1944.
of Patients, 225th Station	Dishonorable discharge and
Hospital.	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 Frank Lamson, Detachment of Patients, 225th Station Hospital, did, at Naples, Italy, on or about 21 August 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Maria Marzano, a human being, by striking her on the head and body with a chair.

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 after supper 20 August 1944, accused, together with two other soldiers named Griffis and Holdren, left a hospital (225th Station Hospital) where they were patients. They went to a town (Naples, Italy) which was near the hospital area, dressed only in pajamas and shoes. They drank "quite a few glasses of wine and some hard stuff" in a building and according to Griffis accused looked "pretty drunk". He urinated in the corner of the room where they were drinking and this action caused an argument between accused and Holdren. About 2000 hours they left and tried to get in another place which was closed. There they became embroiled in an argument with some other soldiers and ran away. Accused and Holdren resumed their argument about urinating in the room and "threw a few punches". Accused, "who looked pretty drunk" then left Griffis and Holdren who returned to camp. (R. 8).

Antonio Recano testified that he lived opposite the deceased, Maria Marzano, on Via Giacomo Leopardi in Fuorigrotta, Naples, Italy (R. 13; Ex. 3). About 0330 or 0400 hours the following morning, 21 August 1944 (R. 12), witness was downstairs in his house when a "soldier" whom witness identified in court as accused (R. 13), dressed only in pants and shoes, pushed open the door of Recano's home and entered. Accused appeared to be drunk. Witness took him by the arm and pushed him outside. (R. 12) Accused called him a son-of-a-bitch (R. 14). About seven or eight minutes later people who lived in near-by houses began shouting "They have assassinated the old one" (R. 14). About 20 days later at the Questura Building in Naples, witness identified accused as the soldier he had seen that night (R. 12,13). The identification was made in the presence of Agent Lipinsky, Criminal Investigations Division (R. 13).

Pietro Grande, son-in-law of the deceased, who lived about ten meters from her home, was summoned to her house at 0400 hours, 21 August (R. 9,10). He found her dead and completely nude, lying on the floor near her bed. Two chairs, a small stove, a wagon wheel, and empty fruit boxes were on top of the body and a stick about three or four feet long was near her mouth. Her face and bed were covered with blood. Under the body was found the top part of a bluish-colored "military pajama". Grande saw his brother-in-law remove a dirty, wet piece of paper from the pocket of this garment. (R. 10,11) Grande did not read the paper but testified that it was "almost like" (R. 11) a mess ticket (subsequently admitted in evidence (R. 22; Ex. 2)). The pajama top was identified by Grande and admitted in evidence (R. 11).

About 0430 hours 21 August, Technician Fourth Grade Raymond E. Naberezny, 7th Station Hospital, was on guard at the main gate of the Medical

Center, Naples, on the road to Bagnoli, and saw accused dressed only in pajama bottoms and shoes, walking down the road (R. 17,18). Accused

"came over, and I asked him what he was doing out at that hour in the morning and where he was going. In reply he asked me whether this was the Medical Center. I said, yes it was. Then he said, 'Where's the 225th Station Hospital?', and I asked him, 'Why, are you a patient there?' He says, 'I am'. Then he says, 'Where's the 45th General Hospital?' So I showed him that. Then he seemed to become orientated because up until that time he seemed bewildered. He presented the story that he did not know he was out of the Medical Center and he just got out of bed and he was lost. So he said he could find his way back to his ward now if I permitted him" (R. 18).

Accused did not appear to be drunk and his speech was normal. He was steady on his feet and did not act abnormally except for the fact he seemed bewildered. His breath did not smell of liquor. Naberezny said to accused "If you wander around at night like this you are apt to get shot", and accused replied "Well, it doesn't make any difference whether I live or die". (R. 18,19)

It was stipulated that if Doctor Augusto Casilli were called as a witness he would testify as follows:

"On 22 August 1944, in Naples, Italy, I was one of three doctors, the other two being Antonio Borelli and Eduardo Fernandez, who examined the body of Marzano, Maria and then proceeded to perform the official autopsy to ascertain the cause of death with the following results: The above mentioned woman, of an apparent age of 70 years, was wounded on the right temple, on the right side of the ear, deep in the bone and showed wounds on the left cheek. Congestion of the brain, which shows an infiltration of blood. Fracture of second, third and fourth ribs. The right lung (the part correspondent to the fractured ribs) was injured. No traces of violence in the genital region" (R. 12).

Captain Leslie S. Jolliffe, Medical Corps, Assistant Pathologist, 15th Medical General Laboratory, testified he tested stains found on the pajama top and that the results "showed the stained portions of this garment contained human protein and constituents of blood" (R. 16).

Agent Bernard Lipinsky, Criminal Investigations Division, investigated the death of deceased, and arrested accused following descriptions furnished by Recano, Sergeant Naberezny and another sergeant who was on duty with him (R. 20). On 18 September 1944 Lipinsky advised accused of his rights under Article of War 24, and told him that he did not have to make a statement

but that anything he said would be used for or against him in the event of trial. Accused then made a statement to Lipinsky which the latter identified at the trial. It was received in evidence without objection. (R. 20,21; Ex. 4) The statement, in pertinent part, was as follows:

"Right after supper on the 20th of August 1944, I left the 225th Station Hosp., where I was a patient, with two soldiers from my ward. The only names I know them by are 'Tex' and 'Shorty'. I think 'Tex' is an MP here in Naples. We went thru the fence to get out of the area. All of us wore our hospital pajamas, nothing else. Some kid took us to one of the houses where we had some drinks. There was a family, some kids and a couple of girls there. We drank quite a bit for a couple of hours, and then went downstairs. Outside in the street, we got in a fight with some people, I don't know if they were G.I.s, civilians, or what, and I don't know why it happened. That's all I remember until I woke up in an alley just before daybreak, while it was still dark. I was alone. I think I just had my pajama bottoms on at that time. I knocked on the door of a civilian house in the alley where I woke up. I don't know what I asked him, but he slammed the door in my face. Then I went immediately toward the hospital. I went to the main entrance gate. The guard stopped me and asked me where I was going and what I was doing out. I told him I was going to the 225th. He didn't ask for my name or serial number. I asked him where the 45th was cause I knew I could get my bearings that way. I went to my ward, I didn't see the nurse or ward man. Got my toilet articles, went to one of the tents in the area and stole a suit of woolens and a field jacket. I dressed in the shower room of my ward and left the pajama bottoms there. I went out another gate, and hitchhiked to Rome. I turned myself in to the Shore Patrol in Salerno last week.

"I had lost my wallet the day I went AWOL. I believe the mess ticket was in my wallet.

"The pajama top presented to me by CID resembles the one in color I wore. I don't remember how I lost the pajama top. The mess ticket in the hands of CID looks like the one I had.

"I don't remember any fight with any woman. The last fight I had was when Tex and Shorty were with me. That is all I know" (Ex. 4).

On 20 September 1944, Lipinsky took a second statement from accused after accused was again informed of his rights under Article of War 24. He was not threatened or promised any reward. The statement was identified by Lipinsky and admitted in evidence as Exhibit 5 over objection of defense counsel. (R. 23-25) After reciting that accused said he understood

that he might remain silent and that whatever he said might be used for or against him, the statement continued:

"On the 20th of August 1944, I was with two friends of mine. I believe we left the 225th Station Hospital at about 1900 hours. It was shortly after chow. We were all dressed in our hospital pajamas. We then went to the little town near the hospital to have a drink. The three of us had quite a few drinks and we were pretty well drunk. We left there about 2300 hours. We got into a fight with some G.I.s in the street. After the fight which didn't amount to too much, the other two boys left me for camp. I then went looking for more vino. I was still dressed in my pajamas. I came to the place where the woman was. I went and rapped at the door. I don't remember the exact time. I asked her for some vino. She then started running at me saying, 'Via!' I grabbed a chair, I hit her and went outside. I then fell asleep. I don't remember how I got the four inch scar on my legs nor how I lost my pajama tops. The pajama tops and the meal ticket shown to me by Agent Lipinski looked to be like mine. I don't remember just where I fell asleep. When I woke up, I knocked on a door. I asked the Italian something, and he slammed the door in my face. I then went back to the hospital. The guards at the hospital did not ask for my name or serial number. It was still dark out.///END///" (Ex. 5).

Accused made the following unsworn statement to the court:

"I just want to say we all went off drinking that night. What happened I don't remember much about it. Three of us went out drinking for quite a while. I left these other two fellows. I know I walked up in this alley and started back to the hospital" (R. 27).

4. It thus appears from the evidence that at the time and place alleged, Maria Marzano, the person named in the Specification, received injuries to the head and body which resulted in her death. Her body when found was completely nude and covered with two chairs, a little stove, a wagon wheel and empty fruit boxes. Her face and bed were covered with blood and a stick three or four feet long was found near her mouth. A pajama top was found beneath the body of the dead woman. This resembled in color the one which accused admitted wearing and losing the night of the homicide. He could not remember how he lost it. The stains on the pajama top contained human protein and "constituents of blood". There was a mess ticket in the pocket of the pajama top which, accused admitted, was similar in appearance to his own mess ticket. Reçano's testimony placed the accused at the scene of the crime shortly before the discovery thereof. Although there was no direct testimony as to the manner of infliction or as to the instrument used to cause the injuries which resulted in death, the court could reasonably infer from the medical report that it was a heavy

object. There were two chairs on the body of the dead woman when it was discovered. Accused stated that he struck a woman with a chair. The circumstances sufficiently establish the identity of the accused as the assailant. Malice aforethought is inferable from the vicious and brutal beating administered by accused with a chair on an aged woman, without legal justification or excuse. It may be inferred from the evidence that accused killed the woman because he became angry when she refused his demand for wine, rushed toward him and ordered him to leave her house. The court properly found accused guilty of murder as charged.

The question of lack of the intent requisite to commit murder was raised by defense counsel. According to Griffis accused was drunk about 2200 hours the preceding evening and Recano testified that he was drunk about 0330 hours on the morning of the discovery of the body. Naberezny testified, however, that about 0430 hours accused did not appear to be drunk, only bewildered, and he became oriented when shown where the 45th General Hospital was located at the Medical Center. He was steady on his feet, his speech was normal and he did not smell of liquor. He had sufficient control of his faculties to commit the assault and later to flee. The question of drunkenness and its effect upon the intent requisite in the offense of murder was one of fact for the determination of the court. No legal impropriety in its determination appears.

5. The charge sheet shows accused is about 25 years of age, enlisted 19 August 1940 and had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory 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.

Edward T. Kargel, Judge Advocate.
Malvin G. Dunn, Judge Advocate.
Henry C. French, Judge Advocate.

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

APO 512, U. S. Army,
9 March 1945.

Board of Review

MTO 5921

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

v.)
Private FRANK LAMSON)
(11 019 582), Detachment)
of Patients, 225th Station)
Hospital.)

PENINSULAR BASE SECTION

Trial by G.C.M., convened at
Naples, Italy, 14 November
1944.
Dishonorable discharge and
confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

OK

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward H. Longfellow, Judge Advocate.
Malvina J. Brown, Judge Advocate.
Henry C. Finch, Judge Advocate.

MTO 5921

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
13 March 1945.

TO: Commanding General, Mediterranean Theater of Operations, APO 512, U. S.
Army.

1. In the case of Private Frank Lamson (11 019 582), Detachment of
Patients, 225th Station Hospital, attention is invited to the foregoing

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MTO 5921, 1st Ind.
13 March 1945 (Continued).

holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 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 5921).



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

(Sentence as committed ordered executed. GMCO 44, MTO, 13 Mar 1945.)

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

APO 512, U. S. Army,
 8 March 1945.

Board of Review

MTO 6008

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private JOHN W. TAYLOR)	Rear Echelon, 92d Infantry
(37 485 128), Company D,)	Division, 30 January 1945.
371st Infantry.)	Death.

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 John W. Taylor, Company "D", 371st Infantry, did at Pietrasanta, Italy, on or about 23 January 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Private First Class Earl Johnson, 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 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 and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on 23 January 1945, the guard for the regimental command post, 371st Infantry, was quartered on the second floor of a building in Pietrasanta, Italy (R. 7). Accused was a member of the guard (R. 7,8). About 1800 hours on 23 January (R. 17,26), accused entered the guard quarters holding an M-1 rifle. Private First Class Earl Johnson (the deceased) was sitting on a bed writing a letter, and a man was lying on the same bed behind him. Accused did not speak but fired a shot at Johnson from a distance of about eight feet (R. 18,19,22,23,26,29,30). Johnson "keeled over" without speaking a word (R. 18,22). Accused said "'Get up, get up!' and the man who was lying on the bed behind Johnson "keeled off the bed" (R. 18,19,22,23). Accused then walked to within one pace from the bed, raised his rifle to his shoulder, aimed and fired two more shots at Johnson. The shots entered Johnson's body. Accused then turned and left the room. (R. 19,22,26-30)

The Headquarters Company commander, Captain Robert E. Moock, 371st Infantry Regiment, who was a short distance away, heard first one shot and then two more. He went toward the guard quarters and met accused at the doorway of the building in the company of several men, one of whom cursed accused and threatened to shoot him. (R. 6-8,10) Accused said "I shot him three times, and I'm all right, now" (R. 11).

Captain Albert M. Davis, Medical Corps, 371st Infantry Regiment, testified that about 1845 hours that evening he examined Johnson who was dead. In his opinion Johnson had been dead 15 or 30 minutes and death, which was caused by rifle fire, was instantaneous. (R. 13-15) He further testified:

"I observed the following wounds, namely, a penetrating wound of the head, a wound entering through the right side of his face, here (indicating right side of face below eye), with an exit in the posterior of his head (indicating back of head), with complex avulsion of the skull, from here to there (indicating right side of face below eye, upward and to back of head). There were other wounds, one in his abdomen, in the upper part of his abdomen (indicating region of upper abdomen), with an exit in the rear, and a penetrating wound of the hand, left hand" (R. 14).

The wounds were sufficient to have caused Johnson's death (R. 15,16).

Accused subsequently (on 24 January 1945) made a pretrial statement to the investigating officer, Captain Fred A. Brewer, 371st Infantry, who first read and explained the 24th Article of War to accused (R. 30-32), and "stressed" the fact that a statement might be used against him (R. 32). The statement which was signed by accused (R. 31), and which was admitted in evidence without objection (R. 32) was, in pertinent part, as follows:

"I first had trouble with Private First Class Johnson when one night last week one of the members of the guard

came to me and told me to see if I couldn't get Johnson up to go out on his tour of guard duty. Johnson heard the man speak to me and Johnson said to me, 'Taylor, don't you say a God damn word to me.' I said, 'I don't have to say anything to you, Johnson. You know what you're supposed to do.' I had been selected by the Sergeant of the Guard as his assistant and it was my job to get the men up. Johnson again said to me, 'Don't say a God damn word to me, Taylor,' and then he said, 'Don't no son-of-a-gun say anything to me.' Then Jackson spoke to Johnson and then Johnson went on to his work as guard.

"I had no more trouble with Johnson until Sunday night, January 21, 1945 when I was passing out the cigarette ration in the guard quarters. Johnson asked me for a package of Camels and I told him that I had already promised the two packages of Camels that I had to other men, but that I'd try to get him a package to-morrow. Johnson then just reached over and took a package out of the box on the table and knocked all the cigarettes chewing gum and chocolate all over the floor. I grabbed Johnson and threw him on the bed; Johnson asked me to let him up and I did. Johnson then pulled out his knife and cursed me and I pulled out my knife and cursed him back. Neither of us used the knives however, and I let him keep the Camels and sat down. We had no further argument that night.

"On January 23 at about 1730, I was eating my supper and some of the other men and I were talking about giving the Italian kid who was there, food. I asked one of the other men for a cigarette and he gave me one and I remarked that I had traded my cigarettes today for Vino. Johnson then said to me, 'You're a liar, you gave it to them whores.' I told him he was a lying cocksucker and he said 'Don't call me a cocksucker,' and I then said, 'Oh, what's the matter with you you cocksucker.' I was joking when I called him this and meant no harm. Johnson then jumped up and grabbed his rifle, pointed it at me and threw the safety off. I kept sitting in the chair where I was and didn't even look at him because I thought he was going to shoot me. Some of the other fellows then spoke to him and took his rifle away from him. I kept sitting in my chair for about thirty minutes and then I went and got my rifle. I thought about the way Johnson had been acting and I decided that I might as well get rid of him for if I didn't he would probably kill me. I then went downstairs and loaded my rifle and then came back up stairs to the room where Johnson was. Johnson was facing me, but I don't know whether he saw me or not. I threw my gun up and shot once, I was trying to hit him and not hit any of the other men. After I shot

once I told the man on the bed to get out of the way. I looked at Johnson who looked as if he was going to get up from the bed and I then shot two more times. I then left the room and started down to Regimental Headquarters Company to tell Captain Moock what I'd done, but the guards met me and took my rifle and then we met Captain Moock who told them to take me on down to Headquarters Company.

"I had tried to get along with Johnson, but every time I said anything to him he would get mad and want to fight. I got along well with all the other men and had had no trouble with any of them, except Johnson. I was not under the influence of intoxicants at the time of the above incident" (Ex. A).

For the defense Private James W. Alexander, Company G, 371st Infantry, testified that about 1800 hours on the evening concerned accused and Johnson had "a little argument" during which accused called Johnson a "cocksucker" (R. 35). Johnson twice told accused not to call him that, but the latter twice repeated the epithet. Johnson then "reached up and got his rifle" but two soldiers took the weapon from him without any difficulty. Accused was unarmed at the time. (R. 33-36)

Accused elected to remain silent (R. 38).

4. It thus appears from the evidence that at about 1800 hours on the date and at the place alleged in the Specification, accused and Private First Class Earl Johnson, the person named in the Specification, had an argument during which accused thrice called Johnson a vile name. Johnson "reached up and got his rifle" but was disarmed by two other soldiers without difficulty. According to his own pretrial statement accused remained seated for half an hour and then went downstairs, obtained and loaded his rifle, and returned to the room where deceased was sitting on a bed writing a letter. Without saying a word accused shot Johnson from a distance of about eight feet. He then moved to about one pace from Johnson's bed, raised his gun to his shoulder and fired two more aimed shots into his body. Johnson was unarmed and his death was instantaneous. Malice is clearly inferable from the deliberate, cold-blooded use of a deadly weapon in a deadly manner. The court properly found accused guilty of murder as charged.

From the evidence and accused's statement it appears that accused and deceased had engaged in other arguments prior to the homicide. During the verbal argument which occurred between them about half an hour prior to the commission of the crime Johnson, apparently angered by the vile epithet applied to him by accused, secured his rifle. It is clear, however, that no legal provocation existed when accused fired the fatal shots, and also that accused was not then in danger of losing his life or of incurring serious bodily injury at the hands of deceased. Accused's murderous purpose is amply evidenced by his admission that for a half hour after the argument he "thought about the way Johnson had been acting and I decided I might as

well get rid of him for if I didn't he would probably kill me". This was a cold, calculated, premeditated homicide which was committed deliberately, without legal provocation, justification or excuse.

5. The charge sheet shows that accused is about 24 years of age, that he was inducted 23 August 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. A sentence to death or imprisonment for life is mandatory upon the court-martial upon conviction of accused of murder in violation of Article of War 92. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Edward H. Kelly, Judge Advocate.
Major R. P. Brown, Judge Advocate.
Maurice C. Genial, Judge Advocate.

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

APO 512, U. S. Army,
8 March 1945.

Board of Review

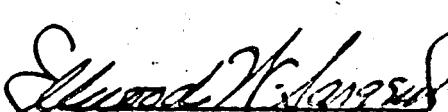
MTO 6008

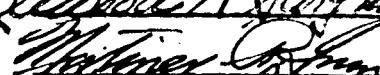
U N I T E D S T A T E S) 92D INFANTRY DIVISION
v.)
Private JOHN W. TAYLOR) Trial by G.C.M., convened at
(37 485 128), Company D,) Rear Echelon, 92d Infantry
371st Infantry.) Division, 30 January 1945.
) Death.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

 Edward W. Janssen, Judge Advocate.

 James C. Remick, Judge Advocate.

 Harry C. Irion, Judge Advocate.

MTO 6008

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
8 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private John W. Taylor (37 485 128), Company D, 371st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50¹, you now have authority to order execution of the sentence.

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MTO 6008, 1st Ind.
8 March 1945 (Continued).

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

(MTO 6008).



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

(Sentence ordered executed. GCMO 38, MTO, 8 Mar 1945)

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

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APO 512, U. S. Army,
29 March 1945.

Board of Review

MTO 6026

UNITED STATES)	FIFTH ARMY
v.)	Trial by G.C.M., convened at
Private JOHN D. FORBES)	APO 464, U. S. Army, 9 February
(31 139 169), 24th Chemical)	1945.
Company (Decontamination).)	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 John D. Forbes (then Private First Class), 24th Chemical Company, did, at or near Florence, Italy, on or about 14 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Lloyd T. Smith, a human being, by shooting him with a carbine.

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, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the

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record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 14 January 1945, the 24th Chemical Company was stationed near Florence, Italy. Both accused and Private Lloyd T. Smith, the deceased, lived in the same pyramidal tent with Corporal Lewis E. Greene, Private Clarence H. Owens and two other soldiers, all members of the 24th Chemical Company (R. 4,5). Smith was about five feet eight inches in height and weighed about 195 pounds. Accused was five feet five inches in height and weighed about 140 pounds. (R. 25,26) Admitted in evidence was a photograph of three tents in the company area. Accused and Smith lived in the tent marked "1". (R. 6; Ex. A)

About 2130 hours 14 January 1945, after accused and others were in bed, Smith entered the tent (R. 5,6). He had been drinking, could not walk straight, and was stumbling and pushing things over as he endeavored to light a candle. Greene, who was awakened by the noise, arose and lit the candle. (R. 6,9) When Smith started to eat some bread on the table, accused asked him if he should not ask before he took things which belonged to someone else. An argument ensued during which accused and Smith "cussed *** and damned each other". (R. 7,9) Accused dressed, left the tent unarmed, and went to see Staff Sergeant Charles A. Jackson, his platoon leader, who was in the depot office about 90 yards away (R. 7,16,17). He asked Jackson to "come up and stop Smith from arguing with him" (R. 17). Jackson partially dressed and walked about 10 or 15 yards behind accused who went back to his tent and obtained his carbine. When Jackson entered the tent and asked accused to give him the weapon, the latter did not reply but left carrying the carbine. Smith was not in the tent at that time. Jackson then went back toward the depot office. (R. 17,18) About 2140 hours Staff Sergeant George O. Edmonds, acting first sergeant of accused's company, was in his quarters, heard an argument and recognized the voice of accused. Edmonds went toward the row of three tents. Accused was standing before either tent No. 2 or No. 3, pointing his carbine into the tent, and arguing with Smith. Edmonds ordered accused to surrender his weapon, and told him that if he did not stop arguing he would be placed under arrest. (R. 11,12,20-22; Ex. A) Accused then stepped back and said he would give the carbine to Edmonds (R. 22,23). At this moment Smith came out of the tent and began to run toward his own tent (No. 1). Accused, who was about 18 to 20 feet away shouted "Stop, Smith, stop!", and fired one shot at him just as he was about to enter tent No. 1. Smith fell inside the tent, to the left of the doorway. (R. 8,9,11-13,22-24; Ex. A). Edmonds ordered accused to give him the carbine, and the latter replied "Come and get it!". Edmonds then went to accused who gave him the weapon and two carbine clips. A clip was also in the carbine. (R. 23) Smith was given first aid and then taken to the hospital (R. 26). Accused appeared to be sober (R. 18,23). Jackson, the platoon sergeant of both accused and Smith, testified that accused was a "first class workman" and had a good reputation in the company for peace and order. Smith "had his faults, but on the whole, he was pretty good". His reputation in the company for peace and order was between good and bad. (R. 19) Private Clarence H. Owens, tentmate of both men (R. 11), testified that accused was "a fine boy" and that Smith "has his ups and downs, but he

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is let off sometimes. It is nothing unusual though." (R. 14)

Lieutenant Colonel Samuel H. Calvin, Medical Corps, chief of the laboratory service, 24th General Hospital, testified that Smith died at 2045 hours, 16 January and that witness performed an autopsy on the body the following day. The cause of death was peritonitis which resulted from a gunshot wound in the abdomen. The bullet

"penetrated the descending colon, took a course upward and to the right, penetrated the left upper small intestine, anterior and posterior wall of the stomach, and then went through the left lobe of the liver, to finally emerge just beneath the ribs on the right side." (R. 15)

First Lieutenant William W. Getts, acting company commander at the time, testified that he saw accused in the orderly room about 2155 hours 14 January 1945 and asked him what had happened. Lieutenant Getts wrote down verbatim what accused then voluntarily told him. As the matter was not being formally investigated at that time, no explanation of his rights was made to accused nor was he told the statement might be used against him. Witness further testified that accused's reputation for peace and order in the company was good but that Smith's was bad. (R. 26-28)

First Lieutenant Joseph C. Stiefvater, 24th Chemical Company, investigated the charges against accused and received his previously made statement from Lieutenant Getts. Lieutenant Stiefvater informed accused that he need not make a statement, and that if he did, he ran the risk of having it used against him in the event of trial. He then showed accused the statement made before Lieutenant Getts, and asked if it was his statement. Accused replied in the affirmative and when asked if he wished to submit it, again replied in the affirmative. The statement was then typed and accused signed it. It was identified at the trial by Lieutenant Stiefvater and admitted in evidence without objection. (R. 28-30; Ex. B) As accused testified substantially in accordance with his statement, the contents thereof are not set forth herein. He stated that when he went to Sergeant Jackson he told the latter, among other things, that if Smith "tried any funny business I was going to kill him".

For the defense Sergeant Thomas W. Gray, accused's section leader, testified that he "would rate his (accused's) work fine", that he could depend upon accused to do an assigned task, and that in witness' opinion he was of value to the service (R. 36).

Accused testified that he completed two years in high school (R. 35), and had been in the Army over 30 months (R. 31). He had known deceased for 27 months (R. 31) and had been his tentmate for about two and a half months (R. 33). Accused had never engaged in any previous serious arguments with Smith, who drank considerably (R. 33,35). Accused, who had nothing to drink that evening, testified that he was cold and not feeling well that evening and decided to go to bed (R. 31).

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"I was in bed. I was feeling a little sick. I was in bed trying to get to sleep. A little while later Smith came in. I knew it was him, because he was always making a lot of noise when he came in. I didn't say anything at that time. I heard him stumbling around trying to find the light, and after awhile Corporal Greene awakened and lit a candle for Smith. Smith said to one of the fellows, 'Wilson, do you have anything to eat?'. Wilson said, 'No'. All this time I said nothing to him. After awhile he started cooking something and I looked to see what it was. I had had some food in my messkit that I had gotten for myself, and I wasn't feeling well enough to eat it - some bread which was covered on top. He took the bread, and then started to use the messkit. I turned to him and said, 'Smith, is that yours?', to which he said 'No'. He said, 'Is it yours', to which I said, 'Yes'. I said 'Smith, you should learn to ask for stuff that is not yours before you start making use of them'. When I said that, he put the food back and said that he didn't want it. I said 'Smith, if you need the food, then you can have it'. He said, 'Forbes, you are a dirty, rotten, son-of-a-bitch'. I said, 'Thank you', and went back to bed. I was in my sleeping bag and had it zipped up and he got up and came to the middle of the room and he said, 'Forbes, you are a dirty, rotten, son-of-a-bitch' again. I told him, 'If I have to be a dirty, rotten, son-of-a-bitch to protect what I have, then I am a dirty, rotten, son-of-a-bitch'. Smith then came between my bed and his and said, 'You are no better than I am. I will kill you, and I have reason to kill you now'. I got up because I was afraid of him. I was afraid he would shoot me or something, so I went to the sergeant's tent to see him. He was not there, so I went to the depot office where he was sleeping that night. I told him what had happened, and after I told him, he put his clothes on and I started back to the tent. When I came back to the tent, Smith was right across from the tent, and I hadn't seen him, but I heard him saying, 'You little, dirty, son-of-a-bitch, I'll kill you'.

"Q At the time you heard that, where was Smith?

A Just outside of the tent he lived in. I went into the tent. I was afraid of him. I didn't know what he had. I was afraid, and my carbine was on the wall and I took it down and came back out, and I said to him, 'You threatened to kill me, and called me a lot of dirty names'. He ran into me and we started to struggle and in the struggle we went to the tent that Sergeant Jackson lived in" (Tent No. 3; Ex. A) (R. 32).

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"Smith backed up against the tent and he tried to get in, but the door was locked. I was standing there facing him, and I called him a few names just as he had called me. Then Sergeant Edmonds said, 'Give me that rifle'. I took two steps back and said, 'Here, Sergeant' and was going to give him the carbine. I had not seen the sergeant before and then I figured he was close enough for protection, and was going to give him the carbine when Smith made a dash for his tent. I had it set in my mind that he was going to get something to hurt me with, and I called to him to stop, and he didn't stop. Then he got to the tent and I fired" (R. 33).

Accused further testified that when he fired he was standing in front of tent No. 3, about 25 feet away from Smith who was then in front of tent No. 1 (R. 33; Ex. A). Accused loaded his carbine when he previously picked it up in his tent. He obtained the carbine because he did not know what action Smith was about to take. "Several times previously he came into the tent and waved his carbine around and tried to shoot me. That made me afraid of him". He had the weapon in his possession when he engaged in the struggle with Smith and knew that his opponent was then unarmed. (R. 34) It appeared to accused that during the struggle Smith was trying to take the weapon away from him (R. 35).

4. It thus appears from the uncontradicted evidence that at the time and place alleged accused shot Private Lloyd T. Smith, the person named in the Specification, and that as a result of the injury inflicted Smith died two days later. After the two men engaged in an argument in their tent during which they "cussed *** and damned each other", accused left, asked his platoon leader to make Smith stop arguing with him, and then returned to his tent where he obtained his carbine. Smith was not in their tent at the time. Accused again left the tent, met Smith who was either near or in another tent, engaged in another argument with Smith and pointed his carbine at him. When Sergeant Edmonds ordered accused to give him his carbine, Smith began to run toward his own tent. Accused shouted to him to stop and shot him at a distance of about 20 feet when he did not do so.

That accused acted with deliberation and malice aforethought when he shot his victim, is clearly inferable from the evidence. He told Sergeant Jackson that if Smith "tried any funny business I was going to kill him". When accused then returned to his tent Smith was not present, and instead of remaining in the tent and thereby avoiding further conflict, accused deliberately armed himself and again departed. When he left the tent he did not give his carbine to Sergeant Jackson who specifically ordered him to do so at the time. It is reasonable to infer under the circumstances that accused left the tent with the express purpose of finding Smith. Accused admitted that when he met Smith shortly thereafter he called the latter "some dirty names". The two men, according to accused, then engaged in a struggle during which accused had his carbine, but his opponent was unarmed. Accused testified that Smith tried to enter tent No. 3 but the door was locked,

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and the evidence shows that accused was pointing his gun at Smith at this time. It was then that accused was again specifically ordered to surrender his carbine - on this occasion by Sergeant Edmonds who, according to accused's own admission "was close enough for protection". Although accused told Edmonds he would give him the carbine he did not do so. Instead he deliberately shot Smith at a distance of 20 feet as the latter was running away, still unarmed. It is reasonable to infer from the evidence that Smith attempted to enter tent No. 3 and then ran to his own tent because accused was threatening him with his carbine.

The gist of accused's defense was that Smith had been calling him vile names, that he feared his antagonist, and that he shot him as he was running toward their tent because he thought Smith "was going to get something to hurt me with". It is an elementary principle of law that where the evidence shows an intent on the part of an accused to kill, no words of reproach, no matter how grievous, are provocation sufficient to free the party killing from guilt of murder (Wharton's Crim. Law, Vol. I, 12th Ed., sec. 584, p. 802). Moreover,

"Mere fear, apprehension, or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent" (Wharton's Crim. Law, Vol. I, 12th Ed., sec. 426, p. 655).

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).

The court was fully justified in concluding from all the evidence that no force was threatened or attempted by deceased which carried any immediate danger or threat of danger to accused. The Board of Review is of the opinion that the findings of guilty of murder are supported by evidence that accused deliberately and without legal justification, shot and killed deceased without legal provocation on the part of the latter. The circumstances exclude any theory of legal justification or excuse and the evidence is devoid of any matters of extenuation or mitigation.

5. The charge sheet shows accused is 30 years of age and was inducted 15 July 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting

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the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory 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.

Eugene M. Hayes, Judge Advocate.
John G. Jones, Judge Advocate.
Henry C. Linck, Judge Advocate.

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

APO 512, U. S. Army,
 10 March 1945.

Board of Review

MTO 6040

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private First Class GENERAL)	Rear Echelon, 92d Infantry
L. GRANT (34 557 976), Company)	Division, 8 February 1945.
D, 366th Infantry.)	Death.

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 Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.
 (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private First Class General L. Grant, Company "D", 366th Infantry, did, at Viareggio, Italy, on or about 8 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Carlo Franceschi, by shooting him in the chest with a gun.

He pleaded not guilty to the Charges and Specifications and was found not guilty of Charge I and its Specification and guilty of Charge II and its Specification. Evidence was introduced of one previous conviction by

summary court-martial for absence without leave in violation of Article of War 61. He was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, Mediterranean Theater of Operations, confirmed the sentence and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The undisputed evidence shows that about 1900 hours (R. 16,18) 8 January 1945 accused (colored), a member of Company D, 366th Infantry Regiment (R. 6), went to a civilian house at 109 Via Fontanella at or near Viareggio, Italy. In the house at the time were Carlo Franceschi (the deceased), his wife Annunziato, his daughter Tereza, two small children, and two white American soldiers, Privates John C. Strong and Sam T. McFalls, members of the 248th Field Artillery Battalion. Giuseppe Franceschi, brother of Carlo, was outside in front of the house. (R. 12-16,18) Accused approached Giuseppe and asked "'Come Stata', how do you do". When Giuseppe, who had never before seen accused, replied "Allright", accused told him to enter the house, followed him into the kitchen and asked for some wine. (R. 13,15) When Giuseppe, in response to the request, replied "Allright", accused entered an adjoining room where the above persons were, said "'Buona Sera, Come State'", and began talking to Tereza. He then asked Carlo for some wine. (R. 13,15,16,18) Strong testified that Carlo "acted like he did not want him to have it, so he asked the old man again" (R. 16). Giuseppe testified that when Carlo said "'Yes I will give you a glass of wine'", accused replied "'No, I want a bottle'", and that as Carlo was going to get a bottle accused said "'You are just going to give me a glass'" (R. 13).

As Carlo walked by accused to get the wine the latter seized him with his left hand, pulled out a .45 caliber pistol from the rear pocket of his trousers with his right hand and fired it. Giuseppe jumped on accused's back, struggled with him and attempted to disarm him. Carlo, who was trying to keep accused away from him (Carlo), was pushed by accused against a table and the table turned over. Accused then fired two or three more shots. (R. 13,16-19)

Giuseppe accounted for three shots. The first was fired at Carlo, the second at witness and the third struck the shoulder of Giuseppe's nephew who was coming to his aid. (R. 13) Strong testified that he (witness) left the room after the second shot and that thereafter he heard two more shots. Carlo was standing when Strong left the room. (R. 16,17) McFalls testified that Carlo pushed the pistol up in the air and that accused fired it twice. He fired a third time as he was backing out the door, and Carlo then fell on his face. After accused left the room McFalls heard a fourth shot in an adjoining chamber. "The boy" came in holding his stomach. (R. 18,19) Giuseppe testified that with the aid of his nephew and Giuseppe's wife, he got accused to the front door where he managed to take the gun away from him. Accused ran outside the house (R. 13). Giuseppe returned, found Carlo dead, and gave the .45 caliber pistol to McFalls who in turn gave it to the military police (R. 13,19).

Accused was the only person in the room armed (R. 14,17). Before the incident occurred no one had threatened or manaced him in any manner (R. 16,19,20). Two eyewitnesses testified that accused appeared to be sober (R. 14,17). When interrogated at the battalion aid station about 2100 hours that evening by Captain Thurston E. Jamison, his company commander (R. 7), accused answered his questions in a satisfactory manner. The officer "could not say" whether he was under the influence of liquor. Accused was asleep when the officer arrived at the aid station. (R. 8)

About 1030 hours 9 January, Major Robert E. Brown, Medical Corps, surgeon for Special Troops, 92d Infantry Division, went to deceased's home and examined a body which was identified as the body of Carlo Franceschi by his daughter Tereza. Witness found a bullet wound "about one inch above and slightly to the left of the left nipple through the heart". In the opinion of the witness death had been caused by the wound, and was instantaneous. (R. 11) Rigor mortis was advanced and the man "had been dead for quite some hours" (R. 12).

First Lieutenant John W. Logan interviewed accused (on 9 January 1945) and advised him of his rights under Article of War 24. Accused then made a statement. No promises or threats were made nor was any coercion used. The statement, identified at the trial by Lieutenant Logan, was admitted in evidence without objection. (R. 20,21; Ex. A) After reciting that Article of War 24 was read to accused and that his rights thereunder were explained to him, the statement continued:

"Around 1800, 8 January 1945, I walked away from camp. I knew that I was A.W.O.L. going away. I walked away to get a drink of vino. I walked to an Italian's home and knocked on the door, I asked him, could I come in. It was one lady sitting in the first room; I asked her for some vino. She said, that she didn't know and I asked the people in the next room. They said that they didn't have any vino. I told them that a lots of Italians say, when a soldier asks for some vino, they would be joking and say that they didn't have any vino. The old man seemed to get mad and started after something. I asked him where he was going, he stopped, turned around and told me to leave out of the house. He turned around and shoved me. When he shoved me, I asked him, 'Why?' He kept shoving me in the same room. Two American white soldiers were sitting in there. I pulled my gun (.45 cal U.S. Army automatic) #1233503. Three Italians, (2 women and one man) and one white soldier, American had ahold of me and was punching me. I shot, the first time I shot to make the people turn me aloose. After they wouldn't turn me aloos(e), I shot into the bunch. The door flew open and they shoved me outside, I got up and ran. It

was the front door, that they shoved me out of. I shot into the bunch twice I shot my automatic three times that I cna remember.

"During my struggle in the other room, they might have been pushing me into the front room. When I found myself, I was outside. That is when I ran" (Ex. A).

No evidence was introduced by the defense and accused elected to remain silent (R. 21,22).

4. It thus appears from the uncontradicted evidence that at the place and time alleged in the Specification, Charge II, accused, shortly after entering a civilian dwelling asked Carlo Franceschi (deceased), an old Italian man, for some wine. Carlo offered to give him a glass of wine to which accused replied that he wanted a bottle. When Carlo went to get a bottle of wine for accused, the latter said that Carlo intended to give him only a glassful. As Carlo passed by, accused grabbed him with one hand, took out a .45 caliber army type pistol with the other from the rear pocket of his trousers and fired it. During an ensuing struggle accused fired two or three more shots. There is evidence that he attempted to shoot Guiseppe, wounded Guiseppe's nephew, and shot deceased through the heart, killing him instantly. There is also evidence that deceased was unarmed and that no one had threatened or menaced accused in any manner before the incident occurred. Accused appeared to be sober.

In his pretrial statement accused contended that when he opened fire occupants of the room were holding and "punching" him. The truth of this contention was a matter for determination by the court. Even assuming it to be true, the degree of violence used against accused as he described it did not justify his resort to the firearm, and did not amount to legal provocation or excuse the homicide on the ground of self-defense.

On searching for a motive for accused's conduct, the evidence presents a reasonable basis for an inference that accused was angered because deceased offered to give him a glass of wine instead of a full bottle. There is no evidence of legal provocation nor of any actions by deceased which required the use of self-defense. Callous indifference to the life of his victim or vicious malice characterized the behavior of accused. His violent, though possibly impetuous conduct, in the absence of any circumstances whatsoever which would in the slightest degree excuse or justify the shooting, fully warranted the court in finding accused guilty of murder. The possibly impetuous nature of his act was not a defense (MCM, 1928, par. 148a; Winthrop's, reprint, pp. 672,673; NATO 696, Pokorney; MTO 4750, Smith; MTO 5917, Jones; ETO 4449, Lewis).

5. It is alleged in the Specification, Charge II, that accused employed a "gun" in committing the offense. The evidence shows that accused shot deceased with a .45 (caliber) army type pistol. The defense did not raise any issue as to the nature of the firearm used. Any variance in this respect between the allegation and the proof is not substantial and accused

was in no manner injured or misled thereby (AW 37; NATO 696, Pokorney; MTO 5917, Jones)..

6. It is also alleged in the Specification, Charge II, that the person killed was "one Carlo Franceschi" whereas the evidence shows that accused shot and killed "Franceschi Carlo". It is a matter of common knowledge that it is an Italian custom to give or write the last name or surname first. In the light of the whole record it is clear that "Carlo Franceschi" and "Franceschi Carlo" were one and the same person and that the man killed was the person named in the Specification.

7. The charge sheet shows that accused is 23 years of age, was inducted 27 November 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 mandatory penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Elwood V. Jones, Judge Advocate.
William R. Brown, Judge Advocate.
Henry C. Reinch, Judge Advocate.

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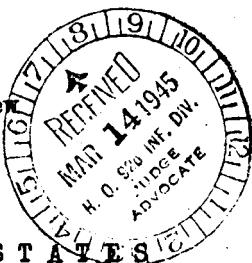
Branch Office of The Judge Advocate General
with the
Mediterranean Theater of Operations, U. S. Army

APO 512, U. S. Army,
10 March 1945.

Board of Review

MTO 6040

UNITED STATES)



v.)
Private First Class GENERAL)
L. GRANT (34 557 976), Company)
D, 366th Infantry.)

92D INFANTRY DIVISION

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 8 February 1945.
Death.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Edward H. Ferguson, Judge Advocate.
Walter P. Irion, Judge Advocate.
Henry C. Remick, Judge Advocate.

MTO 6040

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
10 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private First Class General L. Grant (34 557 976), Company D, 366th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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MTO 6040, 1st Ind.
10 March 1945 (Continued).

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

(MTO 6040).



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

(Sentence ordered executed. GCMO 49, MTO, 16 Mar 1945)

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

APO 512, U. S. Army,
31 March 1945.

Board of Review

MTO 6060-

U N I T E D S T A T E S)	IV CORPS
v.)	Trial by G.C.M., convened at
Corporal GEORGE C. BLALOCK)	Lucca, Italy, 1 February 1945.
(34 082 272), Company A,)	Dishonorable discharge and
701st Tank Destroyer Battalion.)	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 Corporal George C. Blalock, Company A, 701st Tank Destroyer Battalion, did, at Lucca, Italy, on or about 1 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Hubert Woosley, a human being by shooting him with a carbine.

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 reduction to the grade of private, 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. The evidence shows that on 1 January 1945, accused, Sergeant Hubert Woosley (the deceased), Corporal Alfred E. Ness, Corporal Elmer S. Hovland, Private Jacob E. Padgett, Private Russell J. Golden, Private Pretsel L. Wiser and First Lieutenant William G. Coogan, Jr., were members of Company A, 701st Tank Destroyer Battalion, stationed at a rest camp near Lucca (Italy) (R. 5,6,11,17,18,21,23,24,29,35). A considerable amount of drinking occurred in the company area that day (R. 17). Hovland saw accused twice about 1500 hours, at which time accused was drunk (R. 13). About 1615 hours, before guard mount, accused approached Lieutenant Coogan, who was the new officer of the day, and spoke to him about getting a new field jacket. Lieutenant Coogan testified that accused "was in good spirits. I could see he had probably had a little to drink, but at that time he seemed to have pretty good control of himself". Accused volunteered to take the place of a member of the guard who was unfit for duty but Lieutenant Coogan declined to permit him as he was not "in good condition for guard, either". (R. 36)

At guard mount, about 1630 hours, accused became involved in an argument with Woosley. There were no blows struck, neither man touched the other, and Hovland was able to take accused by the arm and lead him away "quite peacefully". (R. 11,12,36,37)

Later, while Lieutenant Coogan was at supper, Woosley approached him, "saluted with quite a flourish", and asked if he and accused were to be court-martialed for interfering with guard mount. Lieutenant Coogan replied in the negative, said that they did not interfere with guard mount and that there would be no court-martial. Woosley was unarmed. He had "probably had something to drink". He was able to control himself and did not stagger. (R. 37-39)

Wiser talked to accused at the mess hall between 1630 and 1700 hours (R. 29,32). Shortly thereafter accused entered a barracks close by and secured a (.30 caliber) carbine (belonging to Padgett) (R. 12,18-20,30). As he came out Wiser asked him where he was going with the weapon and accused replied "I'm going to get that fellow" (R. 30-32,34). Wiser thought accused was "pretty drunk" but he seemed normal and did not appear to be angry or excited (R. 32,34).

Accused then walked around a trailer and as he reached the road he fired a shot into a small bank along the road (R. 6,7,10,31). There was a group of soldiers about ten or fifteen feet away from him on the side of the road where he fired (R. 31). Ness believed accused was trying to scare them and to keep away anyone who might attempt to go near him (R. 9,10). Hovland, Ness, and Wiser approached accused for the purpose of disarming him. Ness hollered to him "to lay down that gun". Hovland got "quite close" but accused heard him, turned around and pointed the gun at him, and "told him to stay back, he didn't want to hurt him". (R. 6,7,10,12,24,31) He said he "didn't want to hurt any of us" (R. 7,8), and "kept motioning back with his hand as he was backing up the road (indicating pushing of hand backwards)" (R. 31). Accused continued to walk north along a building, in a half-crouched position, holding the carbine at his hip (R. 6,14,16). His

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motions were variously described as backing up the road (R. 7,9,10), "side-stepping, or back-stepping a little" (R. 14,25), and running or facing sideways (R. 25,26).

As accused reached the end of the building, Woosley came running around the corner, alone and unarmed (R. 6,7,9,10,12,14,16,25-27,31-33). From his position at the time accused could not have seen Woosley without turning around (R. 7,8,14,32) but he "must have heard him" (R. 31,34). Woosley was between eight and ten feet away (R. 12,13,33), when accused made a quarter turn to the left and simultaneously fired with his carbine (R. 6-8,12-16,24,26,31,34). There was no "loss of motion, he just swung the gun and fired" (R. 8). Woosley fell to the ground, unconscious, by the feet of accused who said nothing and ran around the corner of the building (R. 6,7,10,13,24,25,27,29,31).

Lieutenant Coogan heard the shot and went to the scene. Woosley was still alive but unconscious and was breathing with difficulty (R. 37,38). He was given first aid (R. 13,38), placed in an ambulance (R. 20) and taken to the 47th Medical Battalion (R. 22,38). Although his body was still "very warm" he was dead on arrival and had been dead 20 to 30 minutes. First Lieutenant David C. Williams, Jr., 47th Medical Battalion, examined the body and

"found a penetrating wound through the right upper arm posterior service at the left of the surgical neck of the humerus. The penetrating wound was about 5/10 centimeter in diameter. The right thoracic wall was markedly emphysematory with air bubbles in the wall between the skin extending from the 11th rib to axilla under the scapula. There was also a wound of exit in the eighth interspace in the mid-scapular line, posteriorly on the left. This wound of exit was about a centimeter to a centimeter and one-half in diameter" (R. 22,23).

The wound could have been caused by a .30 caliber carbine bullet. In response to a question as to whether the wound was the cause of death witness replied that the wound was the only mark of violence found on the body and that "It looked like it must have passed through the aorta". (R. 23)

As far as Ness, Hovland and Wiser knew, accused and deceased had been on friendly terms prior to the occurrence (R. 6,13,33). The eyewitnesses testified that at the time of the shooting accused was drunk (R. 8,10,15,27,32,34) but he was not staggering (R. 27). It was stipulated that the testimony of Technician Fifth Grade Irving A. Abram and Corporal Charles K. Rockow would be "generally corroborative" of the testimony of Hovland and Wiser, including that as to "accused's condition, as to being drunk or sober". It was stipulated that immediately after the shooting accused was placed under restraint in the custody of First Lieutenant James T. Hosey. (R. 40)

For the defense, Lieutenant Coogan testified that he had known accused

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since 23 June 1944, that he would rate his character "very highly" and his performance as a soldier, excellent. Accused was not of a quarrelsome nature but was a booster of morale and a very well liked man. When witness saw accused prior to guard mount on 1 January he considered him unfit for guard duty because he had been drinking, was a little unsteady on his feet and was talking queerly. "He was still good natured though" and was able to talk intelligently with regard to a tear in his field jacket. (R. 41,42)

Corporal Patrick M. Roache, a member of accused's organization, testified for the defense that between 1300 and 1530 hours 1 January 1945 he and accused drank about a quart of wine and consumed about three-quarters of a bottle of cognac. When they separated accused was "in a pretty hazy condition" and his eyes were "glassy". (R. 43,44)

Technician Fifth Grade Russell E. Bellamy, a member of accused's organization, testified for the defense that some time between 1500 and 1530 hours 1 January 1945 he had about four drinks of cognac with accused and talked with him. Accused "wasn't sober. He was just starting to feel good". When he saw accused again about supper time he was in "about the same condition" (R. 45-47).

It was stipulated that Private Cecil Honicker "would corroborate generally" the testimony of Roache and Bellamy. It was also stipulated that "Captain Wright *** would corroborate the testimony of Lt. Coogan" as to the character and efficiency of accused and his general reputation with reference to peace and quiet. It was further stipulated that accused was placed under arrest in the company area by First Lieutenant James T. Hosey, and under the guard of Private Eules I. Feagle. (R. 47)

Private Feagle, a member of accused's organization, testified for the defense that at about 1700 or 1730 hours 1 January 1945 Lieutenant Hosey ordered him to guard accused while the latter was being held in the company command post. In about 40 or 60 minutes accused was removed to battalion headquarters and thence to the 170th Evacuation Hospital. During that time accused was not out of witness' sight and had nothing to drink. (R. 48,49)

Captain Paul V. Graham, Medical Corps, 170th Evacuation Hospital, testified for the defense that at about 1950 hours on the night of 1 January he "was called in to see Cpl. Blalock. Cpl. Blalock was sitting in a chair. His clothes were disheveled and he had blood streaked on his face. He was not quite cognizant or appreciative of army rank and he didn't show the proper respect for a superior officer. He answered questions when asked, but didn't limit himself to the answer to the question, but spoke of his own free will. His eyes were bloodshot, and his speech was not what I would call a distinct speech, but there was some slurring. We gave him a test for him to walk a line and

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he walked very straightly, and with the exaggerated awareness of one who obviously realizes what the test is for. I asked at the time if he had been drinking and he admitted, as I recall, to two drinks of cognac. His breath was quite alcoholic. In my opinion, there is no doubt but what he was intoxicated" (R. 50-52).

Accused told Captain Graham he had had nothing to drink since morning. He had an ataxic gait, which meant that he was staggering. Captain Graham testified that in his opinion accused was suffering from acute alcoholism (R. 50-53). Witness further testified that accused

"had the 'I don't give a damn' attitude toward what was going on. He resented the fact that I was asking him questions, although he responded to them."

Accused was not violent, recognized witness as a captain, and knew that he was in a medical station. He was "quite hazy" but "not depressed—rather cheerful about it all". (R. 53) Witness testified that he thought accused "could have intent to do things" but was unable to state whether accused knew the difference between right and wrong because witness did not know him "in his usual state of mind" (R. 54).

Accused elected to remain silent (R. 55).

4. It thus appears from the uncontradicted evidence that at about 1630 hours on the date and near the place alleged in the Specification, accused and Sergeant Hubert Woosley, the person named in the Specification, had an argument during which no blows were struck. At the insistence of another soldier accused was led away from the scene without difficulty. About 30 minutes later, after the evening meal, accused secured a carbine belonging to another soldier and announced that he was "going to get that fellow". As he went down the road several soldiers sought to disarm him but accused fired a shot and told them to stay back as he did not want to hurt them. He aimed his weapon directly at a corporal who approached and, backing or sidestepping, went down the road along a building. As he neared the end of the building, Woosley came running around the corner. Accused turned quickly to his left and fired one shot into Woosley's body. Woosley died a few minutes later. The argument between accused and deceased, which was merely oral in nature, occurred about a half hour before the commission of the crime. It is clear that there was no legal provocation, excuse or justification. There was no evidence which indicated that accused was in danger of losing his life or of incurring serious bodily harm at the hands of deceased who was unarmed at the time. Malice is clearly inferable from accused's threat that he was going "to get that fellow", from his extremely menacing attitude toward the soldiers who attempted to disarm him, from his refusal to surrender the carbine and from his deliberate, cold-blooded use of a deadly weapon in a deadly manner. It is reasonable to infer from all the evidence that accused, when he made the threat, was referring to Woosley with whom he had argued. The court properly found accused guilty of murder as charged.

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5. Witnesses for the prosecution and for the defense testified that accused was drunk when he committed the crime. Golden testified that accused was not staggering. About a half hour before the shooting he had been able to speak intelligently to Lieutenant Coogan with regard to a tear in his field jacket. Lieutenant Coogan testified that accused was in good spirits, as he probably had had a little to drink, but that he was good natured and "seemed to have pretty good control of himself". After he had secured his weapon he had sufficient ability to distinguish and to point out soldiers whom he did not wish to injure. When accused was examined less than two hours after the crime he was cheerful and had an "I don't give a damn" attitude toward what was going on. The examining medical officer testified that although accused was drunk he could still have "intent to do things". Although he did so with "exaggerated awareness", he walked a line "very straightly". Moreover, the threat to "get that fellow" and the circumstances surrounding the actual shooting showed a directed malevolent design with malicious intent. The issue as to whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder was one of fact for the determination of the court. In the absence of substantial, competent evidence indicating that he was so intoxicated, the findings of the court were justified (NATO 951, Chastain; NATO 774, Ruff).

6. The charge sheet shows that accused is about 28 years of age and was inducted 26 April 1941. He had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to death or imprisonment for life is mandatory 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.

Elwood V. Langdon, Judge Advocate.
John G. Linn, Judge Advocate.
Henry C. Reenick, Judge Advocate.

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CONFIDENTIAL

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

APO 512, U. S. Army,
 3 April 1945.

Board of Review

MTO 6161

U N I T E D S T A T E S)	FIFTH ARMY
v.)	Trial by G.C.M., convened at
Private RENTZ McPHERSON)	APO 464, U. S. Army, 20
(34 127 037), 3508th Quarter-)	February 1945.
master Truck Company, 70th)	Dishonorable discharge and
Quartermaster Battalion Mobile.)	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 Rentz McPherson, 3508th Quartermaster Truck Company, did, at or near Pistoia, Italy, on or about 27 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private Jack D. Basey, a human being, by shooting him with a carbine.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court-martial for breaking restriction in violation of Article of War 96. 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. The evidence shows that on 27 January 1945 accused and Private Jack D. Basey (the deceased), both members of the 3508th Quartermaster Truck Company, 70th Quartermaster Battalion, Mobile, were stationed at Pistoia, Italy (R. 5-7,13,14). A map of the company area was identified and introduced in evidence (R. 5,32,33; Ex. A). About 1900 hours that evening Private First Class Frank Harris of accused's company saw accused and Basey "tussling" in a trench at the lower end of the company street and asked them "what was going on". Basey replied that accused had charged him with taking his money and requested Harris to search him (Basey). Harris did so and found nothing, but when he searched accused he found "the money" in his possession. Accused counted the money and said he had all of it. Harris then told them to stop arguing and go to the company. (R. 6) Basey left, said that he was going to tell the first sergeant and went to his (Basey's) tent (R. 6,7).

About 1930 hours Private Anderson Wiseman, of accused's company, who was in tent No. 7, heard Basey say to accused "'Come on Mac, I am going to take you to the first sergeant'", and heard accused reply "'All right; I'll go'" (R. 13-15). About 1935 hours accused and Basey, both of whom were going on guard at 2000 hours, were in the orderly room with First Sergeant Godwin A. Van Brunt, Jr. Asked on direct examination if Basey had "something to say to you", Van Brunt testified in the affirmative. Basey had a .30 caliber carbine and was preparing to go on guard but accused at the time was not armed. (R. 8) The guards were authorized to carry "guns" with a clip of ammunition in the weapon (R. 34). There was no conversation between accused and Basey and nothing happened except that the first sergeant gave each a cigarette. Van Brunt testified that each appeared normal to him. After remaining in the orderly room for about ten minutes Basey left, and accused departed a minute or so later. (R. 8,9)

About 1945 hours Basey, carrying his carbine, opened the wooden door and ran into the pyramidal tent (No. 9) of Technician Fifth Grade August Scott and Private Jewell McKnight, which was the fourth tent away from and situate on the same side of the company street as the orderly room tent (R. 21,23-26; Ex. A). As Basey entered the tent he left the door open. Scott testified that he told him to close the door and that Basey replied "'No, because I'm going to kill someone'". (R. 22,24) To Scott, Basey appeared to be neither calm nor excited, and since he had been in the tent many times before, Scott did not pay any particular attention to him (R. 22). McKnight testified that when Scott started to fasten the door (R. 25) Basey said in a "soft voice, not very loud" (R. 27), "'Don't fasten it, because I am going to kill somebody'" (R. 25,26). Basey asked for a cigarette but neither Scott or McKnight had one. Basey then sat down on a foot locker and nothing further was said between the three men. In about five minutes someone fired two shots in quick succession outside the tent. (R. 22,25) The shots were not fired by Basey who immediately arose and ran out of the tent with his carbine (R. 23, 24,26,27). Scott testified that about four seconds after Basey ran out of

the tent he heard a third shot after which he heard Basey shout. Witness went outside and saw Basey lying in front of his tent "shot up on his left side". (R. 23) McKnight heard the third shot just as Basey ran out of the tent door, and then heard him shout "'Oh Lord have mercy'" (R. 26).

Wiseman, who was still in his tent (No. 7 on Ex. A), heard Basey say to accused in the company street "'Mac, I want you to stop following me. I am tired of you bothering me'" (R. 16). Immediately thereafter he heard two shots fired in quick succession. One of the shots went through Wiseman's tent, about waist high, and missed him by about two feet. After the shots were fired he heard Basey shouting and a few seconds later he went outside and saw Basey lying flat on his back in front of tent No. 10. (R. 14-16; Ex. A) He asked him what was the matter and Basey replied "'Mac shot me'". Wiseman unfastened Basey's belt, pulled up his shirt and saw a hole in the left side of his chest. Basey said "'Mac, you got me'". (R. 15) Wiseman heard two shots only (R. 16).

About five or ten minutes after accused and Basey left the orderly room Van Brunt heard three shots. Two of the shots were close together and the third occurred a few seconds later. (R. 9,12) He left the orderly room and found Basey lying on the ground in front of tent No. 10, with his carbine either underneath him or by his side (R. 10). The carbine contained a clip and had a round in the chamber (R. 10,12,13). Van Brunt, who did not see accused, observed that Basey had been shot in the right side of his stomach. Basey said he was warm, and "'Now I will never get home'" (R. 10). Van Brunt detected the odor of alcohol on Basey's breath and it appeared to him that the latter might have been drinking (R. 12,13).

Technician Fifth Grade William H. Carpenter of accused's company, heard two shots while he was in the orderly room about 1945 hours. Three or four minutes later he heard a groan, left, and found Basey lying on the ground wounded, with his weapon by his side. Basey said "'Mac, Mac'", and Carpenter saw accused standing about 25 yards away. (R. 17,18)

Basey was placed on a bed in the company area and was later taken to the dispensary and then to the hospital (R. 10,19). On the way to the dispensary he said to Corporal Joe Cohen, Medical Detachment, 70th Quartermaster Battalion, "'Joe, I ain't going to make it home'" (R. 18,19). About 45 minutes after finding Basey, Van Brunt smelled the former's carbine but could not determine if it had been fired (R. 34).

About 2010 hours, Warrant Officer Junior Grade Terrell Lyons, Jr., and Van Brunt found accused in the motor park in the company area. He was walking with his .30 caliber carbine in a slung position. Van Brunt took the carbine which had one round in the chamber and an unknown number in the clip. Lyons asked accused if he did the shooting and he replied in the affirmative. (R. 11-13,30,33) At the battalion headquarters Lyons told accused that he was in a "tight spot", but that "he didn't have to say anything". He advised accused that the best thing he could do would be "to tell everything". (R. 31) Accused said that Basey had fired at him and

that he returned the fire. When asked why Basey shot at him, he replied that he did not know. He said that Basey was his best friend and that they were good friends at the time. When asked what reason Basey might have had for shooting at him, accused answered "He just shot at me". (R. 31,32) Accused appeared to be excited and Lyons did not question him further that night. Lyons testified that he could not say whether accused was drunk or sober, but that he had been drinking because he could smell liquor on his breath. He walked in a normal manner. The next morning accused told Lyons that he had given Basey some money when he went to take a shower and that while he was gone Basey spent most of the money and was drunk. He asked Basey for his money and the latter said he did not have it. (R. 31) Accused further stated that he had asked Basey for his money in the presence of the first sergeant while they were in the orderly room, but the first sergeant knew nothing about the matter (R. 32).

Captain Leo Kaplan, Medical Corps, 16th Evacuation Hospital, saw Basey at the hospital at approximately 0900 hours 28 January 1945, at which time Basey was dead (R. 28). Witness, who performed an autopsy, testified that deceased had been dead for about 13 hours when he examined the body. There was a bullet wound on the anterior aspect of the chest. In witness' opinion the wound was the cause of death and could have been caused by a .30 caliber carbine projectile. (R. 29)

Van Brunt testified that both accused and deceased were peaceful and quiet men during the time he knew them (R. 13).

No evidence was offered by the defense and accused elected to remain silent (R. 33).

4. It thus appears from uncontroverted evidence that at the place and time alleged accused killed Private Jack D. Basey, the person named in the Specification, by shooting him with a carbine. There is evidence that about 45 minutes before the shooting accused and Basey had an argument concerning some money accused had asked Basey to keep for him and which accused claimed Basey had not returned. Basey reported the matter to the company first sergeant and later with accused talked with the first sergeant in the orderly room. Both accused and Basey appeared normal at the time. Basey, preparatory to going on guard duty, was armed with a loaded carbine. After leaving the orderly room Basey entered a tent and left the door open. When told to close the door he remarked "No, because I'm going to kill someone". While Basey was in the tent someone outside fired two shots in quick succession. Basey ran out of the tent with his carbine. In about four seconds a third shot was heard and immediately thereafter Basey was found lying on the ground in front of the tent mortally wounded, with a bullet wound in his chest. Within a few minutes after the shooting accused was apprehended near by with a loaded carbine. He admitted that he had shot Basey but said Basey had fired at him first. He stated further that he and Basey had been good friends and when asked why Basey shot at him, replied that he did not know.

The homicide was without legal justification or excuse. Shortly before

the shooting accused appeared normal. Accused's statement that Basey shot at him first is not only without corroboration in the record, but is in direct conflict with the testimony of a number of prosecution witnesses that only three shots were fired, the first two while Basey was sitting in a tent and the third fatally wounding him just after he emerged from the tent door. It is reasonable to infer from the evidence that accused, angered by the "tussel" and the dispute over the money 45 minutes earlier, deliberately followed his victim and shot him. Immediately prior to the shooting Basey told accused to stop following him and that he was tired of being bothered. It is noted that the disputed money was actually found on accused who counted the money and said that he had all of it. The threats by Basey did not excuse the killing as in self-defense. Basey was armed but the court was entitled to believe that no effort was made by Basey to use the weapon against accused and that accused was not in imminent danger at the time he fired. The court was, moreover, justified in concluding that the fatal shot was not fired in sudden passion upon legal provocation. There was a quarrel but it did not involve provocation adequate to reduce the degree of the homicide. There was adequate cooling time in which to subdue any passion that might have been aroused in accused. Malice was inferable from the deliberate use of a deadly weapon in a deadly manner and from other circumstances in evidence. Accused was properly found guilty of murder in violation of Article of War 92 as charged (MCM, 1928, par. 148a).

5. Over objection by the defense that the statements were hearsay, evidence was admitted showing that after he was shot, and while lying on the ground, Basey said "'Mac shot me'", "'Mac, you got me!", and "'Now I will never get home'", and on the way to the hospital said "'Joe, I ain't going to make it home'". There was no error in the admission of this testimony. It clearly appears from the medical testimony and the other evidence that at the time he made the above statements Basey was not only in extremis but also under an acute sense of impending death, thus bringing the statement within the established exception to the hearsay rule pertaining to dying declarations (MCM, 1928, par. 148a).

6. Over the objection of defense that it was "said under compulsion", a prosecution witness was permitted to testify that when he apprehended accused a few minutes after the homicide, accused stated that Basey had fired at him first and he returned the fire, that he and Basey had been good friends and that when asked why Basey had fired at him accused replied he did not know. Witness testified further that before accused made these statements witness had told him that he was in a tight spot and the best thing he could do was to tell everything, but that he did not have to say anything. According to the objection the widest latitude and not limiting it to the grounds stated, still there was no error in admission of this testimony. The declarations did not amount to a confession. Moreover it clearly appears that accused was informed he did not have to say anything and the quoted statements appear to have been made voluntarily.

7. Attached to the record of trial is a report of a psychiatric examination of accused dated 16 February 1945, containing the following:

"States he became involved in trouble with Private Jack D. Basey over a wallet he had given Basey to hold for him while he McPherson took a shower. Basey refused to return it. Later as they went to mount guard Basey stated he was going to kill someone and fired at him twice but missed and then McPherson fired once hitting Basey who died a short time later. He claims he fired once, without aiming and it was too dark to see if he hit Basey or not. He proce(e)d to go on guard but was put under arrest. Denies having any tussle or fight with Basey. McPherson emphatically denies ever having had any homosexual relations with Basey and seemed surprised when informed of Basey's statement to this effect. Shooting apparently occurred on 27 January 45. Shows an adequate amount of contritement for his act. Both had been drinking some wine but neither intoxicated. ***

"This man reveals no mental illness or abnormality which would absolve him from understanding the nature and consequence of his act, or from any legal responsibility for same."

8. The charge sheet shows that accused is 33 years of age and was inducted 7 July 1942. He had no prior service.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. Punishment by death or imprisonment for life is mandatory upon conviction of violation of Article of War 92. Penitentiary confinement 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.

Edward H. Farquhar, Judge Advocate.
Morris Rosen, Judge Advocate.
Henry C. Klunick, Judge Advocate.

(243)

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

APO 512, U. S. Army,
4 April 1945.

Board of Review

MTO 6162

U N I T E D S T A T E S)	ARMY AIR FORCE SERVICE COMMAND
v.)	MEDITERRANEAN THEATER OF OPERATIONS
Private First Class ROBERT L.)	Trial by G.C.M., convened at
FARRELL (34 103 704), 3484th)	Bari, Italy, 31 January 1945.
Quartermaster Truck Company.)	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 first class Robert L. Farrell, 3484th Quartermaster Truck Company, did, at Casamassima, Italy, on or about 24 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Lance Corporal Stanislawa Liksza, a human being by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the "United States" Penitentiary,

(244)

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 for the prosecution shows that on the night of 24 December 1944, four members of the Polish military service, consisting of Maria Kawa and Halina Ceglowski, both Army Territorial Service, 7th Dywizja Piechoty, Osrodek Zapasowy Kobiet; Stefan Nowicki, of the 17th Battalion, 17th LBS; and Stanislawa Liksza (the deceased) (all of the Second Polish Corps), were in Liksza's one-room private dwelling in Casamassima (Italy) (R. 9,10,16,20,21). The room had an entrance from the street and the furniture included a bed, wardrobe, stove, table, some chairs, and particularly a buffet or chest of drawers located several feet from the street along the right hand wall (R. 9-11; Exs. A,B,C,D,E,F; Def. Ex. 1). When the group entered the room at about 2100 hours, Liksza placed on the chest a pistol he had brought with him from the front lines (R. 9,11,22). There was an oil lamp in the room, filled with petrol, and a candle on the table (R. 15). As they sat around the table talking and "eating and singing holy songs", an Italian woman (later identified as Principia Radogna, Liksza's landlady) entered and was invited to join them (R. 10,16). Shortly after 2200 hours a violent knocking was heard on the door. Liksza asked who was there, went to the door and opened it. (R. 10,12,16; Def.Ex.1) On the threshhold was a "colored soldier". Liksza asked him what he wanted and the soldier said something, apparently directing his remarks to the Italian woman, and began to push into the room. (R. 10,17,20,21) The woman replied in Italian, and Liksza, speaking partly in Italian and partly in Polish, asked him to leave. When the soldier persisted in his attempt to enter, Liksza "opposed him" and, "holding one hand on the door, pushed him with the other hand out of the door". (R. 10,17,20,21,23) Liksza closed and bolted the door, returned to the table and sat down. The pistol, which he had placed on the chest when he first entered the room, remained on the chest during the time the colored soldier was in the room. It might have been possible for the soldier to see the pistol but he apparently looked only at the people sitting at the table, and Liksza, when he arose to open the door, was between the soldier and the pistol. (R. 10-12, 17,18,21)

The group sat at the table for about five minutes, discussing the colored soldier, when a violent knocking was again heard at the door (R. 10, 13,17,18,21,23). Liksza arose from the table and took the pistol from the chest. As he stood there, with his left side at about a 45-degree angle to the door, his right side near the chest, and with the pistol pointing to the floor, the little window in the door was broken open, a black hand holding a pistol appeared in the opening, and a shot was fired immediately thereafter. It was the same colored soldier who had been in the room previously. He remained at the door, with his hand still in the window and holding the pistol, until Liksza fell to the floor. (R. 10,11,13-15,17,18,20-22,24) Meanwhile Maria Kawa arose and went to the aid of Liksza who had begun to turn pale, and as he fell to the floor she screamed loudly "'Liksza got killed'", and hurried from the room to call a doctor (R. 11,17,21).

Nowicki picked up the pistol which had fallen out of Liksza's hand,

and ran out the door in pursuit. When he had gone about ten paces from the door he was seized from behind and his assailant, a colored person, struggled with him for two or three minutes trying to take the pistol from his hand. He was then thrown against a wall and the other man began to run away. Nowicki pursued him a few paces and fired four or five shots in his direction, but the man disappeared. (R. 21,24) When Nowicki returned to Liksza's dwelling the girls were not there and he found "only the corpse of Liksza" (R. 21). Shortly thereafter the body was placed in an ambulance and taken to the Polish hospital at Casamassima. The following day Nowicki identified Liksza's body in the presence of a Doctor Flaks. (R. 21,22)

The Polish witnesses had not seen the colored soldier before the incident (R. 13,18,22,23) and none of them identified accused in court. They had no reason to believe that the negro bore any malice toward Liksza. (R. 13, 18,19,23) Maria saw no indication that the soldier was drunk (R. 13), and Halina "supposed only that he was drunk because he was so bold entering the room" (R. 19). Nowicki testified that he could not say if the soldier had been drinking but witness "wouldn't say he was drunk" (R. 23).

At about 1400 hours 25 December 1944, Doctor Joseph Flaks, Polish General Hospital, Casamassima, performed a post-mortem on the body identified by the soldier Nowicki (R. 7). He found two apertures in the aorta and one aperture in the left "bronchis" of the lung. The apertures were caused by a wound from a bullet which entered the body on the left side about five fingers above the left nipple between the second and third ribs. He recovered the bullet in the right side of the body behind the shoulder blade. The cause of death was hemorrhage caused by the bullet. (R. 7,8)

The evidence for the prosecution shows further that accused was a member of 3484th Quartermaster Truck Company, stationed at Casamassima (R. 15,16). At about 2300 or 2330 hours 24 December 1944 Private David Kinard, a member of accused's organization, was in the recreation hall when he was summoned by accused. Kinard noticed a hole in the rear of accused's trousers which were bloodstained. Accused was limping and said he had been shot. He gave Kinard his "gun" and told him to keep it for him until he got out of the hospital. Kinard placed the "gun" under a board in his tent and turned it over next morning to the Criminal Investigations Division. (R. 26,27)

First Lieutenant James Miree, Jr., Medical Corps, Medical Detachment, 46th Quartermaster Battalion Mobile, was on duty 24 December 1944 in the battalion dispensary near Casamassima. About 2345 hours he examined accused who had a gunshot wound in the buttock. Lieutenant Miree asked accused how it had happened and he said he had been shot by an unknown soldier who, he believed, was Polish. Witness testified further:

"He said that this soldier asked him something and due to the fact that he could not understand what the soldier said, he turned around and walked away from him and at that time the soldier shot him." (R. 24,25)

Agent Albert C. Reinert, Criminal Investigations Division, Bari, Italy, testified that he investigated the shooting. On 29 December 1944 he took a statement from accused, after first explaining to him that under Article of War 24 he need not make a statement but could remain silent, that he was not required to say anything that would tend to degrade or incriminate him, and that anything he said might be used for or against him. Agent Doyle "explained it to him and Captain Fleischer explained it to him." No threats or coercion were used, and no promises or inducements were made. Accused then made, read and signed a statement which, after defense had withdrawn an objection, was admitted in evidence. (R. 27-29) The statement is as follows:

"I, Robert L. Farrell, A.S.N. 34103704, Rank: Pfc, Organization: 3484th QM Truck Co 46th QM Trk. Bn. having been warned of my rights under the 24th Article of War, by Agents John Doyle and A. C. Reinert, and without threats or promises, duress or coercion, and knowing that anything that I may say may be used against me, do hereby make the following statement: on 24 Dec. 1944 I left my camp at or about 1830 hours and went directly to Casamassama. I was alone. I first visited a farmer on the outskirts of Casamassama. I remained at his house for about 45 minutes. I gave these people a little candy and tobacco. I left there and went around the corner to some other peoples house. I remained there about an hour and a half. While there I gave them a little tobacco and some candy. I drank a small glass of white wine while there. I had drank nothing at the first house. I had drank a bottle of beer at camp before leaving. I then went to the house where the accident occurred. I had been to this house several times before, because I know the old lady who owns it. I do not know her name. I walked up to the door and knocked about three times. A Polish soldier then opened the door and as I set one foot inside he pushed me out of the door. I noticed that other people were in the room. I didn't see the old lady who owns the house. The Polish soldier had a gun in his hand when he pushed me out of the door. I think he pushed me on the chest with his left hand and held the gun in his right. The door was slammed shut when I was pushed out into the street."

The statement continues:

"I went to the corner of the building, ducked down and took my Beretta pistol from my right hand overcoat pocket. I then pulled the slide back and put one in the chamber. I then went back to the door with my Beretta pistol in my right hand. The little window (wooden) in the door was closed, so I pushed it open with my left hand. I glimpsed the Polish soldier standing there next to the buffet which was in the room. This soldier had his pistol in his hand held at about hip level. Being afraid that he would shoot me I

placed the muzzle of my pistol through this window opening and fired one (1) shot. I ran down the street to the left of the house and then came back past this same house. At this time I had my pistol in my pocket where I had placed it after firing a shot thru the window. Some distance past the house another Polish soldier grabbed me. He had a pistol in his hand and I tried to get it away from him but couldn't. We tussled for some time and I finally broke away from him and ran away. When I was about 30 feet from him I heard a shot and felt pain in my hip. I only recall hearing the one shot which hit me. I kept on walking and don't recall talking to any Italians on the street. Walking back towards camp two Englishmen in a jeep picked me up and took me to the dispensary. When I got there, the orderly called the medical officer who gave me first aid. I then was put in a weapons carrier and taken to the orderly room. I walked over to my tent to get some toilet articles. I then went to Kinard's tent and told him I was going to the hospital. While standing outside Kinard's tent I gave Kinard the pistol which I had fired through the window telling him to hold it for me. I was then taken to the hospital.

"I also wish to make the following statements. The foregoing account of the shooting was given to the agents of the C.I.D. at about 1100 hours on 29 Dec 1944. Prior to giving this statement, I requested that I be allowed to talk to 1st Sgt Spurgeon M. Talley and my commanding officer Capt. Charles Fleischer alone before giving my statement to the C.I.D. The C.I.D. agents left the room and after several minutes returned to my room. At Capt Fleischer's request they again left the room for another 5 minutes. When they returned, I gave the foregoing account.

"Answers to questions

- 1-I believe it was no more than two minutes from the time I was pushed out of the door until I returned and pushed open the window in the door prior to firing the shot.
- 2-I didn't take deliberate aim at the Polish soldier. When the window was pushed open I saw him standing there with his gun in hand and I fired towards him. I did not see him fall.
- 3-When the window was pushed open, I only saw the Polish soldier stand next to the buffet. He was facing the door and had his pistol in his right hand. He made no motions or actions at that time. His pistol was at hip level directed at the door and I was afraid he'd shoot me first. That is why I fired the shot.
- 4-I am positive that when I first attempted to go into the house, the Polish soldier who pushed me out of the door, had a gun in his right hand. It appeared to me like a revolver and it was black in color." (Ex. G)

For the defense, Principia Radogna, of Casamassima, testified that she had rented her house to the Polish soldier (Liksza), and was present in the house with the Polish soldiers on Christmas Eve when a negro soldier knocked at the door. She had not seen him before. He entered the room about one pace, left, returned immediately and fired a shot. (R. 29-31)

Accused testified that he was 28 years of age, lived in Alabama, and had reached the third grade in school. On Christmas Eve he drank a bottle of beer before he left camp and, about ten minutes before he arrived at the house where the Polish soldiers were, he drank a glass of "vino" that tasted like alcohol. He knew "the old lady" who lived there, and who had testified in court (Principia Radogna), and as he had promised her cigarettes and candy for Christmas he went to the house to give them to her. (R. 31,32,35) He was carrying a pistol because in his "home town, it is the custom that they shoot on Christmas Eve night for decoration and I thought I would take my pistol along and if anyone else shot, I would shoot too". It was the same sort of custom as shooting on the Fourth of July—"just shooting Christmas Eve out and Christmas in". (R. 32,33) He had not seen the Polish soldiers before, was not angry with anyone, and did not consider the Polish people his enemies. It was just before Christmas, he was feeling happy and good, and was "hoping they enjoyed their Christmas". (R. 33) He also felt "pretty high" because of the two beverages he had consumed (R. 36). When the Polish soldier, whom accused had never seen before, pushed him from the room and did not ask him to have a drink, it made accused "very mad" and he resented it (R. 33,36). After being pushed outside he stepped back a short distance (R. 34,35). He took out his pistol, pulled back the slide, and put a bullet in the chamber (R. 35,37). He "didn't take a second thought for one thing" (R. 36). He planned to knock on the door and ask the soldier why he pushed him out of the house without explanation, and without asking accused whom he wished to see in the house (R. 35-37). He returned in a minute or two (R. 33) holding his pistol (R. 37), and knocked on the window which "came open". He saw the soldier standing at a 45-degree angle, holding a "gun" pointed in the direction of accused.

"I was so scared and excited I just shot right in and didn't know if I hit him or not, I didn't take no aim. *** I just fired in there and turned and took off. *** It was so quick I didn't have time to think, I didn't do any thinking. I just got the gun and seen this gun, I just shot in."

He did not plan beforehand to kill the man and had no malice against him, "no more than he had pushed me out of there before I didn't." (R. 34) When accused was in the room before he was ejected, the soldier had a gun in his hand and accused feared he might shoot him (R. 33,35,37).

4. It thus appears from the evidence that at the place and time alleged in the Specification, accused knocked violently on the door and entered the dwelling occupied by a Polish soldier, Stanislawa Liksza, the person named in the Specification. Several of Liksza's friends were present. When Liksza asked him what he wanted and requested him to leave the room, accused

persisted in his efforts to enter the dwelling. Liksza, who was then unarmed, pushed him out of the room and closed and bolted the door. Within four or five minutes a violent knocking was again heard on the door and Liksza picked up his pistol, pointed it at the floor, and stood ready to open the door. A small window in the door was broken open by accused who thrust his pistol through the opening and immediately fired one shot at Liksza, who fell to the floor mortally wounded. Accused admitted that he was angered and resentful because Liksza pushed him from the house without explanation, that he loaded his pistol, returned to demand an explanation, and fired at Liksza through the window. He contended, however, that he did not deliberately aim at the soldier, that he did not plan to kill him and bore him no malice. After he saw the pistol he became "scared and excited", feared Liksza would shoot him, and "just fired in there *** and took off".

The truth of accused's contentions was a matter for determination by the court. Even assuming them to be true, the degree of violence used against accused, as he described it, did not justify his resort to the use of his firearm, and did not amount to legal provocation or excuse the homicide on the ground of self-defense. The evidence, including accused's pre-trial statement and testimony, presents a reasonable basis for an inference that accused was angered because he had been ejected from deceased's dwelling, and that he returned to the scene with his weapon loaded and ready to fire, determined upon revenge. Malice is clearly inferable from his acknowledged anger and resentment, his loading of the pistol, the deliberate, cold-blooded use of a deadly weapon in a deadly manner, and the fact that accused's actions clearly stamped him as the aggressor throughout. Callous indifference to the life of his victim or vicious malice characterized the behavior of accused. This was a calculated, premeditated homicide, committed deliberately, and without legal provocation, justification or excuse. Eye-witnesses to the homicide did not identify accused as the assailant, except they described the assailant as a colored soldier. The circumstances of the shooting were similar to those related by accused and accused received a gunshot wound following the shooting by Nowicki outside the building. An inference was justified that it was accused who fired the fatal shot. The court properly found accused guilty of murder as charged.

5. It was alleged in the Specification that deceased was a "Lance Corporal" but the record fails to show his rank or grade. This failure of proof is immaterial, as the name of the victim was clearly and unequivocally shown and accused could not possibly have been misled thereby, nor his substantial rights injuriously prejudiced (AW 37; NATO 2880, Watson).

6. The charge sheet shows that accused is 28 years of age and was inducted 14 May 1941. He had no prior service.

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

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or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Penitentiary confinement 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.

Edward H. Long, Judge Advocate.

John M. St. John, Judge Advocate.

Henry C. Reisch, Judge Advocate.

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

APO 512, U. S. Army,
5 April 1945.

Board of Review

MTO 6165

UNITED STATES) FIFTEENTH AIR FORCE

v.) Trial by G.C.M., convened at
Private THOMAS BROOKS) APO 520, U. S. Army, 24
(38 195 897), Company A,) January 1945.
909th Air Base Security) Dishonorable discharge and
Battalion.) 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 Thomas Brooks, Company A, 909th Air Base Security Battalion did, at Manduria, Italy, on or about 1 January, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Willie J. Lassiter, a human being by shooting him with a revolver.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his

natural life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 1 January 1945 the 909th Air Base Security Battalion, of which accused and Private Willie J. Lassiter (the deceased) were members, was stationed at Manduria, Italy (R. 6,63,64). During the late hours of New Year's Eve and just after midnight, a number of soldiers including accused and Lassiter were engaged in a dice game in the dayroom of Headquarters Detachment. The game was being played on a long table in the dayroom which was illuminated by four candles. (R. 6,8,9,14,17,34,43,44,66) Lassiter asked accused for a dollar and a half which Lassiter said accused owed him (R. 9,17). Accused replied "Don't ask me about it. Don't ask me about the money because you are drunk!". Lassiter walked toward accused and said "I should knock him on his damn ass, if he doesn't pay me my dollar and half!". (R. 17) Accused laid \$1.73 on the table and Lassiter picked it up, took \$1.50, gave 23 cents to another soldier and told him to give it to accused. (R. 9,17,18,23,24) Accused left the table hurriedly and walked toward the door (R. 9,34,41). Whether he actually left the room is not clear (R. 9,10,34,41,43). Lassiter remained at the table (R. 35). About ten minutes later accused returned to the table (R. 10,35). The soldier to whom Lassiter had given the money said "Here is some money Lassiter give me to give you!". Accused refused the money saying it was not his. (R. 11)

Lassiter then approached accused and said "what did you go out for, to get something to fight me with!". Accused replied "No I didn't get anything to fight you with. I'm not bothering you. Why don't you let me alone?". (R. 29) Accused and Lassiter then engaged in an oral argument (R. 11,41,69). After a soldier told them to calm down and pushed each of them away, Lassiter stood a few minutes looking at accused, turned away from him and walked back to the end of the table (R. 11,29,30,41,42). Accused walked away as though he was going out of the door, stopped, said "You got a hard on for me!" (R. 11,16) and also said that "he was tired of Lassiter fucking with him" (R. 25). He then "snatched *** out" (R. 16) a pistol from his waist, approached the table where Lassiter was standing and fired one shot in Lassiter's direction (R. 11,12,16,24,25,37,42,44,46). Lassiter grabbed another soldier, tried to duck behind him, swung him around and both the soldier and Lassiter fell to the floor (R. 11,12,30,33,45,65,66). While Lassiter was on the floor accused fired two more shots at him. Lassiter then got up and attempted to run but fell before reaching the door. (R. 11,12,19,30,31,65-68,70) He had blood on the lower part of his right chest (R. 13,31,38). The pistol, which was of British style, was immediately taken from accused (R. 12,13,25). Several witnesses testified that they did not see Lassiter strike or attempt to strike accused (R. 23,27,28,32,34,39,67,68,70). Neither Lassiter nor accused was drunk (R. 9,18,23,29,35).

Captain Edward J. D'Arata, Medical Corps, 909th Air Base Security Battalion, examined Lassiter, whom he knew, at 0045 hours 1 January in the

dayroom of Headquarters Detachment and found that he had a gunshot wound in the right lung. Witness testified that Lassiter was dead when he arrived at the dispensary and that his death resulted from internal hemorrhage caused by a bullet which had entered his body just below the right armpit. (R. 5-8,38)

Accused testified that on the evening of the alleged offense he went to the American Red Cross where he stayed about three hours. He was returning to his company area when he met two British soldiers whom he had known previously. One of the soldiers gave him an old pistol loaded with six rounds of ammunition. The pistol was defective but the soldier said it could be repaired. (R. 48,51,57) Accused put the weapon in the rear pocket of his trousers, pulled his blouse down over it, shook hands with the soldier and returned to his company area. Hearing noise and laughter in the dayroom he went over and joined in the dice game that was in progress. In about 30 minutes Lassiter came in and joined in the game, and shortly thereafter asked accused for "a shot". Accused told Lassiter he had not been paid and could not "afford it". (R. 48) Lassiter then reached over in front of accused, hit him with his fist and took about \$3.00 of accused's money, which was on the table. Lassiter put it in the center of the table, threw the dice and lost the money. Lassiter then came up to him and said "How do you like that". (R. 48,53,54) Accused replied that he did not like it, whereupon Lassiter told him he would have to like it and said "Why don't you do something about it?" (R. 48,54,55) Accused testified further that Lassiter was a big man and a prize fighter and had fought in Africa. He told Lassiter "Go ahead man, I don't want to fight, because I can't whip you!". (R. 49) Lassiter lunged at accused and twice attempted to hit him. Another soldier intervened and Lassiter walked back to the end of the table, put on his cap and overcoat and with his hands in his coat walked up to accused and said "I should blow your god damn brains out!". (R. 48,49,55,56) Accused then drew his revolver from his left hand pocket and, as Lassiter "kind of pulled his arm to draw it out of his pocket", accused fired one shot at him. Another soldier caught accused's hand and he surrendered the weapon. Accused looked at Lassiter who was on the floor and then walked out of the building and surrendered. (R. 49,56) Accused testified further that he shot Lassiter to prevent the latter from hitting him again, and also that Lassiter "had his hand in his pocket as if he had something" (R. 50). Accused had nothing to drink that evening and knew what he was doing (R. 51). He did not see a gun in Lassiter's possession (R. 57). He further testified that he fired only one shot (R. 56, 57,59).

Private Peter Grey of accused's battalion testified for the defense that accused's bed was next to his and he had never seen accused in possession of such a weapon as Defense Exhibit "A" (the pistol) (R. 61).

4. It thus appears from the evidence that at the place and time alleged accused killed Private Willie J. Lassiter, the person named in the Specification, by shooting him with a revolver. Before the homicide accused and Lassiter engaged in a dice game with other soldiers and became involved in an argument over \$1.50 which Lassiter claimed accused owed him. Accused

finally put \$1.73 on the table and Lassiter took \$1.50. Accused left the table hurriedly and shortly thereafter returned. Lassiter approached him and asked if accused had left "to get something to fight me with". Accused replied in the negative and told Lassiter to let him alone. The two men then engaged in another argument. After they were separated Lassiter walked back to the end of the gaming table and accused walked toward the door. Accused stopped, told Lassiter that he was tired of being harassed by him, took out his pistol, approached the table and fired a shot in Lassiter's direction. There is testimony that after Lassiter fell to the floor with another soldier, accused fired two more shots at Lassiter. It did not appear that the victim was armed. It further appears from prosecution's evidence that at the time he was shot, Lassiter was not threatening or assaulting accused.

Accused, without corroboration, testified that Lassiter had struck him once and had attempted to hit him on two other occasions. He further testified that immediately preceding the shooting Lassiter, with his hands in his overcoat pockets, walked up to him, said he should blow accused's "god damn brains out" and started to take his hands from his pockets. He shot Lassiter to prevent him from striking him again, and also because it appeared to him that Lassiter "had something" in his pocket. He testified positively that he fired only one shot.

There were a number of witnesses to the shooting but none of them corroborated accused's version thereof. Several testified that they did not see Lassiter strike accused or attempt to strike him, and they were practically unanimous in their testimony that accused fired three shots. The credibility of accused as well as the weight to be given his testimony was within the sound discretion of the court. Acting within its prerogative the court rejected accused's version of the homicide and determined the issue of self-defense adversely to him. In this it was warranted. Further, the purported conduct of the victim as stated by accused, which was denied by eyewitnesses to the shooting, offered no provocation or justification sufficient in law to condone or excuse his homicidal use of firearms.

Rejecting accused's version, the homicide was without legal justification or excuse. Malice is inferable from the use of a deadly weapon, the willful, deliberate and wanton manner in which it was employed, the statement by accused just before the shooting that he was vexed at Lassiter's attitude, and the fact that he fired the last two shots at the victim when the latter was on the floor in a helpless position and obviously unable to harm accused in any manner. Accused was properly found guilty of murder in violation of Article of War 92 as charged (MCM, 1928, par. 148a).

5. The charge sheet shows that accused is 25 years of age and was inducted 24 July 1942. He had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. A sentence to death or imprisonment for life is mandatory upon conviction of

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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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

Elwood W. Kershaw, Judge Advocate.
Major P. L. Brown, Judge Advocate.
Henry C. Russell, Judge Advocate.

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

APO 512, U. S. Army,
11 April 1945.

Board of Review

MTO 6166

UNITED STATES

v.
Private First Class ANTONIO
BLAS CAMACHO (20 802 271),
2d Fighter Squadron, 52d
Fighter Group.

FIFTEENTH AIR FORCE

Trial by G.C.M., convened at
APO 520, U. S. Army, 20
January 1945.
Dishonorable discharge and
confinement for 20 years.
Eastern Branch, United States
Disciplinary Barracks,
Greenhaven, New York.

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 92d Article of War.

Specification: In that Private First Class Antonio Blas Camacho, 2nd Fighter Squadron, 52nd Fighter Group, did, at Madna Italy Air Base, on or about 29 December 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one S/Sgt. Alex G. Heinitz, 2nd Fighter Squadron, 52nd Fighter Group, a human being by shooting him with a .30 calibre carbine.

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

Specification: In that Private First Class Antonio Blas

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Camacho, 2nd Fighter Squadron, 52nd Fighter Group, did, at Madna Italy Air Base, on or about 29 December 1944, with intent to commit a felony, viz., murder, commit an assault upon M/Sgt. Melvin Andrew Ledin, 2nd Fighter Squadron, 52nd Fighter Group, by wilfully and feloniously shooting him with a .30 calibre carbine.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specification, Charge I, except the words "with malice afore-thought, deliberately" and "with premeditation", and inserting the word "and" between the words "feloniously" and "unlawfully", of the excepted words not guilty, of the inserted word guilty, not guilty of Charge I but guilty of violation of the 93d Article of War; guilty of the Specification, Charge II, except the word "murder", and substituting therefor the word "manslaughter", and inserting the word "at" between the words "shooting" and "him", of the excepted word not guilty, of the substituted word and the inserted word 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 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 about 1600 hours 29 December 1944 accused, a member of the 2d Fighter Squadron, 52d Fighter Group, went to his section chief's tent in the squadron area where he and the section chief each had about two drinks of Yugoslavian whiskey. After supper they bought a quart bottle of whiskey, returned to the same tent and drank almost all the contents. (R. 4-6) Accused left the tent at 2000 hours (R. 5).

About 2115 hours accused was in the squadron dayroom (R. 6) where there was a bar (R. 7). On one of the tables Sergeant William E. Goodale of accused's squadron and some other soldiers had a bottle of cognac. Accused approached the table and without being asked helped himself to a drink and in doing so spilled part of it. (R. 6) Goodale then said to accused in a friendly manner "'I don't mind you taking a drink; but don't spill it. Help yourself; but don't waste it'". Accused replied that he was not wasting the cognac and after another remark by Goodale that it was all right but that he did not want him to waste the liquor, accused said "'Well, you don't accept my apology'" and "'all right, I'm drunk'". Goodale answered "'Yes, I know you are'". Accused said "'I'll meet you tomorrow at twelve'" to which Goodale replied "'That's perfectly all right with me'". (R. 6,8,9) They shook hands and agreed to fight the following day and then a soldier called accused aside (R. 9). Accused remained in the bar "quite a while, arguing, and looking ornery, trying to pick fights" (R. 7). During this period he had eight or ten drinks of whiskey or cognac with Corporal Harry A. Clark, his tentmate (R. 14). Clark attempted to get accused to go to their tent but as he refused to go, Clark left without him and went to his tent. (R. 15)

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Goodale and a Sergeant Mitchell, who were tentmates, left the bar about 2315 hours to go to their tent and on the way they were called by a Sergeant Ziesmer to come to a place just outside (R. 7,10) a tent occupied by Staff Sergeant (Alex G.) Heinitz (the deceased), Master Sergeant Melvin A. Ledin, Technical Sergeant Clyde B. Headley and Corporal Charles D. Keeter, all members of accused's squadron (R. 16,19,23). There, accused and a Staff Sergeant Melville Moller were sparring and pushing each other. Mitchell took hold of Moller and Goodale seized accused and attempted to persuade him to go home (R. 7,10). Goodale testified that from the way accused was acting he appeared to be "plenty drunk" (R. 9) but that Moller was not drunk (R. 10). Accused then asked Goodale if he was ready to fight; "started to square off, and made a couple of passes" at Goodale, who then struck him "very easy" in the mouth (R. 7,12). The ground was very muddy and slippery and accused, who was standing on an incline, stepped backward when he was struck and fell into a ditch. Goodale and others attempted to help accused to his feet but he was stubborn and rolled over on his face. (R. 7,12) Goodale further testified that accused was so drunk that he could not take care of himself and that he did not appear to recognize witness (R. 9).

Heinitz, Ledin, Headley and Keeter who had just gone to bed heard a little "rukus" (R. 17,20) outside their tent. Heinitz and Keeter got out of bed and went to the window where Ledin's bed was located. Keeter heard Goodale say before accused was struck "'Well let's break this up and got to bed'" and heard accused say "'You think you can knock me on my ass, Goodale'". (R. 17). When accused fell in the ditch Ledin shouted "'What's going on out there?'" (R. 17,19). Ledin then called to Goodale and the others to come inside the tent and as they entered accused arose and walked away rather quickly (R. 7,10,11). When Goodale and the others entered the tent Heinitz and his three tentmates were undressed and sitting up in their beds (R. 11). The visitors remained two or three minutes and left. Goodale and Mitchell went to their tent about 50 or 75 feet away. (R. 7,11,20) All of the lights in Heinitz' tent were then turned off except Heinitz' (R. 20) and possibly Ledin's (R. 24). Heinitz and his tentmates retired for the evening (R. 20). Goodale and Ledin each had wavy, sandy colored hair (R. 21,22,26).

After accused left the scene he ran to his tent, entered it hurriedly and was mumbling. Clark, his tentmate, asked him what was the matter (R. 13, 14). Accused appeared to Clark to be angry and the latter "Knew he was 'pissed - off' about something" (R. 14). The back of his shirt was very muddy (R. 15). Accused then said "'Do you have a gun? *** Where is my gun? Do you have any ammunition?'" (R. 13). Clark got out of bed because accused was knocking rations and other articles from the table to the floor (R. 13, 15). By that time accused had obtained a carbine from behind the table, and put a clip containing 12 to 15 rounds in the weapon (R. 13,15,16). Clark attempted to get the carbine. He testified "I don't know whether he hit me in the face, but I was lying half on the bed and half on the floor" (R. 13). Accused told Clark to stay there and he would not be hurt, and also said he "was going out and shoot somebody" (R. 13,30). He left the tent and went toward Ledin's tent which was about 125 yards away.

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Accused opened the door of Ledin's tent, placed one foot in the door, stuck his head in the tent and asked for Goodale. He held his carbine at hip position, pointed at Ledin. (R. 18-20,23-25) The occupants of the tent said that Goodale was not there (R. 20,23). Heinitz said to accused "'Don't shoot, put up that gun'" (R. 18,24). Ledin said "'For God's sake don't shoot'" (R. 20) and "'Somebody do something'". Headley said "'Don't shoot in here'". (R. 24) Heinitz then jumped out of his bed, which was next to the door, in an attempt to get the gun. When he reached the door and was about four feet from accused, accused fired a shot. Heinitz then "wheeled away from the door". (R. 18,19,21) Ledin then advanced to disarm accused who was holding the carbine about on the level with Ledin's stomach. Ledin seized the weapon and pushed it upwards with his left hand. The carbine struck the door sill, "came back *** against" Ledin and discharged. The bullet struck Ledin in his left arm, between the elbow and shoulder. (R. 21-23,46,47) After the second shot was fired Heinitz fell against Headley who was then getting out of bed. Headley guided him by the shoulders to the floor of the tent. (R. 15) Blood was flowing from Heinitz' mouth (R. 18). When the second shot was fired Ledin was going through the doorway and was attempting to take the gun away from accused. He followed accused outside of the tent where he put him on the ground and took the carbine away from him. (R. 21,22) Two guards arrived at the scene (R. 21,26,27) and one got a "sort of a jujutsu" hold on accused as he was getting up and held him for a short time. Accused said "'Let me go, Sandy, they're after me'" and then broke away from the guard. (R. 27) He ran to his tent where he remained a very short time, then left and went into a field (R. 27,30). One witness testified that he did not notice accused stagger (R. 30). A searching party unsuccessfully attempted to find accused that night (R. 8).

Captain Timothy L. Curran, 4th Fighter Squadron, 52d Fighter Group, examined Heinitz and Ledin on the night of 29 December 1944 (R. 31-33). Heinitz was dead at the time and had two wounds. One was on the upper left arm, laterally between the anterior and lateral parts thereof, and the other was "of the chest in the back on the right side". The point of entry of this latter wound was in the back. "There was no sign of an exit, either through the arm or chest". There was evidence of hemorrhage from both the nose and mouth (R. 31,32). As to Heinitz' arm wound Captain Curran testified:

"The wound was, also, a jagged wound of approximately three-eights of an inch, through which I could see fragments of the upper or humerus part of the arm, which had been fractured by the impact of the bullet. There was a slight degree of hemorrhage on the outside of the wound itself" (R. 31).

"I had a good view of the wound. I could see bone fragments where the bullet apparently shattered the bone. I didn't see the bullet, and didn't probe for it" (R. 33).

As to Heinitz' chest wound he testified:

"that wound was jagged wound approximately three-eights to one-half inch below the right scapula" (R. 31),

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"the hole was three-eights of an inch in diameter, and the skin, itself, seemed to be torn. Instead of the clean hole you might expect from certain types of bullets it was jagged" (R. 32).

In Captain Curran's opinion the wounds "were two separate wounds. Two shots must have been fired" into Heinitz (R. 32). It was witness' further opinion that Heinitz died in about two or three minutes from the bullet wound in the chest (R. 31).

As to Ledin he testified:

"He was in no acute pain. There was a bandage on his upper left arm. The bandage had just been applied, and arrangements had been made to take the man to the hospital. The man complained of some weakness in his hand and lower arm" (R. 32).

Accused testified that he was 25 years of age, married, and had one child, a boy about seven months of age whom he had never seen (R. 36). He served two years with the National Guard (R. 37) and entered active service in 1940 (R. 36). In 1942 he commenced flying cadet training but was "washed out" in February 1943 on the ground of flying deficiency. He left the United States for foreign service 17 May 1944 (R. 37).

Accused testified further that during the morning of 29 December 1944 he worked on the generators in his squadron with a Sergeant Brown. During the afternoon accused went to Clare's tent where he and Clare "finished" a bottle of whiskey. After supper they bought another quart of liquor, went back to Clare's tent and drank it. Accused then left Clare and went to the bar and bought another bottle of whiskey. He did not recall what he did with this bottle of whiskey. He stood at the bar where he met Corporal Clark (his tentmate), and two other noncommissioned officers, had some drinks with Clark and left the bar about 2245 or 2300 hours. (R. 34,35,39) with two or three other soldiers. He "passed out" after leaving the bar and did not remember what happened after that (R. 35,36,39,40) until he awoke in an Italian stable in which there were some horses. He was clad only in his trousers and shoes. He asked someone where he was, but no one told him. He then asked someone to go to a nearby camp, telephone his squadron and request that someone call for him. He wanted to go to his squadron but the people would not let him. They loaned him a blanket to cover himself. (R. 35,40) He did not remember seeing Goodale at the bar, speaking to or having an argument with him over some whiskey, or having an argument with Moller (R. 35,39,40). He did not recall getting a carbine in his tent, scuffling with Clark, firing at Heinitz and Ledin or struggling with Ledin or the guard (R. 36).

Accused began to drink between the ages of 15 and 16. During July 1944 he stopped drinking because the liquor was beginning to make him sick. Later he resumed drinking and continued because he could not control himself.

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(R. 36-38) Prior to 29 December 1944 he had no fights with anyone in the squadron (R. 38).

Staff Sergeant Melville Moller a member of accused's squadron testified for the defense that he saw accused in the bar that evening but did not see him drink. Accused had an altercation with Goodale, but witness did not hear their conversation. About 2300 hours witness was leaving the bar at which time accused was having an argument with a person named Burnett. Witness told accused to go home whereupon accused said to him "Do you want to take his place?". When Moller answered, "Yes, come on outside", accused, witness and Sergeant Ziesmer left and walked toward witness' tent. Then accused said to him "Are you ready?", took off his coat and "squared off". He did not attempt to strike witness but went toward him several times, and each time witness pushed him away. (R. 41,42) Goodale and Mitchell were passing and Ziesmer called them over. The next thing witness knew accused was on the ground and Ledin then shouted from "the shack" (R. 41). No one attempted to pick accused up. Witness went into Ledin's tent at which time accused was lying in a ditch. (R. 43) Witness did not hear anything said which would reflect upon accused or infuriate him to such an extent that he would be compelled to seek a gun, and it appeared strange to witness that accused would suddenly go for a gun (R. 42). Accused appeared to have been drinking and his actions indicated that he was intoxicated. He was able to stand and walk alone and his speech was not "out of the ordinary". (R. 42,43)

It was stipulated for the defense that if Major Charles G. Polan, Medical Corps, Chief of the Neuropsychiatric Section, 26th General Hospital, were present he would testify that he examined accused on 13 January 1945. Accused's version of the shooting, as stated to Major Polan was substantially in accord with his testimony.

"The accused stated that he started drinking at sixteen years of age. At nineteen he was drinking a pint of whiskey two or three times a week. He was arrested once in civil life for reckless driving while intoxicated. At times while intoxicated he would 'pass out' or would neglect to take his car home. After this induction, he got drunk once a week unless he was on furlough, he would then drink every day. After coming overseas he drank daily until July 1944. Since then he has drank two or three times a week.

"Neurological examination was essentially negative.

"The patient at the present time is sane. The following opinions are dependent on the patient's statements. It is possible that at the time of the alleged shooting, the patient may have been suffering from acute pathological alcoholic intoxication. An individual in a state of pathological alcoholic intoxication can have an amnesia for acts committed during that state, and may commit acts for which he has no intent."

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"The patient's diagnoses are:

- a. Alcoholism, chronic.
- b. Constitutional Psychopathic State, inadequate personality" (R. 45).

4. It thus appears from uncontradicted evidence that at the time alleged accused killed Staff Sergeant Heinitz, the person named in the Specification, Charge I, by shooting him with a carbine, and that he assaulted Master Sergeant Melvin Andrew Ledin, the person named in the Specification, Charge II, by shooting him in the arm with a carbine.

The evidence shows that earlier in the evening preceding the fatal assault upon Heinitz and the assault upon Ledin accused, who had been drinking, had a verbal altercation with a Sergeant Goodale which ended by accused inviting Goodale to fight the following day at twelve o'clock. Goodale agreed to do so. Accused continued to drink at the bar, left about 2300 hours and shortly thereafter engaged in an altercation with Staff Sergeant Moller in close proximity to the tent occupied by Heinitz and Ledin. Goodale and his tentmate, who were passing, separated accused and Moller and Goodale attempted to persuade accused to go to his tent. Accused attempted to strike Goodale who hit him in the mouth. Accused fell into a ditch. Goodale and the others then entered Heinitz' tent and departed a few minutes later. Accused ran to his tent which was about 125 yards away, secured a carbine and said that he was going to shoot somebody. He then went to Ledin's tent, opened the door, stood in the doorway with his carbine pointed directly at Ledin, and asked for Goodale. Goodale and Ledin each had wavy blond hair and were apparently similar in appearance. Accused was told that Goodale was not there. Heinitz told accused not to shoot and to put up the weapon. Ledin asked him not to shoot and said "Somebody do something". Heinitz then jumped out of bed, evidently to disarm accused, and when he reached the door and was about four feet from and apparently facing accused the latter fired his carbine. Heinitz "wheeled" away from accused and at this instant Ledin advanced upon accused. The carbine was about level with Ledin's stomach and Ledin knocked the carbine upwards with his left hand. It struck the door sill, "came back *** against" Ledin and discharged. The bullet struck Ledin in his left arm between the elbow and shoulder. When the second shot was fired Heinitz fell against a tentmate who eased him to the floor. Blood was then observed coming from Heinitz' mouth. The medical evidence indicated that Heinitz died two or three minutes later from a bullet wound in the back of the chest. Accused testified that he "passed out" shortly after leaving the bar and did not remember anything which happened thereafter. He awoke the following morning in an Italian stable at some undisclosed location.

The court found accused guilty of voluntary manslaughter and of assault with intent to commit manslaughter. Accused's defense was that he was too drunk to know what he was doing. There was evidence that accused had been drinking and one witness testified that a few minutes before the shooting accused was "plenty drunk" and could not take care of himself. Another witness testified that accused did not stagger, and a third testified that although he appeared to be intoxicated he was able to stand and walk alone

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and his speech was normal. Accused deliberately armed himself, said that he was going to kill someone, went to Ledin's tent where Goodale, the man who hit him, had been present shortly before, asked for Goodale, and refused to put up his weapon. He escaped after the shooting. Such behavior supports a reasonable inference that he was sufficiently sober to realize what he was doing. In any event, the question as to the effect of intoxication, if any, with respect to the general criminal intent involved in the offense of manslaughter and with reference to the specific intent to kill, involved in assault with intent to commit manslaughter, was one of fact for the determination of the court which resolved the issue against accused. Apparently the court found accused guilty of the lesser included offenses only, in the belief that the homicide and the infliction of the injury on Ledin were committed "in the heat of sudden passion caused by adequate provocation" (MCM, 1928, par. 149a, p. 165), namely, the quarrel with Goodale who struck accused and knocked him down shortly before.

The only reasonable inference to be drawn from the evidence, including the medical testimony, was that the first bullet fired by accused struck Heinitz in the arm, for the bullet which caused the wound in the arm entered from the front and the victim was facing accused when the first shot was fired. Following the first shot Heinitz turned about. It was while he was turned about that the second shot took effect, for the bullet entered his back. The second shot first struck Ledin in the arm and then entered Heinitz' back. It was established by the evidence that Heinitz' death was caused by this second wound. The fact that the shot fired at Ledin killed Heinitz is no defense.

"Where A aims at B with a malicious intent to kill B, but by the same blow unintentionally strikes and kills C, this has been held by authorities of the highest rank to be murder, though if A's aim at B was without malice, the offense would have been but manslaughter" (Wharton's Crim. Law, Vol. 1, sec. 442, pp 677-679).

The evidence is legally sufficient to support the findings of guilty.

5. A question as to the legality of the sentence imposed is presented for consideration. The sentence imposed by the court and approved by the reviewing authority includes confinement at hard labor for 20 years. The maximum period of confinement imposable for voluntary manslaughter is ten years and for assault with intent to commit manslaughter is ten years. The confinement imposed is, therefore, the maximum imposable for the two offenses of which accused was found guilty. But,

"If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect" (MCM, 1928, par. 80a, p. 67).

It has been repeatedly held that where an accused is convicted of two or

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more offenses which are but different aspects of the same act he may not legally be punished more severely than is authorized for the more serious offense (Dig. Op. JAG, 1912-40, sec. 402 (2), 428 (5); Bull. JAG, January-June, 1942, sec. 402 (2); Bull. JAG, April 1943, sec. 451 (2); Bull. JAG, May 1943, sec. 428 (5); NATO 1092, Scott). As has been hereinbefore stated, the fatal wounding of Heinitz and the wounding of Ledin were caused by the same bullet, and by the same act of force employed by accused. There is no doubt that two distinct offenses were committed and that there was no improper multiplication of charges (Bull. JAG, May 1943, sec. 428 (5)), but they were committed at the same time and place and by use of a single act of force. The Board of Review is, therefore, of the opinion that the maximum period of confinement imposable in the case under consideration is ten years, the maximum authorized for either offense.

6. The Specification, Charge I, alleges that accused killed "S/Sgt. Alex G. Heinitz". Deceased was shown by the evidence to have been "Sergeant Heinitz". The failure to prove the christian name and middle initial of the deceased person was not material. His organization was shown as alleged and his surname established, thus sufficiently identifying him as the person named in the Specification (NATO 965, Saunders; NATO 1070, Jones, Bailey).

7. It is also alleged in the Specifications of the Charges that the offenses were committed "at Madna Italy Air Base", whereas the evidence does not disclose where they occurred. There is no suggestion in the record that accused was misled or surprised by the absence of this proof, and the locus not being of the essence of the offenses charged, and the jurisdiction of the court not depending upon the geographical location of the situs, the failure to show where the offenses occurred was immaterial (Dig. Op. JAG, 1912-40, sec. 416 (10); Winthrop's, reprint, p. 138; NATO 1715, Kinlow; MTO 5917, Jones).

8. The charge sheet shows that accused is 25 years and 11 months of age, and was inducted 2 November 1940. He had a prior enlistment from 4 October 1938 to 1 November 1940.

9. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty, but legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years.

Edward V. Klemick, Judge Advocate.

William G. Johnson, Judge Advocate.

Henry C. Klemick, Judge Advocate.

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MTO 6166

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
11 April 1945.

TO: Commanding General, Fifteenth Air Force, APO 520, U. S. Army.

1. In the case of Private First Class Antonio Blas Camacho (20 802 271), 2d Fighter Squadron, 52d Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, but legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, which holding is hereby approved. Upon your disapproval of so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, you will, under the provisions of Article of War 50 $\frac{1}{2}$, 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 6166).

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

1 Incl. - Record of trial and duplicate.

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

APO 512, U. S. Army,
19 March 1945.

Board of Review

MTO 6195

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Private ABRAHAM SMALLS)	Rear Echelon, 92d Infantry Division,
(34 512 812), Company L,)	17 February 1945.
370th Infantry.)	Death.

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 Abraham Smalls, Company L, 370th Infantry did, at Viareggio, Italy, on or about 4 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one Private First Class George W. Jones, 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 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 and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on 4 February 1944 Company L, 370th Infantry Regiment, of which accused and Private First Class George W. Jones (deceased) were members, was bivouacked in a rest area about two miles from Viareggio (Italy) (R. 8,11-13,17). Between 0800 and 0830 hours on that date accused was in front of his tent and Sergeant Willie B. Adams, another member of his company, was about five yards away washing his face. Jones approached and first asked accused, then Adams, for "the soap". (R. 8,10-12). Adams told Jones the soap belonged to accused. Jones again asked accused for the soap and accused said he was going to give it to Adams. Jones then said "'I will strike your tent'" (R. 9,12), and accused replied "'I will shoot you'" (R. 9). Jones reached down, pulled up the front pins of accused's tent, and as he straightened up accused shot him with an M-1 rifle (R. 9-12). Jones fell to the ground and rolled over on his face. Adams "jumped" accused and tried to stop him, but accused fired five or six more shots at Jones who was prone on the ground (R. 9-11). Jones did not move and Adams felt his body and found his heart had stopped beating (R. 12). Accused did not have a rifle at the time Jones said "I will strike your tent" (R. 13).

About 0830 hours on the day of the homicide, Captain Eugene L. Young, Jr., 370th Infantry Medical Detachment, Third Battalion surgeon, examined a body identified to him by Jones' company commander as that of George W. Jones. Captain Young testified that in his opinion Jones had been dead five or ten minutes when he examined the body, and that death resulted from two gunshot wounds, one in the right chest and one in the left chest. Because of the appearance of the wounds, witness was of the further opinion that they were caused by rifle bullets. (R. 5-7) Dog tags bearing the name "George W. Jones" were found on the body (R. 7,8).

For the defense, First Sergeant John Graves of accused's company, testified that Jones was about five feet eight or nine inches tall and weighed approximately 165 or 170 pounds (R. 13,14).

Private Cicero Clark, a member of accused's company, testified that one night "in December", while the company was in reserve, Jones called accused out of the sleeping quarters, pointed his rifle at him and told accused he would kill him (R. 16). They argued for about five minutes, then entered the sleeping quarters where Jones struck accused "several licks *** that night" (R. 15,16). Witness testified further that while in the rest area near Viareggio, after accused was paid, Jones, "through some crook or hook" got accused's money. On the night preceding the homicide, accused told Jones all the money belonged to him (accused) and asked Jones for ten dollars of it. Jones refused to give it to him. (R. 16)

Private First Class Walter Hills, another member of accused's company, testified he had seen Jones "picking" on accused "very much" but witness did not pay much attention to the matter (R. 17).

Accused made the following unsworn statement:

"I am Private Abraham Smalls, 370th Infantry, Company 'L',

APO 92. I was in the hospital from the 29th of September 1944, and from the 33rd General Hospital I was sent to Rome to APO 6695. From there we went to Pisa, and from there I was sent back to my Company. I returned to my Company a few days after Christmas. I don't know what the date was. After I got in the Company Jones approached me one afternoon. He said, 'Say, I want to see you'. I said, 'O.K.', so after he started talking he said, 'I want you to give me one-hundred dollars'. I said 'I don't have no money Jones'. He said, 'You were in the hospital four months, and you are going to get paid in January and you have one-hundred and some odd dollars coming; I owe Captain Brown one-hundred dollars because I was over the hill; I know you are going to draw it, so you can give me one-hundred dollars'. I said, 'You must think I am your father or you are my son; my mother said to me that a one-time fool is not a fool and a two-times fool is a damn fool'. He said, 'You are going to give me one-hundred dollars so my folks will not know that I was in the guardhouse'. I said, 'You should have considered that before you did what you did'. The next night he was drinking vino and he came to me with that same thing again. I said 'I am not going to give you anything; you are trying to play me for a fool'. He said, 'I want it and I am going to have it'. I said, 'You are not going to get it from me, and don't harass me because I am not going to give it to you.' He kept that up from day to day, and I kept begging him not to because if I got mad I couldn't control my temper. I said to him, 'If you keep on harassing me I will have to do something to you and I don't want to kill you'. He said 'Mother-fucker you are going to give me one-hundred dollars; all I want is one-hundred dollars and I don't care what happens I am going to get it'. Everytime he drank vino or canned heat as he would call it, he would come and start worrying me. I said to him, 'Jones everytime you start drinking you harass only me'. He said, 'Motherfucker you are going to give me one-hundred dollars or I am going to kill you'. I said, 'If that's the way you feel about it, O.K., but I don't want to kill you'. After pay-day he came back again and I said, 'Jones please leave me off because I don't want to get out of patience'. Everytime he would come to me it was the same thing over and over. About the 3rd of February I was in my tent asleep and I heard someone coming in and I said, 'Who is that?'. He said, 'Me motherfucker, Jones, you got my money?'. I said, 'Please leave me off' and he said 'Motherfucker you are going to give me that money or I will set your tent afire'. I came out of the tent, and later on that night, I don't know what time it was, but I was asleep, and when I woke up I heard somebody coming back in and I said 'Who is that?'. He said 'Me motherfucker, I want my money and I am going to have it'. I said, 'Please

leave me off; do you want me to get out of patience and kill you? I am going to ask for a transfer'. He said, I don't care motherfucker, you are going to give me some money'."

Accused continued:

"After a while he left, and the next morning I got up and was washing my face. He came to me and said, 'Motherfucker, you are going to give me my money'. I said, 'I didn't sleep good last night, and I am just about getting enough of you and if you keep on I am going to kill you'. He said, 'Either you give me that money today or I will spray your tent with gas'. Chow was about ready and I stood up and looked down that way. I said to myself, 'That man keeps on harassing me and I am going to give him what he is asking for'. When he came back I was in my tent straightening it up like the Sergeant had ordered me to do. Sergeant Adams had my soap. Jones came back in front of the tent and started saying 'Hey, hey, hey' and kicking me at the bottom of my feet. I said, 'Please leave me off'. Sergeant Adams handed me the soap and Jones said, 'Give me the soap motherfucker' and I said, 'This is my soap'. He said, 'I will strike your tent' and I said, 'I will kill you'. He reached down and pulled up my tent pin and I picked up my rifle and shot him." (R. 18,19)

4. It thus appears from uncontroverted evidence, corroborated by accused's unsworn statement, that on the date and near the place alleged accused killed Private First Class George W. Jones, the person named in the Specification, by shooting him with an M-1 rifle.

In his unsworn statement accused admitted that on the morning of the homicide he told Jones "I am just about getting enough of you and if you keep on I am going to kill you", and that he then said to himself "That man keeps on harassing me and I am going to give him what he is asking for". Shortly thereafter Jones threatened to strike accused's tent and accused said "I will shoot you". Accused at this time did not have his rifle. Jones then pulled up the front stakes of the tent and as he straightened up accused deliberately shot him in the chest. Jones fell to the ground and rolled over on his face. Despite Sergeant Adams' efforts to prevent him, accused fired at Jones five or six more times as deceased was prone on the ground. One of the bullets of this fusilade struck Jones in the chest. It is apparent that accused secured his rifle for the express purpose of carrying out his threat to kill deceased.

The defense adduced evidence tending to show that about a month before the shooting, Jones began and thereafter persistently followed a course of conduct calculated to intimidate and harass accused into giving him money. Accused also related that shortly before the homicide Jones came to the

front of his tent, said "Hey, hey, hey", and kicked him on the bottom of his feet. The truth of this contention was a matter of determination by the court. Even assuming this to be true, such harassing conduct on the part of deceased and the degree of violence used against accused shortly before the shooting, as he described it, did not, under the circumstances established by the evidence in this case, justify his resort to the firearm, and did not amount to legal provocation.

The homicide was without legal justification or excuse. Malice afore-thought was abundantly evident, as was indicated by accused's previous and repeated threats to kill deceased, from his use of a dangerous weapon, the deliberate, vicious and wanton manner in which the homicide was committed and from other circumstances in evidence. Accused was properly found guilty of murder as charged (MCM, 1928, par. 148a).

5. After accused was arraigned the defense requested and was granted a two-day continuance in order to have accused examined by the division psychiatrist. After the prosecution had rested the defense made the following statement:

"The defense wishes to call to the attention of the court at this time that court was recessed in order to allow time for a preliminary examination of the accused by the Division Psychiatrist. On February 18, 1945, Captain Holloman, the Division Psychiatrist, interviewed the accused. As a result of that interview, Captain Holloman stated that he found nothing of any consequence wrong with the defendant. He further stated, however, that since heretofore it had been the policy to have a board of officers make such examinations, he did not feel free to submit a formal report on his findings" (R. 13).

There is nothing in the record of trial which indicates in any measure that at the time the offense was committed or at the time of trial, accused was other than fully competent mentally.

6. The charge sheet shows that accused is 34 years of age and was inducted into the Army 7 November 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.

Elwood H. Lasseter, Judge Advocate.
William P. Brown, Judge Advocate.
Henry C. Finch, Judge Advocate.

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

APO 512, U. S. Army,
19 March 1945.

Board of Review

MTO 6195

U N I T E D S T A T E S	92D INFANTRY DIVISION
v.	Trial by G.C.M., convened at
Private ABRAHAM SMALLS (34 512 812), Company L, 370th Infantry.	Kear Echelon, 92d Infantry Division, 17 February 1945. Death.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Elwood K. Kibbey, Judge Advocate.

John R. Irion, Judge Advocate.

George C. Remick, Judge Advocate.

MTO 6195

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
19 March 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Private Abraham Smalls (34 512 812), Company L, 370th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

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MTO 6195, 1st Ind.
19 March 1945 (Continued).

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

(MTO 6195).

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

(Sentence ordered executed. GCMO 52, MTO, 19 Mar 1945)

~~CONFIDENTIAL~~

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

APO 512, U. S. Army,
 7 April 1945.

Board of Review

MTO 6235

U N I T E D S T A T E S)	IV CORPS
v.)	Trial by G.C.M., convened at
Private JOSEPH S. LOVE)	Pistoia, Italy, 12 January
(14 017 845), Company A,)	1945.
235th Engineer Combat)	Dishonorable discharge and
Battalion.)	confinement for life.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greechaven, New York.

REVIEW by the BOARD OF REVIEW

Sargent, Irich 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 Joseph S. Love, Company A, 235th Engineer Combat Battalion, did, at or near San Vittore, Italy, on or about 6 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 German Army, and did remain absent in desertion until he returned to military control at the Seventh Replacement depot on or about 15 March 1944, in a manner not stated.

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

Specification: In that Private Joseph S. Love, Company A,

235th Engineer Combat Battalion, then Detachment of Patients, 602nd Clearing Company, did, without proper leave, absent himself from his place of duty at or near Florence, Italy, from about 6 November 1944 to about 14 November 1944.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of three previous convictions by summary court-martial, two for absence without leave in violation of Article of War 61 and the third for theft of equipment valued at \$75.00 belonging to another soldier in violation of Article of War 93. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involves a finding that accused did, at the place alleged, on or about 15 February 1944, desert the service of the United States in the manner and with the intent alleged, and with termination thereof as alleged, 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. With reference to Charge I and Specification (desertion with intent to avoid hazardous duty), the evidence shows that about 28 January 1944 the 235th Engineer Combat Battalion was opening and maintaining a tank and supply road at the base of Mt. Cairo, in the vicinity of Cassino, Italy, and was in direct support of the 34th Infantry Division. The battalion was under direct observation of the enemy and was subjected to constant artillery fire as well as occasional air raids. (R. 5,6,9) About that date accused was assigned to the battalion as a replacement from the 7th Replacement Depot and he reported with other replacements, who had recently arrived from the United States (R. 5,11), to the battalion's rear echelon headquarters. There a roll call was held by the battalion's acting S-1 and personnel officer, Chief Warrant Officer Alan Chapman, and accused answered "here". (R. 5-7, 20,32) By telephone Chapman reported the arrival of the replacements to the battalion forward command post at San Vittore, Italy (R. 6,13,17), and he was ordered to hold them until word was received from the commanding officer. The replacements were then called together by Chapman for a short orientation lecture. They were told during this lecture that when they went to the forward position they would be under artillery fire and occasional air raids, and not to become panicky but to watch the older men of the battalion who knew what to do during artillery fire. He also explained that a radar unit was stationed near by and said that if they saw liaison planes, not to fire on them as they were "our own planes" and were not to be mistaken for German reconnaissance planes. He instructed them that they were not to leave the area without his express permission. (R. 6,15) About an hour after the men were "settled", a call was received from the battalion commander directing that the replacements be sent immediately to the forward command post and they, including accused, were then sent to the command post which was at San Vittore (R. 6-8,15,31). A few days later the rear echelon also

moved to San Vittore to join the rest of the battalion, and between 4 February 1944 and 15 February 1944 a battalion order was cut assigning accused to Company A (R. 6,10,11,31). Chapman testified that he did not see accused after the latter was sent to the forward command post until he saw him brought in under guard at Molinelleo (Italy) on 10 December 1944 (R. 5-7,32), and that accused "never returned to our control" after February 1944 until 10 December 1944 (R. 32).

The first sergeant of accused's company, Harold M. Womack, testified that when the replacements arrived at the battalion all were attached to Company A (accused's company) for rations and duty prior to receiving regular assignments. On 15 February witness made a check and searched the company area for accused, but he was not present. (R. 8-10) Womack did not see accused with the company after 6 February until the date of trial (R. 8) and testified that "To my knowledge he never reported to the company". About 6 February and during the week prior thereto, the company had been maintaining tank and supply routes and was under continuous enemy fire. (R. 9)

Technician Fifth Grade Roscoe S. Deubner, one of the replacements who reported to the battalion and who had been a member of accused's company since 28 January 1944, testified that about 29 January 1944 he saw accused at the battalion command post at San Vittore. Witness was with the company from the "beginning" (R. 12) of February 1944 except for the period between the second week of February 1944 and the latter part of March 1944, during which time he was with Headquarters and Service Company. He did not see accused after 29 January 1944 until the date of the trial, 12 January 1945. (R. 11-13)

Private First Class Mariot W. Middaugh, of accused's company and one of the replacements, testified that he was on a truck with accused going from Naples to the battalion headquarters on 28 January and that he saw accused at the battalion command post at San Vittore that following day. Witness had been a member of Company A since that time but had not seen accused again until the date of the trial. (R. 14-16)

Private Peter Daloia of accused's company, also one of the replacements, saw accused at the battalion forward command post at San Vittore about 29 January. Witness, who had been a member of the company ever since, did not see accused after that time. (R. 17-19)

An extract copy of the morning report of accused's company, introduced in evidence without objection, contained the following entries:

"6th Feb. 1944 - S. Pietro Italy
 14017845 Love, Joseph S. Pvt. - Asgd to and Jd Co.
 Record of Events. Co. Maintained Tank Troad Vic. of
 Cassino Italy.

Paul L. Brose, Capt., CE

15th Feb. 1944 - S. Pietro Italy
 14017845 Love, Joseph S. Pvt. - Asgd to and Jd. Co as
 of 6th Feb. 1944 Entered By Error Asgd to Co. as of 6th

Feb 1944 to AWOL as of 6th Feb. 1944.

Record of Events. Co. Maintained Tank Road Vic of Cassino Italy.

Max I. Rees 2nd Lt., CE

19th April 1944 - Casanova Italy

14017845 Love, Joseph S. Pvt. - AWOL 30 Days to Absentee

Paul L. Brose Capt., CE

8th July 1944 - 2 Miles S.W. Casaglio Italy Q287220 APO 464

14017845 Love, Joseph S. Pvt. - Asgd to Co. Per. Par. #1

S.O. #72 Hq 7th Repl Depot dated 30th March 1944. Sol AWOL as of 30th March 1944. Sol Droptd as Absentee April 30th 1944 (30 Days AWOL).

Co Record of Events' Usual Camp Duties.

G. S. Smither, 2nd Lt., CE

11th Dec. 1944. - 1 Mi N.E. Castle Di Casio Italy I642136

14017845 Love, Joseph S. Pvt. - Sol dropped on 8th July

1944 as 30 Day Absentee as of 30 April 1944. Fr. Absentee to Conf in 5th Army Stoc(k)ade as of 10th Dec. 1944.

Donald A. Ford, Capt., CE"

(R. 29, Ex. 1).

With reference to Charge II and Specification (absence without leave 6-11 November 1944) the evidence shows that on 5 November 1944 accused was admitted as a patient to the 602d Medical Clearing Company (R. 27,28,33; Exs. 2,3) at Florence, Italy (R. 25). Private Raymond Trost, the night man, on duty in Ward A-1, to which accused was assigned (R. 24,26,28) made a bed check at 2300 hours on 6 November 1944 and found accused absent (R. 24,28). He reported his absence to the noncommissioned officer in charge of the ward who assisted in making a search for accused throughout the hospital, but he could not be found. He had not slept in his bed. (R. 23,26) The night man checked again at 0800 the following morning and found accused still absent. The night man, who was on duty in Ward A-1 between 6 November to 11 November 1944, did not see accused between those dates (R. 28,29) and testified that according to his recollection accused never returned. He did not have permission to be absent (R. 23,24,28; Ex. 4).

Accused, after being advised of his rights (R. 29,30) elected to make an unsworn statement. He stated in substance that he left the Naples replacement depot, went to the 235th Engineers Replacement Headquarters and was the only one to get off of the truck at that point. A warrant officer told the sergeant major to take accused in a command car to the forward command post where the other men were present, and when he arrived at the forward command post the other men were already there. He did not hear the lecture given by Chapman. (R. 30)

4. With reference to Charge I and its Specification (desertion from about 6 February 1944 to about 15 March 1944 with intent to avoid hazardous duty) it thus appears from the evidence that at the place alleged, accused absented himself without leave from his place of duty at some time between 6-15 February 1944. There is evidence that when accused went absent his organization was opening and maintaining tank and supply routes and was

being subjected to constant enemy fire and occasional air raids. Accused was one of several replacements who had been sent to join the forward elements of the battalion on 28 January 1944. Before going forward the replacements were told during a lecture that they would be subjected to artillery fire and air raids and not to become panicky. Accused claimed that he was not present at the lecture but the evidence indicates that he answered a roll call shortly before. The truth of accused's testimony was a matter for the determination of the court. Accused absented himself without leave a few days after he joined the forward elements of his organization. The evidence is legally sufficient to support a finding that when he went absent accused intended to avoid hazardous duty.

It was alleged that he remained absent in desertion until he returned to military control at the 7th Replacement Depot on or about 15 March 1944 in a manner not stated. The only evidence possibly connected with the termination of his absence is an entry in the morning report of accused's company dated 8 July 1944 in which it was stated that he was assigned thereto by virtue of special order No. 72, Headquarters, 7th Replacement Depot, dated 30 March 1944, that he was in a status of absent without leave on that date, and that he had been dropped as an absentee 30 April 1944. There was evidence that accused had never rejoined his company. In any event, the absence of proof as to the manner, time and place of his return to military control is immaterial as the offense was complete when accused with the requisite intent absented himself without leave (NATO 2045, Sanders), and the legality of the sentence does not depend upon the duration of the absence (MCM, 1928, (corrected to 20 April 1943) note, p. 97). The evidence is legally sufficient to support the findings of guilty of desertion, as approved.

With reference to Charge II and its Specification (absence without leave from about 6 November to about 14 November 1944), accused was admitted as a patient to the 602d Medical Clearing Station on 5 November 1944. He was absent without leave from bed check at 2300 hours on 6 November and the evidence indicated that he never returned to the station. There is no evidence with reference to the alleged termination of his absence on 14 November 1944. It is stated in an entry on the morning report of accused's company, dated 11 December 1944, that accused's status changed from that of an absentee to confinement in the Fifth Army stockade as of 10 December 1944, and Chapman testified that he was brought in under guard at Molinalleo on 10 December 1944. The papers accompanying the record of trial show that accused was, in fact, apprehended 14 November 1944. It is unnecessary to determine herein the legal propriety of the findings of guilty with respect to the duration of accused's absence. Not only is it alleged in the Specification that he returned to military control on a date earlier than that shown by the evidence, but also the legality of the sentence does not depend upon the duration of the alleged absence without leave (MCM, 1928 (corrected to 20 April 1943), note, p. 97). The evidence is legally sufficient to sustain the findings of guilty of absence without leave.

In the Specification accused is charged with absenting himself "from his place of duty" rather than from his command, guard, quarters, station or

camp. The use of the quoted words rather than those of Article of War 61, under which the Specification was laid, is not usual nor the preferable manner of pleading this offense. However, it does not appear that accused was in any way misled by the language employed (NATO 2046, Jamruska).

6. Attached to the record of trial is a report of a psychiatric examination of accused dated 30 December 1944 in which it is stated in pertinent part:

"The soldier himself states that he was justified in going AWOL. He states most of his time overseas was spent in Replacement Depots, where he and other soldiers did not get the proper treatment. He blames the army for his predicament. He claims he went AWOL because he couldn't get treatment for a skin condition. However he admits not seeking medical attention during his period of absence, until in the stockade.

"*** From our examination of the patient and due consideration of all available data, the undersigned medical officers find: That Private Love is not now insane or is there any evidence to indicate that he was insane at any time in the past; and that he is now and was at the time of commission of the offense of which he is charged, capable of distinguishing between right and wrong.

"In our opinion the diagnosis is: Constitutional Psychopathic State, Inadequate Personality. LOD - No, EPTS."

7. The charge sheet shows that accused is 24 years of age, enlisted 23 August 1940 and had no prior service.

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

Edward K. Bergman, Judge Advocate.
John G. Jones, Judge Advocate.
Henry C. Keenly, Judge Advocate.

(281)

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

APO 512, U. S. Army,
17 April 1945.

Board of Review

MTO 6273

U N I T E D S T A T E S)	92D INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Corporal CORRIES JOHNSON)	Rear Echelon, 92d Infantry
(38 302 109), Company D,)	Division, 4 March 1945.
371st Infantry.)	Dishonorable discharge and
)	confinement for 21 years.
)	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 Charges and Specifications:

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

Specification: In that Corporal Corries Johnson, Company D, 371st Infantry, did, in the vicinity of Pietrasanta, Italy, on or about 28 January 1945, forcibly and feloniously against her will, have carnal knowledge of Matteoni Bruna.

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

Specification: In that Corporal Corries Johnson, Company D, 371st Infantry, did, in the vicinity of Pietrasanta, Italy, on or about 28 January 1945 with intent to do her bodily harm, commit an assault upon Matteoni Bruna by willfully and feloniously striking the said Matteoni Bruna on the throat and shoulders with his hands.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and its Specification, but guilty of "an additional Specification, in Violation of Article of War 93, to wit: In that Corporal Corries Johnson, Company D, 371st Infantry, did, in the vicinity of Pietrasanta, Italy, on or about 28 January 1945, commit an assault with intent to commit rape on Matteoni Bruna", and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, three-fourths of the members of the court present concurring. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 21 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 50 $\frac{1}{2}$.

3. The evidence shows that about 1600 hours 28 January 1945 (R. 6,14). Matteoni, Bruna, a housewife, her sister Maria, Elsa Giannini, a farm-worker, and an elderly woman were near Bruna's house at Pietrasanta, Italy (R. 5,8, 9). Bruna was gathering olives (R. 5) and Elsa Giannini was tending sheep about six or seven yards away (R. 9).

Bruna testified that at this time she saw accused (R. 5), whom she had never seen before (R. 14), coming toward her. Maria remarked to Bruna that there was a colored soldier and suggested they go away. Bruna asked Elsa if accused had come along with her and she replied in the negative. Maria said "'Let's go away, I'm afraid'". (R. 5) Accused then said "'Piuda, afraid *** American soldiers good, Germans are bad'". He then fired two shots from a pistol (R. 5) in the direction of Maria (R. 6), whereupon Bruna said to Maria "'Let's go away'", and started toward her home (R. 5). Accused then fired two shots in the direction of Bruna (R. 6,7), approached her and asked where she lived. When she pointed to her home accused asked about her husband and she replied that he was in the house. (R. 5) Accused then seized her by the throat with his left hand and threw her to the ground. She began to scream. Maria was also screaming, and the elderly woman who was there was calling for help. As a ruse Bruna told accused that the old lady was her mother because she thought this might cause him to leave. He then fired two shots at the old woman. (R. 5,7) Accused, still holding Bruna by the throat, dragged her about ten or twelve yards toward (R. 5) and near (R. 8) a canal. She struggled in an effort to get away. He threw her to the ground and once more seized her by the throat because she was screaming for help. In his other hand he held the pistol. He then laid the pistol down beside them and tore off "all" of her clothes. (R. 5,8) She struggled with her hands and feet as much as possible because she did not want accused to "touch" her, and continued to shout for help. Bruna's small son arrived and accused turned and fired two shots at him. (R. 5,6,8) Accused then "raped" her (R. 6). He inserted his penis into her vagina although she made every effort to prevent the act.

Bruna testified further that after he "finished" he flung her into a

small bush. She slipped and fell about 12 or 15 yards down the side of the canal. While she was sliding downward accused fired six or seven shots at her. (R. 6) There was a "water passage" at the bottom of the canal about four yards high. Accused flung her "down that" into the canal. (R. 6,8) He seized her clothes "at the front and tore them all off", and also threw at her a small sack which she used to carry olives. He pushed her and she fell another three or four yards. He then seized her and began to strike her with his fist. She managed to escape and to run four or five yards, but he caught her, threw her to the ground, and again began to hit her with his fist. She managed to arise, and ran to a gate. She closed the gate and held it but accused, who had followed her, stood on the other side of the gate and continually struck at her with his fist. At this point, when she was "almost done up", she saw three American soldiers running toward her from the other side of the canal. She was scarcely able to resist any longer and said to accused "'Be good paeson, I will come with you if you stop hitting me'". (R. 6) Accused let her go and they started along the road, she in the front and he in the rear. She approached the three soldiers, went behind them and then left and went to her home. (R. 6) Witness positively identified accused at the trial (R. 5). She further testified that accused struck her arms, shoulders, chest, face, hands and "all over" (R. 6). She did not see accused on the morning of 28 January and did not talk with him about food that afternoon (R. 14).

Elsa Giannini testified that she saw a colored soldier approach with a pistol in his hand and she became frightened. When she went toward Bruna and told her that she was afraid, the soldier said "'Don't be afraid'". Witness started to go away and the soldier fired a shot near her. The soldier wanted to take Bruna by the arm but as she did not want him to do so "the soldier put his hand on her (Bruna's) shoulder and came down with her". Bruna appeared to be afraid and began to call her sister Maria who said "'Go on down home; I will come down in a little while'". (R. 9)

Musetti Alfio, Bruna's son, testified he was playing in a garden near his home when a woman called him. He went "up among the olives" to within three or three and a half yards of his mother who was on the ground "with a colored soldier laying on top of her". The soldier was holding his mother by the throat, and had a pistol in his hand. Witness began to scream and the soldier fired two shots at him. Witness ran away to call some other soldiers, but when he returned the soldier was not there. He was not able to identify the soldier. (R. 9,10)

Doctor Lucchesi Pietro, Medical Surgeon and Director of Hospital, Pietrasanta, Italy, examined Bruna about 1400 or 1500 hours 29 January 1945. He found her suffering from bruises and cuts on her arms, shoulders, legs and neck, and in his opinion the bruises had been inflicted within 24 hours. They were still quite red and had not turned black. In witness' opinion they "could have been caused by a fall or from having been dragged, or having been hit by any person". Although the woman said she had been "forced, assaulted and raped", he did not examine her for rape because she was a married woman with children and at that time he "could not have made sure".

The woman appeared to be very sensitive and as she did not wish him to examine her he did not press his services upon her. (R. 10,11)

On 5 February 1945 First Lieutenant Frank A. Scott, 371st Infantry, while investigating the charges, interviewed accused and advised him of his rights under Article of War 24. Without any promises or threats being made or coercion used, accused then made a written sworn statement. The statement, which was signed by accused and identified at the trial by Lieutenant Scott, was admitted in evidence without objection and was, in pertinent part, as follows:

"On 29 January 1945 my company was on a rest period in the vicinity of Pietrasanta, Italy. I went for a walk up the mountainside about 400 yards. I fired one round from my pistol in the air. I saw a lady on a ledge below me who seemed to be afraid. I put my pistol in my pocket and walked down and tried to talk with the lady. I asked her if she was afraid. She said 'Yes'. I told her not to be afraid as I was not going to bother her. She tried to go to her house and I caught her by the hand trying to talk with her. She got away from me and I caught her on the next ledge above. She turned around and fell. I fell too. While on the ground a notion struck me and I told her if she gave me 'some' I would pay her. She said 'No'. I reached with one hand to loosen my trousers. She rolled over and I caught at her. I caught her dress but she got away from me and ran to the house. I fired about six times with my pistol to the right. She was to my left. I ran to catch her. When I caught her she was at the gate. I fell down and she went inside the gate. Two soldiers approached and asked me if I was drunk. I told them 'No'. They said 'Go on, you'll get yourself in trouble. It's not right.' I said, 'Yes, you're right.' I went back to my house. While I was with the lady I lost my cap, my cartridge case and my pistol holster. I did not rape the lady" (R. 12,13; Ex. A.).

Accused testified that about 1100 hours he talked to Bruna about trading food for sexual intercourse and that they "made an agreement". He promised her that he would return to the place where he was staying and get the food. Before he left he asked her "the question" and she told him that "others would see her, which was three ladies". Accused then told her that he would fire his pistol, that the women would become frightened and leave, and that he and Bruna then "would go and have an intercourse". Bruna replied "'Maybe'", and accused said "'Yes they will go!'". He then left, obtained the food and returned. (R. 13)

4. There is thus substantial evidence that at the place and time alleged in the "additional Specification in Violation of Article of War 93" of which accused was found guilty, accused assaulted Matteoni, Bruna, the

woman named, with the intent to have carnal knowledge of her by force and without her consent. After firing his pistol in the direction of Maria and Bruna he seized Bruna by the throat with one hand while holding his pistol with the other, and threw her to the ground. An elderly lady who was nearby called for help and accused fired two shots at her. Still holding Bruna by the throat he dragged her ten or twelve yards toward a canal. She struggled to get away and while she was screaming for help, he again threw her to the ground and seized her by the throat. He then lay the pistol down beside them and tore off her clothes, or part of them. She continued to scream and to shout for help. When her small son approached accused, who was lying on top of the mother, fired two shots at the son. The woman testified that although she made every effort to prevent it, accused succeeded in penetrating her person, "raped" her, and then threw her into a bush. Accused, in his pre-trial statement, asserted that after he and the woman accidentally fell to the ground, he thought of having sexual intercourse with her and reached with one hand to loosen his trousers, but the woman refused to indulge in the act and escaped. He denied that he raped her. The truth of his contention was a matter for the determination for the court which found him guilty of the lesser included offense of assault with intent to commit rape. The actions of accused justified an inference of a concurrent intent to have sexual intercourse with the woman and the degree of violence employed indicated an intention to overcome any resistance which might be offered. Bruna resisted strenuously and there is evidence that she did not consent to the intercourse intended. All elements of the offense as found by the court are established by the evidence (MCM, 1928, par. 1491; NATO 583, Terrell; NATO 980, Overstreet-Cox). Although the findings of the assault with intent to rape do not specify the manner of commission of the assault, they do sufficiently state all essential elements of that offense.

There is evidence, further, that at the place and time alleged in the Specification, Charge II, accused struck Matteoni, Bruna, the person named in the Specification, with his fist and with such force and violence that her arms, shoulders, legs and neck were bruised. After accused threw Bruna into a bush she slipped and fell 12 or 15 yards down the bank of a canal. As she fell accused fired six or seven shots at her from his pistol and then threw her into the canal. He again tore off her clothes or part of them and threw a sack at her. He pushed her, causing her to fall another three or four yards, seized her and began to strike her with his fist. She attempted to flee, but accused caught her, threw her to the ground, and again began to hit her with his fist. After she fled behind a near-by gate, accused stood on the other side of the gate and repeatedly struck at her with his fist. She testified that he struck her arms, shoulders, chest, face, hands and "all over" her body until she was "almost done up". Finally, unable to resist any longer, she said that she would come with him if he stopped hitting her. The severity of the beating administered by accused was corroborated by the medical evidence. From the violence, persistence and viciousness of the assault and the character of the injuries sustained, the court was justified in inferring an intent by accused to do bodily harm as charged (MCM, 1928, par. 149n; NATO 583, Terrell; MTO 4463, Anderson et al).

5. A question arises as to the legality of the approved period of

confinement imposed, 21 years. The maximum period of confinement imposable for the offense of assault with intent to commit rape is 20 years and that imposable for assault with intent to do bodily harm is one year (MCM, 1928, par. 104c, p. 99). The court found accused not guilty of rape (Charge I and Specification), but guilty of "an additional Specification in Violation of Article of War 93" in that he "did *** commit an assault with intent to commit rape on Matteoni Bruna". As noted above the Specification of which accused was thus found guilty by the court contained no description of the particular acts of violence visited by accused upon the victim with respect to the commission of this assault. The court also found accused guilty of assaulting the woman with the intent to do her bodily harm by willfully and feloniously striking her on the throat and shoulders with his hands.

The rule is that:

"If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect" (MCM, 1928, par. 80a, p. 67).

In view of the foregoing principle, if the court had based its findings of guilty of assault with intent to commit rape upon that part of accused's behavior which consisted in repeatedly striking the woman on the throat and shoulders, the two offenses of which he was found guilty would constitute but different aspects of the same act, and the maximum period of confinement imposable, therefore, would be 20 years. If, however, the court based its findings of guilty of assault with intent to commit rape upon the prior acts of accused, namely, firing his pistol, seizing the victim by the throat, throwing her to the ground, lying on top of her and tearing off her clothes, the two offenses of which accused was found guilty were not different aspects of the same act, but were separate and distinct transactions during which different types of force and violence were employed. It is noted that the evidence does not show that accused struck the woman with his fist prior to or during the time she testified she was on the ground and he penetrated her person. The blows with his fist first occurred after she later slid several yards down the bank and after he threw her into the canal. There was in the proof ample basis for a conclusion that the offenses of which accused was found guilty may have been the result of two separate transactions in which separate acts of force were used. As it does not affirmatively appear from the record that the two offenses as found grew out of the same act, the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence as approved.

6. The court found accused not guilty of Charge I and its Specification (rape in violation of Article of War 92) but guilty "Of an additional Specification in Violation of Article of War 93", in which it was alleged in substance that accused did at the time and place alleged in the Specification, Charge I, commit an assault with intent to commit rape on the person described in the Specification, Charge I. It is obvious that the court

intended, by its findings, to find accused not guilty of the offense of rape in violation of Article of War 92 but guilty only of the lesser included offense of assault with intent to commit rape in violation of Article of War 93. Although the findings are not in the form of findings with exceptions and substitutions as prescribed by the Manual for Courts-Martial, 1928 (par. 78c, p. 65; Appendix 6, p. 267), the intent of the court is clear and the irregular manner in which the findings were set forth did not injuriously affect the substantial rights of accused within the meaning of Article of War 37.

7. The charge sheet shows that accused is 24 years of age and was inducted 2 November 1942. He 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 assault with intent to 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.

Edward K. Keyes, Judge Advocate.

(sick), Judge Advocate.
Henry C. Remick, Judge Advocate.

CONFIDENTIAL

(289)

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

APO 512, U. S. Army,
5 May 1945.

Board of Review

MTO 6308

U N I T E D S T A T E S)	PENINSULAR BASE SECTION
v.)	Trial by G.C.M., convened at
Private JOSEPH GOODS (38 201 699) and DEXTER TAYLOR (17 016 414), both of 3641st Quartermaster Truck Company.)	Naples, Italy, 17 January 1945. As to each: Dishonorable dis- charge and confinement for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
 2. Accused were jointly tried upon the following Charge and Specification:

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Dexter (NMI) Taylor, 3641st Quartermaster Truck Company, and Private Joseph (NMI) Goods, 3641st Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, at Naples, Italy, on or about 6 December 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Bert (NMI) Raby, a human being, by shooting him with a pistol.

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

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life, three-fourths of the members of the court present concurring. The reviewing authority approved the sentences, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement as to each accused and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 6 December 1943 accused Goods and Taylor were members of the 3641st Quartermaster Truck Company, stationed at Capua (Italy) about 25 miles from Naples (R. 21).

Corporal William D. Kenyon, 36th General Hospital, testified that on 5 December 1943 he left the hospital at Caserta and went to Naples with two soldiers named Bert Raby (the deceased) and David Sapp, both of the 71st Signal Company. They spent the night at a house and returned to the house on 6 December about 1600 hours. On the second floor was an apartment consisting of four rooms and a hallway which led out to the stairs. All kinds of alcoholic beverages were for sale in the apartment and women were present downstairs and also in the apartment. There was a piano and dancing in the apartment (R. 9,10,13) and witness testified "at the dance you can always find a woman and take her some place else in the building" (R. 13). (The entrance to the apartment consisted of swinging doors (R. 35,36)). Witness, Raby and Sapp danced and had a couple of drinks. About 1630 hours five or six colored American soldiers entered and the woman who ran the establishment "made it plain that she didn't like to patronize the colored fellows". She asked witness, Raby and Sapp if they would speak to the colored soldiers and Raby asked the soldiers to leave. The colored soldiers "seemed a little bit het up about it" and one wanted to argue and to talk to the woman. One colored soldier "started to pull a gun". Finally the colored soldiers left. (R. 10,14,39) No blows were struck (R. 15).

Kenyon testified further that about 1830 hours four or five of the colored soldiers returned to the door and were told by the door keeper that the place was about to close. Witness walked over to the door and found Raby talking to the soldiers. Witness was standing to the rear of Raby when three of the colored soldiers, who were somewhat small in stature, started to push through the door. One reached the place where witness was standing, one was in front of Raby and the third was in the doorway. Raby hit the soldier in front of him, knocked him against the soldier in the doorway and both soldiers were thus forced outside. After witness seized the third soldier and pushed him outside, he closed and locked the door and returned to the room where they had been dancing. Raby remained at the door. Witness returned about a minute later, found the door open, and found Raby arguing with the colored soldiers. A large colored soldier, who was standing in front of the right hand door, pulled a "gun" from his pocket. Raby seized the weapon and tried to pull it away but the soldier jerked it from Raby's grasp. (R. 10-12,15-17). The weapon "looked *** like a .38 revolver" (R. 11), but it was dark in the hallway and as far as witness "could guess", it appeared to be a Beretta automatic pistol (R. 12). Witness shoved Raby aside and closed the door but he did not have time to lock it because the soldiers outside were shoving at the door. Raby pushed on the right side of the door and witness pushed on the left, in an attempt to keep it closed as those outside were "shoving at it" (R. 11). A few seconds later about three shots were fired from outside.

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the door (R. 11,12,17,38), and Raby said "'Bill, I'm hit'". Witness shouted to the colored soldiers to stop shooting, that "they shot somebody". He opened the door, lit his flashlight and saw the colored soldiers running down the stairs. Sapp seized Raby and laid him on the floor. Raby was later taken to the 118th Station Hospital where witness identified him to a lieutenant. (R. 12,13) Sapp and Raby had no pistols in their possession. The only "gun" witness saw inside the apartment was the one which one of the colored soldiers had "started to pull" when they first arrived about 1630 hours. Witness did not hear any shots fired from behind him (that is, from within the apartment), and the total number of shots he heard that afternoon was three. (R. 39)

Kenyon testified further that he was not able to identify the two accused as having been at the establishment that evening, because the incident occurred "a year ago" (R. 13,14,17). About two weeks after the shooting witness identified three of the colored soldiers from a group of about 1000 soldiers and saw them at a prior trial at which he was a witness. Asked if the two accused were in the group of 1000 soldiers, witness testified "Not that I remember". (R. 14,16,17)

When Raby was brought to the 118th Station Hospital at Naples on 6 December he was dead (R. 18,40). There was a bullet wound in his chest, the point of entry being on the left side (R. 40). On 7 December an autopsy was performed by Major Julius Belinkoff, Medical Corps, 2d Medical Laboratory, who testified that in his opinion death was caused by the bullet wound in the chest. The bullet perforated both lungs and was found in the body. There were no other bullet wounds. (R. 20)

Private First Class Edward W. Giddings of the organization of both accused, testified that he and both accused occupied the same tent. Between 2200 and 2400 hours 6 December accused entered the tent and from their conversation witness judged that there had been an argument in Naples between some white and colored soldiers and that a shooting had occurred. Accused Taylor said that he fired a few shots from a revolver and ran. Witness saw Taylor take a large revolver from his pocket and put it under his pillow. Accused Goods remarked that he had lost a hat while running. The hat belonged to witness and Goods was wearing it when he left camp. The hat, which was shown to witness the following June or July by "CID agents" (Agent Lipinski), contained witness' name and the last four digits of his serial number. Witness identified it at the trial and it was admitted in evidence, the defense stating there was no objection thereto. Giddings further testified that he did not remember whether Goods said he had a revolver or whether he said he fired any shots. He watched Goods undress that night and did not see a weapon in his possession or a bulky object in any of his pockets. (R. 21-24, 26; Ex. 1).

On the morning after the shooting Agent Bernard Lipinski, Criminal Investigations Division, Peninsular Base Section, went to the establishment where the shooting occurred and received a hat, helmet liner and raincoat. A few months later the hat was finally traced to Giddings who was questioned

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as a suspect, and both accused were arrested. (R. 27-29) After being verbally informed "of his rights under the 24th Article of War", accused Taylor "told his story" and incriminated accused Goods who was summoned and "informed of his rights under the 24th Article of War" (R. 29). Accused were then taken to the office of the Criminal Investigations Division in Naples where they were each told that he need not make a statement but that if he volunteered to make a statement, it could be used for or against him in the event of trial. Each accused then made a statement dated 5 July 1944. After they were again "informed *** of their rights" by the Chief Agent, each accused signed his statement in witness' presence. The two statements were identified by Lipinski at the trial and they were admitted in evidence, the defense stating there was no objection thereto. (R. 29,30,32,33; Exs. 2,3) The trial judge advocate requested the court to consider Goods' statement only as against Goods. No request was made that the court consider Taylor's statement only as against Taylor and no statement was made by the court with respect thereto. (R. 32) The statement of accused Goods was as follows:

"On the day the shooting took place I went to town with Taylor and Wesley Branch. To my knowledge Taylor was the only one that had a gun. He borrowed it before he left camp. We came into Naples had one or two drinks. During the day we got separated from Branch. We spent the afternoon with different women. About the time it was dark Taylor and I came to the place where the shooting occur(r)ed. We went in the courtyard and saw three or four colored boys talking and asked them about the women here. I saw a girl I wanted so I went over to her. I left Taylor with the boys. I had intercourse with the woman, and when I came out I looked for Taylor. I heard him upstairs with all the other fellows and they were making a lot of noise and arguing. I started up the steps to get Taylor. I had only gone a few steps when I heard gun fire. I turned around and ran down the steps and away from the building. There wasn't anyone with me when I ran away. When I got to the main street I tried to get a ride back to camp. While I was getting a ride Taylor came and we went back to camp together. He told me he was up there with the other boys and he was scared. He said he fired the gun. I had seen him dump two empty shell casings out of his gun before we got on the truck going back to camp. When we got back to camp Taylor told the boys in our tent that he had got in some trouble in town" (Ex. 2).

The statement of accused Taylor was as follows:

"In December, before Christmas, Goods, Branch and myself went to Naples. Before we left camp I borrowed a large black Italian revolver from Frank Pritchett. When we get to town we had some drinks and then we ate dinner. After we ate, Branch left us, and Goods and I walked

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around town. During the afternoon we went to a house and stayed with some women. About four o'clock we went to the place where the shooting occur(ed). When we went into the courtyard we saw four colored fellows talking to some girls. They told us we could get drinks and women there. Goods stayed and talked to them and I walked over to one of the apartments where another colored boy was standing talking to a girl. I stood and talked with them for a while, then I went over to another apartment and got myself a girl. After I got through I looked for Goods. I was told he was upstairs so I went up there. Goods was talking to the same colored boys in the hallway. They were saying that they had been there before. I knocked on the first door and asked the lady for some vino. She said she didn't have any. Then I walked past the fellows over to the apartment where they were playing a piano. When I went through the door and into the hall of the apartment I met a couple of white fellows. The big one said to me, 'What are you doing here, this is a white man's party, no niggers allowed here.' He grabbed me by my right arm as though to sling me out the door. My raincoat slipped off my shoulders. Someone hit me and knocked my helmet liner off. Another white fellow said, 'Let's get them one at a time.' That's when my friends came in. More white fellows came out of one of the rooms and we all started to scuffle around. We were all backed out of the door. I was the last one out. The big white soldier grabbed me by the neck and tried to pull me back in. Then I saw another white soldier standing by the window with a gun. I jerked loose when I saw the guy with the gun. He fired twice.

"Once when the door was closed. I backed up onto a step and fired once into the closed door. I don't know whether anyone else fired. We all ran away. Goods and I got a lift back to camp. When we got back to our tent, Goods told the fellows that he had fired. I don't know whether he did or not. I put the gun under my pillow and the next day I gave it back to Pritchett.

"When Goods and I came back to camp we told the guys in the tent about the shooting. They were: Giddings, Earl Evans, Gartrell Evans, Herman Carter, Paul Stevens and Wesley Branch" (Ex. 3).

During the course of the investigation both accused were taken to the Peninsular Base Section stockade where "three other members of the case who had already been tried by general court" were confined. These three men were not able to identify either Goods or Taylor. (R. 32)

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Agent John Kritko, 1299, 69709 Platoon, Provost Marshal General's Office, testified that before entering the service he was for eight years an identification technician in the Ohio State Bureau of Criminal Investigation and also in the police department, Munhall, Pennsylvania. While in the Army he had studied ballistics and his duties in the Army were those connected with ballistics. (R. 34,35) On the day after the case was reported to witness' office, he visited the scene of the shooting (R. 34) and examined the double swinging doors of the apartment on the second floor (R. 35,36). The doors opened in the center (R. 36). Witness found three bullet holes, two being of a much larger caliber than the third. In witness' opinion one shot from a .32 caliber weapon was fired from outside directly into the center panel of the right door (facing into the apartment), and the person who fired the weapon must have been standing outside on the floor. The hole in the door was about 58 inches from the floor. The bullet was not recovered but a certain bullet was given witness by a doctor at the 118th Station Hospital (R. 35,36,38,59). Witness fired five or six weapons recovered from the various suspects in the case but was unable to identify the weapon which "fired the fatal bullet". Asked if he had been able to recover the bullet "from the gun that was purported to have been given by Private Taylor to some other soldier", witness replied in the negative. (R. 38)

Kritko testified that he also recovered two bullets, American .41 caliber, which, in his opinion, were fired from outside the apartment. One of these two bullets was fired into the edge of one of the swinging doors near the hinge. This door was on the left as one entered the apartment. The other bullet was fired into the edge of the door where the handle was situated. Because the second .41 caliber bullet was embedded in the edge of the door, witness was of the opinion that the door was being opened when the shot was fired. (R. 35-38) Witness was of the further opinion that the two .41 caliber bullets were fired from the same weapon, and that the person who fired the shots was standing on the right hand side of the door and on the first or second step of the stairway (leading to the third floor) (R. 35,59). In his experience witness had never seen an Italian .44 caliber revolver, but had seen a new Italian Breschia revolver about .46 caliber which is issued to Italian officers and noncommissioned officers (R. 58). Aside from this weapon he had never found a model larger than a .41 caliber. The weapon from which the two .41 caliber bullets were fired, could fire larger bullets but not bullets of caliber .45. The size and weight of the so-called Italian .41 and .32 calibers differed considerably (R. 59), and witness testified that it was very easy to differentiate between the weapon which fired the fatal bullet and that which fired the two bullets recovered in the door. (R. 60)

For the defense it was stipulated that if Agent Lipinski were in court he would testify that he received from men named Patterson, Ray, Harris and Bing Crosby Thomas, the following weapons which he turned over to Agent Kritko: A Guernica automatic, caliber 7.65; a Beretta automatic, caliber 7.65; a Beretta caliber .9, 1942 model; a Smith and Wesson six shot revolver, caliber .32; and a Destroyer patent automatic pistol, caliber 6.35. It was further stipulated that if Technician Fourth Grade Frank C. Pritchett, 3641st Quartermaster Truck Company, were present he would testify that "when we were at

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"Capua", accused Taylor borrowed from him a large black Italian revolver which "used shells about the same size as a 45". (R. 45) It was further stipulated that the bullet recovered from Raby's body was given to Agent Kritko by Captain (Major) Belinkoff (R. 41).

Kritko, recalled as a witness by the defense, testified that he received from Agent Lipinski five weapons: A .25 caliber automatic, a .32 Smith and Wesson revolver, a .32 Italian Beretta, an Italian Beretta caliber .9 or caliber .38 American, and a Spanish automatic, caliber .32. The last weapon was taken from the possession of a Private Harris. (R. 41) The fatal bullet was "of a left twist" and was .32 caliber, 7.65 in military terms (R. 42,43,45). Kritko, after experimenting with the pistols, "ruled out" the first four weapons because they belonged "to *** the righthand family". This fact left only the Spanish automatic .32 caliber "as a suspected weapon". (R. 42) The fatal bullet was marked with left hand striations and witness, in his experience, had never seen an Italian weapon with left hand threads (R. 43). Although witness fired 30 rounds from the Spanish .32 caliber weapon he could not definitely say that the fatal bullet was fired from this "gun". He testified that when a weapon is old and worn the striations "are nothing more or less than straight lines. There are no land-marks on the bullet". However, witness testified that it was his opinion, "in ballistics, not facts", that "the fatal bullet could have come from that weapon". (R. 42,43) It was his further opinion that the two bullets recovered from the door were fired from a large, black Italian Breschia .41 caliber revolver, and that they were not fired from any one of the five forementioned weapons. He concluded that the fatal bullet was the one which passed through the middle panel of the door and he suspected that it was fired from the Spanish automatic which was labeled as belonging to Harris. (R. 43,44) No revolver was recovered from either accused (R. 44,45).

General Prisoner Leo Patterson, Disciplinary Training Stockade, Peninsular Base Section, testified that he was previously tried in connection with the incident for a violation "of the 92nd Article of War *** For shooting" and was sentenced (R. 45,48). On the night of 6 December he was in a house in Naples with men named Ray, Harris, Lundy, Freddy Thomas and another man named Thomas (R. 45,46,49,50). The group were upstairs on one occasion where Lundy and Harris had an oral argument with a "white fellow". The group then went downstairs and drank a half bottle of cognac. (R. 46,48,49) While they were drinking two strange colored soldiers entered. Witness testified "I don't know them for myself but the information I got from the CID they were Goods and Taylor but I couldn't recognize them". (R. 46,49,50) Witness testified that he saw these two soldiers in the court room (R. 50). The two soldiers drank and smoked but did not sit down at witness' table. Less than four or five minutes later the two soldiers left and said that they were going upstairs. (R. 47,49) Witness and his group remained downstairs talking. There was no conversation about returning upstairs. About 15 or 30 minutes after witness and his group came downstairs, they also went upstairs. (R. 47) When witness reached the top of the stairs he saw "the two men at the door" which was half open (R. 47). Witness and his group stopped at another door and "asked if they had champagne. They said they had but when we came to it the door closed". They then walked to the other door which was closed.

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and witness heard the sounds of a scuffle. Witness denied that he, Ray and Harris were in the door at this time. When witness and his group started to walk through the door, "the door was closed and this guy reached for a gun". (R. 47,49) Witness fled and when he reached the top of the stairs he saw the reflection of a gun in the darkness and heard one shot only (R. 47,51, 52). At this time witness' companion Ray, according to witness' recollection, was at the top of the stairway and Harris was near by. Asked if Lundy or the two soldiers named Thomas were "there", Patterson replied in the negative. (R. 50) He testified further that he, Ray and Harris were not at the door when the shot was fired (R. 48). Two men were then at the door (R. 47) but witness could not tell which man fired the weapon. "All I could see was the reflection because it was dark in here". (R. 47,51). Witness had a pistol in his possession (R. 50) but did not fire any shots (R. 47), and he did not know whether his companions had any pistols (R. 50). The only colored soldiers in the establishment that night were the six in witness' group and the two strange soldiers (R. 52). After the shot was fired Patterson fled downstairs (R. 47).

Accused Taylor testified that on 6 December he, accused Goods and a soldier named Branch went on pass to Naples where they stopped at a house and had a drink. After they ate dinner in a cafe, Branch departed and witness and Goods spent the remainder of the afternoon with two girls in another house. They finally arrived at the establishment where the shooting occurred. (R. 53) Witness had in his possession a large black Italian .44 caliber revolver (R. 53,56). Goods did not have a weapon with him because he "owned no gun". About a month before the shooting Goods sold a "gun" to the commander of the 364th Quartermaster Truck Company, a Captain Cooper. (R. 53,54,57)

Taylor testified that when witness and Goods first entered the house three or four colored men were talking in the doorway. When witness asked them if they could find anything to drink and whether women were present, they told him "you could find anything you wanted in this place". An elderly woman and a girl were in the courtyard and the former asked witness if he wanted a girl. He replied that he did and then Goods approached with another girl. Each accused took a girl and separated. Witness entered a room and when he "finished" he left and waited for Goods who did not appear. He then heard a piano being played upstairs and when an Italian woman pointed upward, he went upstairs where he thought he would find Goods. When he reached the top of the staircase he saw "these four guys" talking in the hallway. (R. 54) He walked over to a door and asked a woman if she had anything to sell or drink and she replied in the negative. He then passed the other men who were still standing in the hallway and as he was about to enter another door, a rather small white soldier asked him where he was going. When witness replied "'in here'" the soldier said "'No, this is a white man's place and we don't want no niggers here'". Witness said "'Let's go'" and as he "made a step to step away" the soldier seized his right arm. Witness braced himself and another soldier struck him and knocked his helmet liner to the floor. Witness' raincoat "came loose, and we started scuffling". A third white soldier came out from the kitchen, stood by a window, said "'Let's get 'em and get 'em one at a time'" and tried to pull witness inside. The white soldiers were

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trying to close the door and witness was "in the middle ways of it". (R. 55,56) "All the colored fellows was trying to fight to get out the door", and one large soldier was holding witness. "At that time a guy pulled out a gun and he said 'Get back!'. When witness saw the gun he "went to jerk loose from the room". When he reached the door the big soldier seized his collar and they scuffled. One soldier was standing behind the door trying to close it "and the guys from outside pushed the door to keep from closing so that I could get out". Just before witness ran out the door a "gun" was fired and the door "slammed". Another bullet was fired and splinters struck witness' face. (R. 55) He did not know who fired (R. 58). He then jumped to the side of the door, pulled his "gun" and fired one shot at the door (R. 55-57). He did not see where the bullet hit (R. 57) but it might have entered the frame of the door (R. 56). Witness fired "down low" (R. 57) and at the time was standing about five feet from the door (R. 58) on the foot of the stairs leading to the third floor (R. 55,58). He testified that he fired in order "to keep them from running out after us until we could get down the stairs" (R. 58). When witness went upstairs Goods was already up there standing in the hallway but witness did not know where Goods was during the scuffle (R. 56,57).

Taylor testified further that he did not spend any time with the other group of soldiers discussing an incident which had previously occurred upstairs (R. 56). He did not see Goods with a "gun" and Goods did not have a "gun" in his possession when he undressed at camp that night (R. 57,58). On cross-examination accused Taylor testified as follows:

"Q. When you got back to your tent and you talked to Goods about this, he said he had fired a gun, didn't he?

A. Yes, sir.

"Q. He did tell you that didn't he?

A. Yes, sir.

"Q. But you didn't see him shooting?

A. I didn't see him with a gun" (R. 57).

Accused Goods elected to remain silent (R. 58).

4. There is evidence that at the time and place alleged a bullet from a pistol, fired through a closed door, mortally wounded Private Bert Raby, the person named in the Specification. There is also evidence that on the date alleged Sapp, Kenyon and Raby were in an apartment on the second floor of a building in Naples, Italy, in which there were women and liquor. The entrance to the hallway of the apartment from the outside hall consisted of swinging doors. About 1630 hours four or five colored soldiers entered the apartment. Raby entered into an oral argument with them, during which one colored soldier "started to pull a gun". The colored soldiers finally left. About two hours later four or five of the colored soldiers returned. While Raby was talking to them at the doorway, three of the soldiers started to

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force their way into the apartment. Raby struck one and he and Kenyon succeeded in ejecting them to the outside hall. Kenyon locked the door and departed but returned a minute or two later to find Raby arguing at the open door with the colored soldiers. When one of the soldiers drew what appeared to Kenyon to be a .38 caliber revolver or a Beretta automatic pistol from his pocket, Raby unsuccessfully tried to wrest it from the soldier's grasp. Kenyon shut the door and when the soldiers in the outside hall attempted to force it open, Raby pushed on the right side of the door and Kenyon on the left. Suddenly about three shots were fired and Raby fell to the floor wounded. He died that night. Death was caused by a bullet wound in the chest which was the only injury found on his body.

When accused Taylor and Goods returned to their tent between 2200-2400 hours Giddings, a tentmate, heard them talking and from their conversation concluded that a dispute had occurred in Naples between some white and colored soldiers. Taylor declared that he fired a few shots from a revolver and ran. Giddings saw Taylor take a large revolver from his pocket and put it under his pillow. Goods said that he lost his hat while running. The hat belonged to Giddings, who identified it at the trial and testified that Goods was wearing it when he left camp. The hat was found in the establishment where the shooting occurred. Giddings did not recall whether Goods said he had a revolver or fired any shots, and he did not see a weapon in Goods' possession when the latter undressed that night.

It further appeared from the evidence that a Private Patterson was in the building that evening with men named Ray, Harris, Lundy, and two men named Thomas. On one occasion these men were upstairs where Harris and Lundy had an argument with a white soldier. Patterson and his group then went downstairs, and they were drinking when two strange colored soldiers entered. Patterson testified that he saw those two soldiers in the court room and that the "CID" had told him their names were Goods and Taylor. Shortly thereafter Goods and Taylor went upstairs. Patterson and his group also went upstairs and Patterson saw "the two men" at a half-open door. There was a scuffle at the door and when witness and his own companions started through the door someone reached for a gun. Witness and his group fled and when they reached the top of the stairs, a shot was fired. Patterson admitted that he had a pistol, but denied that he fired it, and also denied that he or any of his own companions were at the door when the shot was fired. Two men were at the door but he did not know which one fired the shot. The two strange soldiers, and Patterson's group were the only colored soldiers in the building that night.

An examination of Taylor's pre-trial statement and testimony discloses that when he and Goods arrived at the establishment they talked with four colored soldiers in the courtyard. Taylor then talked with another colored soldier before one of the apartments. He and Goods then separated. When Taylor later went upstairs looking for Goods he saw the same colored soldiers in the hallway. He testified that Goods was talking to these soldiers. When Taylor passed the group and entered the hallway, a white soldier told him that "no niggers" were allowed there and seized him. Other white soldiers appeared, Taylor was hit, and a scuffle ensued. One white soldier said "Let's get

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them one at a time'" and tried to pull Taylor outside. In his pre-trial statement Taylor said "That's when my friends came in". A general fight occurred. "All the colored soldiers was trying to fight to get out the door" and the white soldiers were trying to close it. Finally, the colored soldiers succeeded in getting out the door. A white soldier fired a "gun" and the door slammed. Another shot was fired. Taylor testified that he then fired one shot at the door as he was standing on the foot of the stairs leading to the third floor, and that this shot might have entered the door frame. He testified that the colored soldiers ran away, and that he did not know where Goods was during the scuffle. He further testified that he did not see a "gun" in Goods' possession that day, and that Goods did not own a "gun". When Goods and he were in their tent that night, Goods told him that he had fired a "gun". Taylor had borrowed a large black Italian ".44 caliber" revolver from a soldier named Pritchett before leaving camp. It was stipulated that Pritchett would testify that the revolver "used shells about the same size as a .45".

Goods, in his pre-trial statement, confirmed Taylor's statement that they talked to some colored soldiers when they entered the courtyard. Goods then indulged in sexual intercourse, and when he thereafter looked for Taylor he heard "all the other fellows" upstairs making a lot of noise and arguing. When Goods started upstairs he heard gun fire, turned around, ran down the steps and away from the building.

It further appeared from the evidence that three bullet holes were discovered in the door and two of the bullets were found in the door. In the opinion of Agent Kritko the fatal bullet was fired into the center panel of the right hand swinging door (facing into the apartment) from a .32 caliber weapon by a person who was standing in the outside hall directly in front of the doorway. Of the two bullets found in the door, one was in the edge of one of the swinging doors near the hinge (the door on the left as one entered the apartment). The other was in the edge of the door where the handle was situated. In Kritko's opinion both bullets were of .41 caliber and were fired by a person standing to the right of the door and on the first or second step of the stairway (which led to the third floor). Kritko, in his experience, had never seen a .44 caliber Italian revolver and had never seen a model larger than a .41 caliber. A .45 caliber bullet could not be fired from a .41 caliber revolver.

Weapons received from Patterson, Ray, Harris and Bing Crosby Thomas were examined by Kritko. Harris' weapon was a .38 caliber Spanish automatic. It was Kritko's further opinion, "in ballistics, not facts", after he had studied the fatal bullet and had fired the .32 caliber Spanish automatic, "that the fatal bullet could have come" from the weapon labeled as belonging to Harris. It was also his opinion that the two bullets recovered from the door were not fired from any of the weapons recovered from Patterson and his companions. No revolver was recovered from either accused.

The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of murder with respect to accused Taylor. Patterson's group, Taylor and Goods, were the only colored soldiers

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in the building that evening. It may be assumed for the purposes of discussion that Taylor was not with Patterson and his group when they first had the initial argument with Kenyon and deceased about 1630 hours. Taylor admitted that when he came upstairs just prior to the shooting, he saw the same group of colored soldiers whom he had previously seen downstairs and with whom he had engaged in conversation, and further admitted being in, the fight between the white and colored soldiers which occurred almost immediately after his arrival on the second floor. During the fight one colored soldier pulled a "gun". After the colored soldiers were ejected the door was closed, but the soldiers outside tried to force it open while Kenyon and Raby attempted to keep it closed. Three shots were then fired and Taylor admitted that he fired one shot at the door. Although the evidence indicates that Taylor did not fire the fatal bullet the evidence does indicate a strong possibility that Taylor fired at least one of the two bullets recovered from the door itself by Kritko. In any event, it is clear that Taylor joined the other colored soldiers in a wrongful, joint display of murderous force and violence against the white soldiers. By thus intentionally joining in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involved the contingency of taking human life, Taylor became responsible for the homicide committed by one of the colored soldiers while acting in furtherance of that common design. It is of no material importance which one of them fired the fatal shot (NATO 2221, Harris et al.).

Taylor stated in his pre-trial statement that prior to the closing of the door a white soldier fired twice, and also testified that he (Taylor) fired "in order to keep them (the white soldiers) from running out after us until we could get down the stairs". Taylor's statement as to shooting by the white soldier was without corroboration and in direct conflict with the testimony of Kenyon to the effect that Kenyon did not hear any shots fired from within the apartment, that only three shots were fired, that they were fired from outside the apartment, and that the only "gun" Kenyon saw inside the apartment was the one which one of the colored soldiers had "started to pull" during the first visit about 1630 hours.

The law of self-defense is stated 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. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renewes the fight, the latter becomes the aggressor" (MCM, 1928, par. 148a, p. 163).

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The court could conclude from the evidence that Taylor had no reason to believe that he was in danger of losing his life or of incurring great bodily injury. Not only did he admit that the door to the apartment was closed when he fired but he admittedly made no effort before firing to retreat as far as he safely was able to do so. He retired only as far as the stairway leading to the third floor and fired from that position. Kenyon testified that he and deceased were pushing on the door to keep it closed when the three shots were fired. Any contention that Taylor fired in self-defense was, therefore, wholly without merit.

There is evidence also that Taylor, when he fired, was not acting under legal provocation. Accused claimed he was struck during the tussle at the door and that the white soldiers tried to pull him into the apartment. The truth of this contention was a matter for determination by the court. Assuming it to be true, the degree of violence used against accused as he described it, did not justify his subsequent resort to the homicidal use of firearms (MTO 5920, Cooley and Dean; MTO 5918, Mack).

The shooting was deliberate and wanton, and done without legal justification or excuse. Malice is fairly inferable from the use of a deadly weapon and the other circumstances in evidence. Accused Taylor was properly found guilty as charged (NATO 2221, Harris et al.).

The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty with respect to accused Goods. Although Taylor testified that when he arrived on the second floor Goods was talking to the other colored soldiers in the hallway, Taylor testified he did not know where Goods was during the struggle with the white soldiers. Goods said later that he ran away and lost his hat while running. The hat was found in the establishment but there was no evidence as to where it was found or that it was discovered near the door where the shooting occurred. Giddings did not see any weapon in Goods' possession when he undressed in the tent that night, and did not recall whether Goods said he had a weapon or fired any shots. Taylor testified that he did not see a "gun" in Goods' possession, and that Goods owned no "gun". Goods, in his pre-trial statement, said that when he, Taylor and Branch went to town, Taylor was the only one who "had a gun" to Goods' knowledge. There was no evidence that Goods went upstairs with Patterson and his companions or that Goods went upstairs with any pre-conceived plan or design.

The only evidence which possibly implicated Goods in the commission of the offense alleged was the following testimony of Taylor on cross-examination:

"Q. When you got back to your tent and you talked to Goods about this, he said he had fired a gun, didn't he?

A. Yes, sir.

* * *

"Q. But you didn't see him shooting?

A. I didn't see him with a gun."

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Presumably Goods made the remark when he and Taylor were discussing the various incidents which occurred in the building in Naples where the shooting occurred. However, there is no evidence as to when and where Goods supposedly fired. There is no evidence as to whether he fired prior to, during, or after the fight with the white soldiers, where he fired, or even that he fired while he was in the building. From Taylor's testimony it is logical to assume that Goods meant only he had fired on his way to or from Naples and at a considerable distance from the scene of the shooting, or even on an entirely different day.

Considering the testimony of Taylor in its aspect most favorable to the prosecution, it could in reason mean no more than that Goods fired at some unspecified time and in some unspecified direction before or during the altercation or afterward in furtherance of his effort to escape from the scene. In the opinion of the Board of Review the circumstances of Goods' mere presence at the scene prior to the conflict which resulted in the homicide and the firing of a weapon at some undeterminable time and for some undeterminable purpose do not form a reasonable basis for an inference that he was in fact a participant in the homicidal disorder or that he aided or encouraged it.

The following remarks from a holding by another Board of Review are applicable here:

"Convictions by courts-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence--the 'slightest particle or trace,' is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience. The following from an approved holding by the Board of Review is pertinent:

'The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A. W. 50 $\frac{1}{2}$). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference (C.M. 150828, Robles; C.M. 150100, Bruch; C.M. 150298, Johnson; C.M. 151502, Gage; C.M. 152797, Viens; C.M. 154854, Wilson; C.M. 156009, Green; C.M. 206522, Young; C.M. 207591, Nash et al.). The following has been quoted, with approval, by the Board of Review (C.M. 197408, McCrimon; C.M. 206522, Young; C.M. 207591, Nash et al.):

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"We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens" (Buntain v. State, 15 Tex. Appeals, 490.)' (C.M. 212505, Tipton)" (Bull. JAG, August 1942, sec. 422 (5)).

There is no evidence in the record of trial from which an inference may properly be drawn that Goods was a direct or indirect participant in the offense charged. The Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty with respect to accused Goods.

5. The charge sheets show that accused Goods is 30 years of age and was inducted 24 September 1942. Accused Taylor is 23 years of age and enlisted 15 February 1941. Neither accused had prior service.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as to accused Taylor but legally insufficient to support the findings of guilty and the sentence as to accused Goods. A sentence to death or imprisonment for life is mandatory upon conviction of murder under Article of War 92. Confinement in a penitentiary in the case of Taylor 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.

Edward W. Long, Judge Advocate.
William R. Brown, Judge Advocate.
Henry C. Reisch, Judge Advocate.

MTO 6308

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
5 May 1945.

TO: Commanding General, Peninsular Base Section, APO 782, U. S. Army.

1. In the case of Privates Joseph Goods (38 201 699) and Dexter Taylor (17 016 414), both of 3641st Quartermaster Truck Company, attention is invited

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MTO 6308, 1st Ind.
5 May 1945 (Continued).

to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and sentence as to Taylor and legally insufficient to support the findings and sentence as to Goods, which holding is hereby approved. Upon your disapproval of the findings and sentence as to Goods you will, under the provisions of Article of War 50 $\frac{1}{2}$, have authority to order execution of the sentence as to Taylor.

2. After publication of the general court-martial order in the case, ten 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 6308).



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

Incl. - Record of trial and duplicate.

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

APO 512, U. S. Army,
28 April 1945.

Board of Review

MTO 6376

U N I T E D S T A T E S)	10TH MOUNTAIN DIVISION
v.)	Trial by G.C.M., convened at
Private VIRGIL P. SHAFFER)	Campo Tizzoro, Italy, 20 March
(35 624 798), Battery A,)	1945.
616th Field Artillery)	Dishonorable discharge and
Battalion.)	confinement for 15 years.
)	Eastern Branch, United States
)	Disciplinary Barracks,
)	Greenhaven, New York.

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 75th Article of War.

Specification: In that Private Virgil P. Shaffer, Battery A, 616th Field Artillery Battalion, did, in the vicinity of Cutigliano, Italy, on or about 6 February 1945, while before the enemy, render himself unfit for the proper performance of his duty by the excessive use of intoxicating liquors.

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

Specification: In that Private Virgil P. Shaffer, Battery A, 616th Field Artillery Battalion, did, in the vicinity of Cutigliano, Italy, on or about 6 February 1945, feloniously

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take, steal and carry away one Italian Postal Bond, No. D000.140, issued to Petrucci Celestina diAbele, of the face value of 500 lire, certain Italian bank notes of the face value of 6,150 lire, and three certain photographs of nominal value, all of the aggregate value of \$66.50, in lawful money of the United States, the property of Celestina Petrucci Pistolozzi.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence was introduced of two previous convictions by special court-martial, both for absence without leave in violation of Article of War 61. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 15 years, three-fourths of the members of the court present concurring. The reviewing authority approved the sentence, 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 for the prosecution shows that on 6 February 1945, Battery A, 616th Field Artillery Battalion, had been located for about a week in a firing position near Cutigliano (Italy), giving supporting fire to the infantry. The enemy held the mountain directly in front, about 2000 yards away, and was returning the fire. Among the members of Battery A were First Lieutenant Robert H. Colburn, Executive Officer; First Sergeant Hansford H. Osborne; Sergeant James E. Bowman, chief of the second gun section; Private John C. Morello; and accused, who was a cannoneer or ammunition handler in Sergeant Bowman's gun section. (R. 6,7,15,19,20,25) The section consisted of ten men, whom Bowman had split into two groups on six hour reliefs, thus giving "half the section a chance to rest and the other half handle the gun" (R. 7,23), a procedure which had been followed since the organization came "over here" (R. 7). The men who came on duty at 1700 hours were on duty until 2400 hours (R. 7,8). Lieutenant Colburn had not given any orders not to drink when off duty and knew of no orders having been issued with respect thereto (R. 23). Accused was scheduled to report for duty at 1700 hours on 6 February. The other members of the section were present at the appointed hour but accused did not report for duty. Sergeant Bowman replaced him with a soldier from the other relief and reported accused's absence to the first sergeant. (R. 7-9).

The evidence also shows that on 6 February 1945, Celestina Petrucci Pistolozzi lived at 39 Via Nazionale, adjacent to the bivouac area of Battery A, in the vicinity of Cutigliano (R. 9,15). Accused came to her house at about 1500 hours and remained there about an hour or an hour and a half, "drinking wine and joking with his friends" (R. 9). He returned between 1730 and 1800 hours, with two other soldiers, and asked for some wine. Celestina testified that accused "had been drinking, but he didn't seem to be very drunk". At that time she was downstairs in the kitchen with her mother, her brother, and her brother's friend, a short and heavily-built wine merchant. (R. 9,10,14) They did not want to give him any wine but did give him permission to enter the house to go to the latrine. The

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toilet was situated at the first turn near the head of the stairs which led to the second floor. On the second floor were three bedrooms, one of which was also used as a storeroom and contained foodstuffs and two bottles of wine. Accused went upstairs, alone, and remained about ten minutes. (R. 9, 10) When he came down he called to his friends and they left the house. Celestina's brother noticed that accused had some wine and "went after them". Celestina saw accused out in the street, saw one jug of wine drop to the ground and saw another jug on the ground. Then she went upstairs to her bedroom. (R. 10)

In the drawer of a bedside stand she had kept three snapshots, some pay envelopes belonging to her husband, bank notes and money. The latter included two 500 lira notes of Allied Invasion Currency, 15,000 lire in Italian currency of 1,000 and 500 lira denominations, one bank note of 100 lire, one bank note of 50 lire, and a postal bond belonging to her and made out in the name of Petrucci Celestina di Abele. When she got upstairs she noticed at once that her bedroom door was open, the drawer of the bedside stand was on the bed, "and the money was gone". (R. 10,11) At the trial Celestina identified as her husband's an envelope No. 958 dated 15/12, 1944, in which the money had been kept, and further identified as her own a 500 lira postal bond, payable to Petrucci Celestina di Abele, issued at Pian-sinatico, Italy, on 12 September 1938, #D000.140. She testified that both were missing from the drawer. The envelope and the postal bond were admitted in evidence without objection (R. 10,11; Ex. 1) and it was stipulated that the bond was worth its face value of 500 lire (R. 11). Celestina also identified as missing from the drawer two bank notes, one No. 543923, dated 24 June 1944 of La Banca Commerciale Italiana in the amount of 50 lire, and one No. 179893, dated 22 May 1944 of La Banca Toscana in the amount of 100 lire. These were admitted in evidence without objection and it was stipulated that each note was worth its face value. (R. 11,12; Ex. 2) She identified as her husband's, a pay envelope marked No. 918 with a notation 16 November to 30 November typed thereon. The envelope was kept in the drawer and contained ten 500 lira Italian Metropolitan notes and one 1,000 lira Italian Metropolitan note. These were subsequently admitted in evidence without objection. (R. 12,22; Ex. 4) She further identified a pay envelope of her husband's which was kept in the same drawer, with the notation 31 December 1944 stamped thereon, and which contained three snapshots. The snapshots consisted of one of her baby girl and her brother, one of her baby girl, and one of an unknown girl. They had all been kept in the drawer and were missing when she went upstairs. The envelope and the three snapshots were admitted in evidence without objection. (R. 12,13; Ex. 3)

Celestina went downstairs, told her brother that accused had taken her money and asked accused, who was outside with his friend, to return what he had taken. Accused did not understand her, so she sent for Private Morello, who understood Italian. (R. 13) Morello testified that when he arrived at the house accused was staggering and cursing, was talking in a loud and rough manner and was drunk. In witness' opinion, accused was unfit for duty. (R. 15-17) When Morello asked the woman what the trouble was, he was told that "they" had stolen some money. Accused said that he was trying to pay for the bottle of wine he had broken and that they would not take the

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money. For the purpose of getting the matter straightened out the group, including Italian civilians, accused and several other soldiers, went to the battery command post. (R. 13,15,17) On the way, Celestina noticed accused "trying to throw away the money". He did not throw it away but she saw him "put part of them" under his shirt. (R. 13) Morello saw accused take something from his shirt pocket and put it in the pocket of his trousers (R. 16).

Lieutenant Robert J. Colburn, the battery executive officer, was on duty at the battery command post when accused was brought in about 1800 hours (R. 19,20). He testified that

"there was a lot of loud talking, and these Italians were trying to tell me what happened. He (accused) was trying to tell me at the same time. It seemed that there had been some difficulty about some money, and Private Shaffer claimed he got the money through change for a \$10.00 bill" (R. 20).

Accused pulled a "handful of money" out of his pocket and said "something about 'although I am drunk you can't pull anything over on me'" (R. 20,21, 24). In Lieutenant Colburn's opinion accused was drunk. His speech was loud, halting and drunken, and approached insubordination. His personal appearance was "rough", and his eyes were rather glazed. Witness doubted if accused could stand straight. He placed accused under guard, because he judged him to be unfit for duty that night and drunk beyond the point of being responsible. (R. 20,21,23,24,26)

Lieutenant Colburn continued his conversation with the Italians and secured their story through an interpreter. He then ordered First Sergeant Osborne to search accused. (R. 21) Osborne was at the battery command post when accused was brought in and testified that in his opinion accused was drunk. He was slouchy, talked loudly and with a thick tongue, and was "rather insubordinate". Osborne considered accused unfit for duty, which "just meant that another man would go on in his place, and each man in the gun section had his relief to go on". (R. 26) When he searched accused he found about ten dollars in Allied Invasion currency, six 500 lira notes, some bills of larger denomination, three envelopes and three photographs, all of which he turned over to Lieutenant Colburn. He identified envelope No. 958 and the 500 lira postal bond (Exhibit 1) as being, to the best of his knowledge, among the articles he found on accused. The 50 and 100 lira bank notes (Exhibit 2), the envelope containing the snapshots (Exhibit 3), and the envelope containing the six 500 lira notes (Exhibit 4) were identical with or similar to articles he had removed from accused. He recognized the photographs, and remembered the picture of the woman and the baby. (R. 27, 28) Lieutenant Colburn likewise identified the photographs and other articles he had received from Sergeant Osborne (R. 21). There was approximately \$60.00 in 500 and 1,000 lira notes in one envelope (Exhibit 4), for which, together with the 500 lira bond and the 50 and 100 lira notes, a Lieutenant Andresen gave Signora Petrucci a receipt in the sum of 6,650 lire (R. 21-25; Ex. 5). Morello, who was present when accused was first searched, testified that money, pictures and envelopes were found on accused's person, and witness

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identified the 500 lira postal bond and the three photographs, which he had seen removed from accused (R. 17-19; Exs. 1,3). About seven to ten days later Celestina recovered 8,000 lire of the missing bills from a toilet at the battery command post (R. 14).

For the defense, Private Thomas M. Merrell of accused's organization testified that on 6 February he and accused were on guard from 0600 to 1200 hours. After lunch they went down "to the civilian's house", where they drank for about three hours and sat around "shooting the bull" with other soldiers. Nothing had been said about drinking during off-duty hours. Accused purchased drinks that afternoon. The woman went to a wall safe to get money in order to "give change". When they returned for the evening meal about 1630 hours, witness and accused parted and he did not see accused again until 30 or 40 minutes later, when accused was returning from the civilian's house. Witness could not say that accused was drunk at that time and he thought accused would have been able to go on duty. Witness went on duty at 1800 hours. (R. 28-30)

Private Richard A. Carlson of accused's organization testified for the defense that about the first of February, and before accused got into trouble, he and accused had participated, with some Italian soldiers, in a crap game, about a mile and a half from the battery position. The money used in the game was mostly Italian lire in five dollar denominations. Accused was winning and had some of that type of money on his person on the night of the game. (R. 31,32)

Accused testified that after he came off duty at noon on 6 February, he and Merrell went down to "this house" where with other soldiers he drank, talked and had "a lot of fun". When he returned to the battery area he found that dinner was not yet ready so he returned to the house. He testified:

"We go in the door—to the left is the kitchen. The woman was baking biscuits at the time, so I go up to the latrine which is at the head of the stairs. I went into the latrine, took a leak, and when I came back out, to the right of me there is a small room and there was this here Italian, I don't know who he is, her brother or husband, from what I gather its her brother, so I ask him 'fiasco vino' and he said 'si'. I had fatigue pants on and an OD shirt, and I unbuttoned the shirt to here. I asked him for the bottles and handed him a \$10.00 bill, and he says 'Si'. He handed me one bottle in my left hand, and I had \$10.00 in my right hand, and he stuck the other one in my shirt. He said 'Fiasco vino' and I didn't say anything. Then I stuck the other bottle in my shirt and both tips of the bottles were sticking out. I turned, and I happened to think of something. 'Hell, I gave him \$10.00,' I thought to myself, so I said, 'Paesano, come here'. I said, 'Change for \$10.00'. He said, 'Oh, Si, Si, Si, Paesano, Si,' kind of winking a little at me, handed me an envelop(e)—one

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envelop(e). I had this vino here in my shirt with the tops sticking out. I took the envelop(e) and stuck it in my pocket, and go down the steps to the door, it's on the right of the kitchen."

He continued:

"Cothey and me was together so naturally I asked for him, and he told me to be quiet, put his finger to his mouth, and I said 'Me' and he says, 'Si'. So I went on out. I walked out on the curb and turned around, and he was standing there smiling. I didn't pay any notice where he went or what he done, but I hollered for Cothey. Cothey came out. I says, 'Don't worry, I bought the vino.' The woman comes right up behind Cothey. She mumbles something—I look at her, and this small Paesano that's with her now was there at the same time. I couldn't understand them, so we go upstairs. I was right behind her. One bottle of vino got busted. You go in and go around the bed. You go in the room on the right hand side of the bed. Back home you would call it a smoking stand. She pulls the top down and points in there and I says I don't 'capish'. I didn't know what happened until Morello came. Morello told her to talk slow. So she says 'OK', I guess, and he says, 'You stole \$150.00'. I said, 'What do you mean?' Meantime I thought they wanted me to pay for the vino. I was trying to pay for the vino—that wasn't it. She said '\$150.00.' I looked at Cothey and laughed. She still wanted it, so we decided to take her to the battery commander and she is willing to go up."

Accused testified further:

"I began to think to myself. It ain't a hell of a lot of good to bring her up without the man I bought it off of. So Cothey goes up and he tries to get the man that I bought it off of. In the meantime I got the youngster out here, the young brother. I didn't hurt him or anything—just took hold of him. I tried to tell Morello to tell him we were going to the battery commander. We get this settled. So the big guy gets away, and Cothey said he got away. I said, 'We'll take these two up to the CP.' Morello and Cothey and her brother and her, we all went up and Lt Colburn began to question them and they were all gabbing. I reached down in my pants pocket and threw out an envelop(e). The Italians were saying some things about me and I was trying to tell them I didn't steal it—the man gave me that for change. I didn't think to look at it. I just stuck it in my pocket. They take

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me over to an adjoining room and I sit down for about 30 or 45 minutes, then I am searched again by Sgt Osborne. Then after I take everything out of my pockets then a T/4 he shakes me down. He says, 'I have everything, well, go back and sit down.' My battery commander came in and started talking to me. That was the last he said, 'Take them out. They ain't fit for white men.' So I was out in the yard. They kept us out there for three days." (R. 33)

When he arrived at the house he had about \$75 in Italian money and about \$12 in Allied currency. He had won in a "crap game" about \$65 in large 500 lira Italian notes and those notes were taken from his possession. The only envelope in his possession was the one which the man gave him containing the change for his \$10. Accused did not know how much was in the envelope. (R. 34,35) He did not think that he was drunk: "I had been drinking, but I wasn't too drunk". When he returned to the house and went upstairs with the woman, although he had already paid the man once for the wine, he offered to pay her again.

4. There is evidence that at the place and time alleged, while before the enemy in the sense that his battery was occupying a support firing position within some 2000 yards of enemy troops, accused used intoxicants to excess and became drunk to such a degree that he was unfit properly to perform his duties as a cannoneer and ammunition handler. When he became drunk he was on an off-duty or rest status. He did not report at the designated time for his assigned tour of duty with his gun, and because of his drunken condition he was not allowed to assume his duties as cannoneer and ammunition handler when he did appear. Another soldier took his place.

It is not alleged expressly or by implication, nor is it proved that accused voluntarily or intentionally made himself drunk in order to evade his duty or to avoid combat, or that his acts endangered the safety of his command. The question is presented as to whether, in the absence of circumstances of the kind described, the mere act of a soldier, while before the enemy, in becoming drunk through excessive use of intoxicants is "misbehavior" within the meaning of that term as used in Article of War 75. The query must be answered in the negative.

The Manual for Courts-Martial, 1928 (par. 141a), in defining misbehavior before the enemy, states that

"Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. *** Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy."

The Manual for Courts-Martial, 1921 (par. 425 IV), which remains applicable

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(MCM, 1928, p. VII), states that

"misconduct", like misbehavior, implies a wrongful intention, and not a mere error of judgment" (underscoring supplied).

It must be concluded that the term misbehavior implies intentional wrongdoing. Although drunkenness usually involves voluntary acts in drinking intoxicants, it does not follow that all who drink intoxicants intend to become drunk. Drunkenness may of course be the result of bad judgment, heedlessness or ignorance of the probable consequences of what is done.

In his Treatise on Military Law and Precedents Winthrop states that a soldier who makes himself drunk in order that he may evade a present or impending engagement or other active service against the enemy is guilty of misbehavior before the enemy. But he also states:

"The act of misbehavior must be voluntary. The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender. The mere circumstance that he is found in a condition of intoxication, when called upon to march or operate against the enemy, will not constitute the offence, unless such condition should have been induced for the express purpose of evading such service" (Winthrop's, reprint, p. 623).

The Board of Review is of the opinion that the record is legally insufficient to support findings of guilty of misbehavior before the enemy in violation of Article of War 75.

The Specification, Charge I, states and the evidence establishes an offense to the prejudice of good order and military discipline in violation of Article of War 96, an offense closely related to and therefore punishable as for the offense of being drunk in command or camp. The maximum punishment authorized by paragraph 104c of the Manual for Courts-Martial for this offense is forfeiture of 15 day's pay. In as much as the sentence otherwise authorized involves dishonorable discharge, substitution of a form of punishment other than forfeiture may not be made.

5. With respect to the Specification, Charge II, it appears from the evidence that at the place and time alleged accused took and carried away the property described in the Specification, of the value and ownership as alleged. Accused was shown to have been alone for about ten minutes in the immediate vicinity of the bedside stand where the money and bond were kept. Shortly thereafter, the property was found to be missing and was discovered on his person. Unexplained possession of recently stolen property is legally sufficient to support a conviction of larceny (MCM, 1928, par. 112a; Dig. Op. JAG, 1912-40, sec. 451 (37); NATO 1975, Lester and Moore). Accused testified that the Italian 500 lira notes found on his person had been won in a crap game, and that the envelope found on his person contained change which had

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been given to him for a ten dollar bill he had given some one at Celestina's house in payment for wine. Accused further claimed that when he received the envelope he had placed it in his pocket without examining the contents, and he denied knowledge of more than one envelope. It was for the court to determine whether or not the explanation by accused of his possession of the recently stolen property was satisfactory. Other circumstances, corroborative of guilt, sufficiently establish intent to steal. It was stipulated that the 500 lira postal bond and the two bank notes of 100 lire and 50 lire, were worth their face value. The court was warranted in taking judicial notice of the value of the Italian lira including Italian Metropolitan lira, as established by Allied military authorities, that is, a value of one cent per lira. All the elements of the offense of larceny are established by the evidence.

The maximum sentence to confinement authorized is that prescribed by paragraph 104c of the Manual for Courts-Martial for the offense of larceny of property of value in excess of \$50, to wit; confinement at hard labor for five years.

6. The charge sheet shows that accused is 21 years of age and was inducted 21 January 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 of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years.

Edward W. Kibbey

Judge Advocate.

(sick)

Judge Advocate.

Henry C. Reueck

Judge Advocate.

MTO 6376

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
28 April 1945.

TO: Commanding General, 10th Mountain Division, APO 345, U. S. Army.

1. In the case of Private Virgil P. Shaffer (35 624 798), Battery A, 616th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient

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MTO 6376, 1st Ind.
28 April 1945 (Continued).

to support only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, which holding is hereby approved. Upon your approval of only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, and upon your disapproval of so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, you will, under Article of War 50 $\frac{1}{2}$, 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 6376).



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

Incl. - Record of trial and duplicate.

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

APO 512, U. S. Army,
10 April 1945.

Board of Review

MTO 6411.

UNITED STATES) 92D INFANTRY DIVISION

v.	Trial by G.C.M., convened at Rear Echelon, 92d Infantry Division, 3 March 1945.
Privates First Class NATHANIEL STEEDELEY (33 805 685) and WILLIE J. WILLIS (34 551 748), both of Company G, 365th Infantry.	As to each: Dishonorable dis- charge 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 soldiers named above has been examined by the Board of Review.

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

STEEDELEY

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First-Class Nathaniel Steedley, Co G, 365th Inf and Private First-Class Willie J. Willis, Co G, 365th Inf, acting jointly and in pursuance of a common intent, did at Careglio, Italy, on or about 21 January 1945, forcibly and feloniously against her will, have carnal knowledge of Diana Tognarelli Servi.

WILLIS

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First-Class Willie J. Willis, Co G, 365th Infantry and Private First-Class Nathaniel Steedley, Co G, 365th Infantry, acting jointly and in pursuance of a common intent, did at Careglia, Italy, on or about 21 January 1945, forcibly and feloniously against her will, have carnal knowledge of Diana Tognarelli Servi.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification pertaining to him. No evidence of previous convictions was introduced. Each was sentenced to be hanged by the neck until dead, all members of the court present concurring. The reviewing authority approved the sentence as to each accused 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 as to each but commuted it in each case to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the "United States" Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 21 January 1945, Signora Diana Tognarelli Servi was living at 12 Via Antelminella, Coreglia (Italy), with her four children and her sister Maria Tognarelli, who was slightly lame (R. 7,10,11,14,18). One of the children, a young girl, was upstairs sick in bed (R. 7,9,10). At about 2030 hours a knock was heard on the door, and when Signora Servi asked who was there a voice answered that it was the police (R. 7,10). She went downstairs, opened the door and four colored American soldiers entered the house and went into the room where her sister and three children were. When she asked them what they wanted they answered in English and she told them she did not understand. They then asked "where were the Germans, as if they were angry", and she told them there were no Germans there. (R. 7,8,10) While one of the soldiers remained downstairs with Maria and the children, the other three forced Signora Servi to go upstairs ahead of them and into the first room that was open. A small gasoline light was burning there. One of them looked under the bed and she said to him, "'You can see there are no Germans here'". (R. 7-10) Then two of the soldiers pushed the third soldier and her son out of the room and closed the door.

At that point, Signora Servi testified, she

"began to get alarmed and went to the door to try and get out but could not because they blew out the light that I had. Then while one of them closed the door the other soldier grabbed hold of me and flung me on the bed. Then one soldier got on top of me while the other one was holding me by the legs. I was then screaming. I started screaming when they flung me on the bed. While I was screaming and scratching, the soldier which was on top of me was hitting me on the face and on the head, at that

same time putting his hand over my mouth so that I could not call for help. While struggling with the one that was on top of me, we rolled from one side of the bed to the other and over on the floor. I still had the bottle of gasoline in my hand and I struck one of the soldiers with it."

While she was struggling with the one on top of her the other one had torn off her drawers and stockings.

"After that, I was almost senseless from the blows and struggling. Thinking that the other two might have gone to the room where my daughter was and that they might have killed her and while I was senseless, the soldier that was on top of me raped me and did as he wanted with me. When the first soldier got up off me the other one flung himself on the top of me and attempted to rape me".
(R. 8).

The first soldier penetrated her vagina with his penis. She struggled as long and as much as she could.

"I punched them, I scratched them *** I also hit them with a can or a bottle, the light I had with me. Both soldiers were holding me on the bed and both of them had their hands over my mouth so that I could not do anything but struggle." (R. 8,9)

The second soldier, Signora Servi testified, did not rape her because, evidently hearing noises downstairs, he arose from her person and the two soldiers ran out of the room "as if they were frightened or something" (R. 8, 9). Signora Servi got up "as best" she could, went to her daughter's room to see if she had been injured, and then went downstairs. She had not seen the four soldiers before and would not have been able to recognize them if she saw them again. (R. 9)

Meanwhile Maria, who was downstairs, had heard her sister calling "Maria call for help; Maria call for help!". The children were screaming and Maria was "very worried". (R. 10) She opened the window to call for help, but as she could not call loud no one heard her and no one came. It was dark in the room because one of the soldiers had come downstairs and had blown out the light. She went outside to find help. Her lameness made it difficult for her to walk rapidly and she could find no one in the dark. (R. 11) As she returned to the house she met Commandante Sciuto Giovanni, commanding officer and sergeant major of the Carabinieri di Coreglia (R. 11,12), who had heard some civilians calling for help about 2100 hours and had gone immediately with his corporal major to 12 Via Antelmanella. Upon arrival he saw no lights in the house and sent his corporal to secure a flashlight and to get aid. The corporal returned with two colored American soldiers, "friends Petro and William". (R. 11-13,16) Maria told the carabinieri and

the two colored soldiers about the colored soldiers in the house, and urged them to hurry so that they could apprehend them (R. 11).

The evidence for the prosecution further shows that Private First Class Norman Evans, Private First Class William H. Coxe, and both accused were members of Company G, 365th Infantry Regiment (R. 18,19,22,23,26). On 21 January 1945 Evans saw the two accused together in front of a bar room between 1730 and 1800 hours (R. 19). Coxe saw them together in Coreglia at about 1800 hours or shortly thereafter (R. 23). About 2100 hours Evans and Coxe were in a house in Coreglia when they heard a woman screaming and knocking on the door. They went out to investigate, met the carabinieri and went with him to 12 Via Antelmanella. (R. 14,15,19,23) Sergeant Major Sciuto, carrying Coxe's flashlight, entered the house first, followed by Coxe, Evans and Maria (R. 11-13,19,20,23,24). They searched together through the rooms on the ground floor, but found no evidence of disturbance. As they came out of one of the rooms they heard voices and the sound of footsteps. Two colored soldiers came down the stairs. Coxe called to them to stop and as they halted momentarily at the bottom of the stairs, Sciuto flashed the light in their direction and both Coxe and Evans, who were from two to four yards away, saw and recognized accused Steedley. (R. 13-16,20-22,24,25) Steedley and the soldier with him then ran out the house, passing Maria on the way (R. 11,13,20,24).

Sciuto, who had not been able to see the soldiers who came down the stairs because Coxe and Evans obscured his view, ran after them but they had already disappeared. When he reentered the house he saw Signora Servi coming down the stairs. Her hair was "all in disorder" and, Sciuto testified,

"she was saying 'they have raped me; they have raped me'; I asked her what had happened and she told me that she had been attacked and raped by two American colored soldiers. Then to certain myself that it was true, I at once went into the room where the attack was supposed to have taken place. I found in the room the bed was all in disorder and found a few pieces of rags on the floor, also ther(e) I found something on the floor that was the remains of the evidence of intercourse." (R. 13)

Evans testified that when he and Coxe searched the rooms upstairs with the Italian police he went into "the room where the lady said she and the soldiers were. It was all in a mess" (R. 21).

Maria testified that her sister's hair was "up-side down, with her face all bruised and she felt very badly for a little while" (R. 11). Doctor Mario Borrini, community doctor of Coreglia, was summoned shortly after 2115 hours 21 January 1945, to the home of Signora Servi by a corporal of the carabinieri and an American soldier (R. 16-18). When he arrived there Signora Servi's daughter was "very excited" and told him that "two colored soldiers had raped her mother". He found Signora Servi sitting on a chair. Dr. Borrini testified:

"She was in a very nervous condition, and seemed to be suffering from shock. There were signs of contusions seeming to have resulted from blows. I examined her and found sperme in the vagina and on the lips of the vagina. After a careful examination, I could see that she had been through a sort of bad experience." (R. 17)

His examination "at once revealed that there had been an intercourse", a fact which he determined from "the sayings of the woman, from the sperm outside of the vagina and also inside from the enlargement of the womb" (R. 17). When he examined Signora Servi the next day he found that she had "bruises all over her face, neck, mouth and eyes. The woman, I also forgot to state, was in the last days of her monthlies" (R. 17,18). Signora Servi remained confined to her bed for five or six days, unable to move (R. 11).

Corporal Frank T. Hardison, 92d Division Military Police Platoon, interviewed accused Steedley and, after warning him of his rights under Article of War 24, to the effect that he had the "rights of a soldier", could refuse to make a statement, that no one could force him to make one but that if he did make a statement anything he said would be used for or against him on any trial, obtained from Steedley a signed, sworn statement. Hardison testified that an officer, whom he believed was "Lieutenant Pearce", also warned Steedley as to his rights. Over objection by defense the statement of Steedley was admitted in evidence. (R. 26-29) It reads as follows:

"Not very far from the town there were three or four of us got together and we went on down in the town of Coreglia to a dance. So we left the dance and went up to this place where we buy vino at, and we just set there and bought vino and drank. Everybody was feeling good so we just have leave there and patrol the streets. What we wanted was to find out the password before we went in so we asked the guards the password and we went on down the street till we got on up in some little street in there, I don't know the name, and found some people what could speak English and sat there and talked awhile. So we got to this particular house, knocked on the door, and the fellow was so long in opening it we got angry and told him to open the door that we were looking for Germans.

"He opened the door and there was a lady she was standing in the hall where it was light. She took us upstairs. We went in a room I grabbed her and throwed her on a bed. She screamed and I told Willis to put his hand over her mouth. I threw three punches and he caught them. There I pulled out my prick and stuck it in her. We rolled off the bed on the floor. He asked me was I finished and told him yeah and got up. Then he got down there. He screwed a while and we heard a noise. We started down the steps someone called me and I stopped. I saw that Willis was ahead of me so I started running again. I ran down the passage out of town and went on back to camp" (Ex. A).

Corporal Hardison also interviewed accused Willis and, after warning him as to his rights under Article of War 24, secured a signed, sworn statement. Hardison offered no promises, made no threats, and in no way coerced Willis into making or signing the statement. Over objection by defense the statement was admitted in evidence. (R. 29) It reads as follows:

"On 21st January 1945 I left my company about 4:00 or 4:30 PM., we went to the town of Coreglia. When we got there we heard a band playing. We went down where they were having a dance in there. Steedley wasn't with me then, it was J. D. Flowers and Hill. So I asked the girl to dance and she said 'Si'. I danced and Flowers and Hill danced too. Shortly after then my platoon Sgt. came in. He danced with one of the girls. Shortly after then my platoon leader came in looking for the platoon Sgt. (Sgt. Anderson). After then Steedley and Bradford and Wallace they came in there too. So while we were in there we bought a quart of Vino from a 'peasono'. We drank the Vino about dusk dark, the dance broke up. We left the dance and went back up to a bar. So we bought some Vino there to drink. J. D. Flowers and Hill left us there they were going back into the company. We went to about 3 or 4 houses after they left. So we went to the last house. We went there and knocked on the door and the people opened the door and we went in. Steedley asked the woman about 'Tedeschi'. He talked to her for a while and she got the little light and went upstairs. He (Steedley) was behind her and I was behind him. We went in a little room and there was a bed in there. She was standing with a little light showing him the room and he grabbed her and threw her across the bed. The light fell and went out and the woman started hollering, he said hold her mouth. I went and threw my hand over her mouth I didn't get it down over her mouth and he went to hit her, I caught three licks on my wrist. Whether he hit her, I don't know. He was laying between her legs. I asked him if he had it in? He said, 'Yes'. Upon the bed he did it for a while, she struggled and then they fell off the bed and fell on the floor, so he did it for a while on the floor. Then he told me he was through and he got up. I pulled out my prick and got down on the floor over her and stuck it in her. I did it for a while, then we heard a noise downstairs. Steedley says, 'Come on Willis', then I jumped up and we ran downstairs. On the way downstairs some body hollered, 'Steedley', and he stopped on the stairs and I ran out by him. He caught up with me and we went back to the company" (Ex. B).

Captain Charles G. Carluccio, Division Investigating Officer, interviewed accused Willis "at the house of the victim" at Coreglia. He warned Willis of his rights under Article of War 24, offered no promises, made no threats and in no way coerced Willis, who thereupon signed and swore to a statement

before him. The statement, which was admitted in evidence without objection by the defense (R. 30,31), reads as follows:

"On 21 January 1945 I was with Nathaniel Steedley P.F.C Co G 365 Infantry in Careglia Italy. It was dark and I don't recognize the room or the house. This incident took place approximately 9 o'clock at night. I have already made a statement on 26 January 1945 and this is an additional statement. I was confronted at a home in Coreglia today with Diana Tognarelli a woman in black and she looks like a widow. She took her hair down like the woman who we saw that night. I don't know how long the hair was of the woman who we attacked that night. All I know is that her hair was down at the time we came into her house when Steedley asked for tedeschi. I don't recognize her because it was dark and the woman who I saw today had very long hair but I don't know how long the hair was of the woman we attacked on 21 January 1945. I did not complete the act and took my prick out before finishing because of noise that I heard downstairs" (Ex. C.).

Each accused elected to remain silent and no evidence was introduced by the defense (R. 31).

4. There is thus direct and positive evidence that at the place and time alleged in the Specification, accused Steedley forcibly and without her consent had unlawful sexual intercourse with Diana Tognarelli Servi, the woman named in the Specification. Pretending to be military policemen in search of Germans he and accused Willis forced their way into Signora Servi's home, compelled her to go upstairs with them and there Steedley and Willis threw her on a bed. As she screamed and struggled, Willis held her legs and removed her stockings and drawers, and Steedley got on top of her, put his hand over her mouth and hit her about the face and head. Signora Servi was "almost senseless" from the blows and from her struggles, and she clearly resisted to the extent of her ability. By force Steedley overcame her resistance and without her consent penetrated her person sexually by violence. The testimony of the victim as to the fact of penetration was amply corroborated not only by the medical evidence but also by Steedley's own pre-trial statement. Upon the facts and circumstances disclosed, the court was clearly warranted in finding accused Steedley guilty as charged.

As to accused Willis the evidence also supports the findings of guilty. Although he admitted that he inserted his organ inside her and "did it for a while" Signora Servi testified that he only "attempted to rape" her. However, whether or not Willis penetrated the woman's person, that both accused acted jointly and in pursuance of a common intent is amply shown by the facts and circumstances. It is clear that they were looking for a woman and invaded the victim's home with that intent. Willis's conduct was that of countenancing and rendering active aid and assistance to Steedley in the perpetration of the physical rape. He held the legs of the victim and

removed her stockings and drawers, while Steedley lay on top of her. He admitted that he placed his hand over her mouth. As an aider and abettor, Willis was clearly charged as a principal (MTO 5916, Weir and Farrar; NATO 1925, Cofield et al; NATO 385, Speed et al).

None of the Italian witnesses, including the victim, identified accused as the assailants, except they described the assailants as colored American soldiers. However, it is abundantly clear from the record that in fact Steedley and Willis were the perpetrators of the crime. They were twice observed together earlier in the evening by different members of their organization, both of whom again saw Steedley in the house of the victim. Willis admitted that originally four soldiers went near the house, and that as he and Steedley came down the stairs someone shouted "Steedley", both of which facts were corroborated by witnesses for the prosecution. The circumstances of the assault were similar to those related by each accused and the inference was justified that it was Steedley and Willis who violated Signora Servi. The court properly found each accused guilty of rape as charged.

5. Defense objected to the admission in evidence of the pre-trial statements made by accused to Corporal Hardison, the military police investigator, on the ground that under Article of War 24 the rights of accused should have been explained to them by an officer prior to the making and signing of their statements. There is, of course, no such requirement in Article of War 24. Moreover, the evidence was uncontradicted that an officer had previously advised accused of their rights, and it nowhere appears that the statements were other than voluntarily made. The objection was properly overruled.

6. Each accused in his pre-trial statement made reference to the acts of the other accused in the commission of the crime. These statements were admitted in evidence unconditionally. The court should have been advised not to consider the statements made insofar as they involved the acts of the accused who was not the author of the statement. However, the acts related by each accused in regard to the other were substantially admitted in the statement of the other accused and the Board of Review is of the opinion that the substantial rights of either accused were not injuriously affected thereby.

7. Sergeant Major Sciuto testified, without objection by defense, that as Signora Servi came down the stairs she said "'they have raped me; they have raped me'". This was properly admitted, as a prompt complaint, for the purpose of corroborating the testimony of the prosecutrix relative to the corpus delicti (Bull. JAG, January 1943, par. 395 (22); NATO 910, Hudgins). The testimony of Doctor Borrini that Signora Servi's daughter told him that two colored soldiers had raped her mother was, of course, compounded hearsay and even without objection by the defense should have been excluded. The competent evidence, including each accused's own statement, is so clear and convincing, however, that the wrongful admission of this improper testimony could not possibly have prejudiced their substantial rights (AW 37).

8. The charge sheets show that accused Steedley is 19 years of age

and was inducted 17 November 1943, and that accused Willis is 23 years of age and was inducted 29 October 1942. No prior service is shown as to either accused.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentences. A sentence to death or imprisonment for life is mandatory 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.

Edward V. Koenig, Judge Advocate.

William G. Brown, Judge Advocate.

Henry C. Keenick, Judge Advocate.

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

APO 512, U. S. Army,
10 April 1945.

Board of Review

MTO 6411

UNITED STATES)

v.)

Privates First Class NATHANIEL
STEEDELEY (33 805 685) and
WILLIE J. WILLIS (34 551 748),
both of Company G, 365th
Infantry.

92D INFANTRY DIVISION

Trial by G.C.M., convened at
Rear Echelon, 92d Infantry
Division, 3 March 1945.
As to each: Dishonorable dis-
charge and confinement for life.
U. S. Penitentiary, Lewisburg,
Pennsylvania.

HOLDING by the BOARD OF REVIEW

Sargent, Irion and Remick, Judge Advocates.

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

Elwood Ferguson, Judge Advocate.

John Irion, Judge Advocate.

Henry C. Remick, Judge Advocate.

MTO 6411

1st Ind.

Branch Office of The Judge Advocate General, MTOUSA, APO 512, U. S. Army,
10 April 1945.

TO: Commanding General, MTOUSA, APO 512, U. S. Army.

1. In the case of Privates First Class Nathaniel Steedley (33 805 685) and Willie J. Willis (34 551 748), both of Company G, 365th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of

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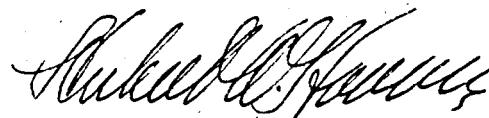
(325)

MT0 6411, 1st Ind.
10 April 1945 (Continued).

trial is legally sufficient to support the sentences, 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 sentences.

2. After publication of the general court-martial order in the case, ten 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:

(MT0 6411).



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

(Sentence as to each accused as commuted ordered executed.
GCMO 59, MT0, 10 Apr 1945)

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