IN A GENERAL COURT-MARTIAL
SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA

UNITED STATES	)	
	)	Defense Motion for
v.	)	Appropriate Relief:
	)	Bill of Particulars
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	12 July 2017
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

RELIEF SOUGHT

The defense requests this Court order the Government to provide a bill of particulars pursuant to RCM 906(b)(6). Oral argument is requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion. RCM 905(c)(2)(A). Proof by a preponderance is required as to factual matters. RCM 905(c)(1).

FACTS

The specification to Charge I (Article 85) alleges:

> In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, on or about 30 June 2009, with the intent to shirk important service and avoid hazardous duty, namely: combat operations in Afghanistan; and guard duty at Observation Post Mest, Paktika Province, Afghanistan; and combat patrol duties in Paktika Province, Afghanistan, quit his place of duty, to wit: Observation Post Mest, located in Paktika Province, Afghanistan, and did remain so absent in desertion until on or about 31 May 2014.

The specification to Charge II (Article 99) alleges:

> In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, at or near Observation Post Mest, Paktika Province, Afghanistan, on or about 30 June 2009, before the enemy, endanger the safety of Obser- vation Post Mest and Task Force

Yukon, which it was his duty to defend, by intentional misconduct in that he left Observation Post Mest alone; and left without authority; and wrongfully caused search and recovery operations.

EVIDENCE AND WITNESSES

The relief sought presents only a legal issue. No evidence or witnesses are required.

LEGAL AUTHORITY

1. Art. 85, UCMJ
2. Art. 99, UCMJ
3. RCM 906(b)(6)
4. MCM ¶ 9.c.(2)(a)
5. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Sep 2014).
6. *United States v. Aldridge,* 8 C.M.R. 130 (1953)
7. *United States v. Perry*, 16 ETO 61 (1945)
8. *United States v. Siglasky*, 19 ETO 369 (1945)
9. *United States v. Skuczas*, 29 ETO 7 (1945)
10. *United States v. Albertson*, 2 C.M.R. 542 (A.B.R. 1952)
11. *United States v. Olsen*, 11 C.M.R. 613 (N.B.R. 1953)
12. *United States v. Barley-Espada*, 12 C.M.R. 358 (A.B.R. 1953)
13. *United States v. Merrow*, 14 C.M.A. 265, 34 C.M.R. 45 (1963)
14. *United States v. Smith*, 18 C.M.A. 46, 39 C.M.R. 46 (1968)
15. *United States v. Gonzales*, 42 M.J. 469 (C.A.A.F. 1995)

ARGUMENT

A. The specification to Charge I does not identify which of the three factual allegations are charged under each theory of culpability.

The Court should order the government to submit a bill of particulars identifying, for each of the three factual allegations, which theory of culpability the government is pursuing. Charge I alleges that SGT Bergdahl intended to "shirk important service and avoid hazardous duty" when he missed three separate duties: (i) combat operations in Afghanistan; (ii) guard duty at Observation Post Mest, Paktika Province, Afghanistan; and (iii) combat patrol duties in Paktika Province, Afghanistan.

The terms "hazardous duty" and "important service" are not interchangeable. *See* United States v. Aldridge 8 C.M.R. 130 (1953) (Article 85 "spells out three very different offenses, to wit: desertion with intent to remain away permanently, desertion with intent to avoid hazardous duty, and desertion with intent to shirk important service -- each involving a separate and distinct specific intent."); *See also* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, instr. 3-9-2,

NOTE 1 (1 Sep 2014) ("The offenses of desertion with intent to avoid hazardous duty and desertion with intent to shirk important service are separate offenses.") With respect to each of the three factual allegations, the defense requests the government indicate whether SGT Bergdahl is being accused of intending to avoid hazardous duty, intending to shirk important service, or both.

B. The terms "combat operations" and "combat patrols" in Charge I are unduly vague, as neither identifies specific operations or patrols.

Two of its three factual allegations refer to "combat operations in Afghanistan" and "combat patrol duties in Paktika Province, Afghanistan". Each is too vague and indefinite as to the operations or duties at issue to allow the accused to prepare for trial.

The Discussion following RCM 906(b)(6) states:

> The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

"Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide." MCM ¶ 9.c.(2)(a). *See also United States v. Merrow*, 14 C.M.A. 265, 267, 34 C.M.R. 45, 47 (1963) (finding that surrounding circumstances may endow an otherwise everyday duty with the "critical quality" that makes it important under Article 85); *United States v. Gonzales*, 42 M.J. 469, 472 (C.A.A.F. 1995) (whether service is important is an "objective question of fact dependent on evidence of circumstances surrounding the service to be performed"); *United States v. Olsen*, 11 C.M.R. 613, 616 (N.B.R. 1953) ("Without a showing of a particular hazardous duty or a showing that the accused knew that such duty was imminent, an inference that the accused intended to avoid hazardous duty is based on speculation, conjecture, and suspicion.").

The term "combat operations" is both vague and overbroad. While typically thought of as hostile engagements with the enemy, we cannot tell from the specification what specific operations the Government alleges. More specificity is required because not all duties in a designated combat theater are important or hazardous. *See United States v. Smith*, 18 C.M.A. 46, 39 C.M.R. 46 (1968) (assignment to Saigon during Vietnam conflict not sufficient); *United States v. Skuczas*, 29 ETO 7 (1945) (assignment to infantry company during war, without specific facts as to how far the accused was from enemy fire and what other hazards may have existed, *held*, not sufficient to sustain conviction).

Whether the duties were to occur immediately or imminently is also critical to the determination of whether a duty is important or hazardous within the meaning of Article 85. *See United States v. Perry*, 16 ETO 61 (1945) (overturning AW 58 conviction where the accused left his unit while they were "reorganizing and preparing" to go back to the front lines because knowledge that they would "eventually" go back into combat was insufficient to prove knowledge of imminent hazardous duty); *United States v. Siglasky*, 19 ETO 369 (1945) (evidence that the accused's battalion had been engaged in combat with the enemy in the weeks immediately preceding his unauthorized absence – but no evidence of "combat at the time the absence commenced, or that combat was then reasonably imminent and accused aware of its imminence, and no evidence of the activity or tactical situation of his unit at that specific time" – *held*, legally insufficient). Without alleging the specific combat operations the accused allegedly shirked or avoided, the factfinder cannot properly analyze whether such operations were immediate or imminent within the meaning of Article 85.

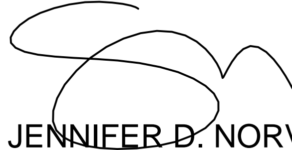
Likewise, the term "combat patrols" requires greater specificity. To analyze whether such patrols were hazardous or important, the factfinder must know: (i) when the patrol was scheduled to assemble and set out; (ii) the geographic area in which the patrol was to occur; (iii) the mission of the particular patrol; and (iv) the tactical relationship of the enemy to the patrol. *United States v. Albertson*, 2 C.M.R. 542 (A.B.R. 1952) (whether patrols were hazardous turned on whether they involved "actual contact with the enemy"); *United States v. Barley-Espada*, 12 C.M.R. 358 (A.B.R. 1953) (patrol was hazardous duty where mission was to "encounter and destroy the enemy if discovered" and the unit on patrol actually pushed through the main line of resistance); *see also Perry*, *supra*; *Siglasky*, *supra.*

C. The reference to Task Force Yukon in the specification to Charge II is unduly vague.

The Court should order the government to submit a bill of particulars because the reference to "Task Force Yukon" in the specification to Charge II is too vague and indefinite to allow SGT Bergdahl to prepare for trial. The offense requires the government prove, *inter alia*, that his alleged absence (i) "endangered the safety of Observation Post Mest and Task Force Yukon"; and (ii) that SGT Bergdahl had a duty to defend Observation Post Mest and Task Force Yukon. The term "Observation Post Mest", a set location with boundaries identifiable on a map, is not problematic. Task Force Yukon, in contrast, was a "brigade-plus sized element," Art. 32 Tr. 21, ll. 1-6, with personnel spread across several locations. The factfinder must know whether the government alleges that SGT Bergdahl endangered all of Task Force Yukon, regardless of location, or only certain elements of that Task Force.

CONCLUSION

The Court should require the government to provide a bill of particulars responsive to the requests in this motion.



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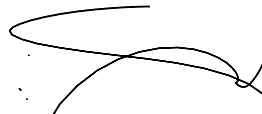
I certify that I caused a true copy of the above to be served on the Trial Counsel on 12 July 2017.



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Branch Office of The Judge Advocate General
with the
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APO 887

BOARD OF REVIEW NO. 1

5 FEB 1945

CM ETO 5958

UNITED STATES v. Privates WILLIAM O. PERRY (14082411) and ROBERT ALLEN (18043470), both of Company A, 603d Tank Destroyer Battalion (Special)	)	6TH ARMORED DIVISION Trial by GCM, convened at Lixing Les St. Avold, Moselle, France, 13 December 1944. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for 40 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

2. Accused were charged separately and tried together with their consent.

Accused Perry was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that William O. Perry, Company A, 603d Tank Destroyer Battalion (SP), did, at Lorris, Loiret, France, on or about 16 September 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: active combat duty against the enemy, and did remain absent in desertion until he surrendered himself at Nancy, Meurthe et Moselle, France, on or about 29 October 1944.

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CONFIDENTIAL

Accused Allen was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Robert Allen, Company A, 603d Tank Destroyer Battalion (SP), did, at Lorris, Loiret, France, on or about 16 September 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: active combat duty against the enemy, and did remain absent in desertion until he surrendered himself at Nancy, Meurthe et Moselle, France, on or about 29 October 1944.

Each accused pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification preferred against him. Evidence was introduced of one previous conviction of accused Perry by special court-martial for disobedience of a noncommissioned officer and willfully destroying three window panes of the value of $2.25 in violation of Articles of War 65 and 96, respectively. No evidence of previous convictions of accused Allen was introduced. Three-fourths of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused, approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 40 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

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

About 13 or 14 September 1944, Company A, 603d Tank Destroyer Battalion, arrived in the vicinity of Lorris, Department of Loiret, France, from Brest (R9,15,19). In the Lorris area, according to the testimony of First Lieutenant Clayton M. Taylor, platoon leader of the first platoon, "we were more or less reorganizing and waiting for the rest of the Division

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before moving to the Nancy area" (R9) and the platoon's activities consisted principally of "maintenance and getting equipment together, cleaning clothes, cleaning up personnel, and so forth" (R9-10). Sergeant Ralph B. Utz, security sergeant of the first platoon, testified that both accused came to his security section "the day [15 September] before they left"; Allen was in the platoon prior to that time, was wounded and hospitalized and Perry was transferred from Headquarters Company (R12,15-16). Witness did not assign them any duties but members of his section were cleaning their equipment "to get ready in case we would move out. It was a rest period" (R15). According to the testimony of the first sergeant of Company A, the men were lying around the camp "waiting to move up front" (R11).

With respect to contemplated future action and knowledge thereof by accused, Taylor testified

> "We all knew at that time and [sic] as soon as the Battalion and the rest of the Division arrived we were going to move up into the Nancy area for future operations. * * * Every member knew that when we left Brest that our future operations would be towards Nancy with the Third Army".

The usual procedure in the company was that the platoon leader would give information as to contemplated action to noncommissioned officers who in turn would pass it on to members of their units. Taylor did not personally ask the men whether or not they knew where they were going

> "because we did not have too much information ourselves. We knew that after reorganizing that we were going to move into this general Nancy area with the Third Army but as far as to what we were going to do after hitting there, we did not know" (R9).

The first sergeant testified that the men "knew they were going up to the front and were just waiting for orders to move up to the front"; they did not know, however, the exact area to which they were to move, "but the company commander knew in what direction". He did not believe that the company commander informed him where he thought they were going (R11). Utz testified that neither on the 16th nor the 17th of September did he know where they were going to move. They were there "just on a rest period to reorganize" (R14). "They never told us any length of time that we would

be there" (R15), but "We knew that we would move some time or other", and he "presumed" that all members of his section knew this before accuseds' departure on the 16th. "We all knew that we wouldn't stay there all the time". They all knew they were "either in there for that [reorganizing to prepare for another attack] or for a rest" (R14). Around 16 September, witness did not know what was going to happen next (R15). The platoon sergeant of accuseds' platoon testified that about that time he did not know even approximately in what direction or at what time they were going to move (R18-19). On the day after arrival in the area (14 or 15 September) instructions were passed down from the company commander through platoon leaders and noncommissioned officers to the men, including both accused, that they were to work on maintenance of vehicles and on trucks - "More or less re-equip for another drive" (R19).

Utz testified that when the unit moved into the Lorris area he was instructed that when men wished to go "any place" they were required to advise witness or request permission from the platoon sergeant, first sergeant or platoon leader (R13). Witness did not know the reason for this - "They were my orders" (R15). The first sergeant testified that passes were not issued at that time, but that men were absenting themselves from the area for the purpose of visiting friends in other companies "around there" (R11).

On the afternoon of 16 September Utz, according to his testimony, was in charge of a truck which took men to the shower point. When they returned to the area both accused were missing. Utz searched for them and reported their absence to the platoon sergeant (R12,17), who also searched for them without success and passed the report on to the platoon leader (R9) and first sergeant (R17). The latter with Utz made a further unsuccessful search of the area for accused and reported their absence to the company commander (R10). Neither Utz nor the platoon sergeant gave accused permission to leave (R13,17). Neither accused took his bedroll or musette bag with him (R13,14,17). The other equipment in possession of members of the unit consisted of guns, clips, belts, canteens and first aid packs (R14). They were also required to wear leggings and helmets and to carry arms (R19). The hair of each accused was brown when they left but during their absence was dyed and was black when they returned (R13,16,18). Utz testified that accused were never present with their section between 16 September and 29 October and that he never knew where they were or received any information concerning them during that period (R16).

The first instructions with respect to further movement of the unit were received about 1930 hours 19 September (R12,13-14,17,18). In accordance with usual procedure the noncommissioned officers and gun commanders were called together and instructed to "load up" in order to move at midnight, at which time the battalion did in fact leave the area (R13-14,18). According to Utz' testimony, when they moved out they knew they were going into battle, but he was not instructed as to their destination (R13).

4. After accuseds' rights were explained to them, defense counsel announced their election that accused Perry should testify on behalf of both accused and that accused Allen should remain silent (R21). Perry testified that the reasnn they left the company area on 16 September was as follows:

> "Allen and I were confined in the Replacement Depot Hospital and we wanted to have a little fun. We had some money and we went into Montargis [ten or 11 miles away (R27)] to have a good time" (R22).

They took helmet liners and leggings but not a razor. During the time they were in Montargis they were drinking but always conscious that they were absent without leave. They left Montargis the 18th, spent the night with girls, returned to the bivouac area the morning of the 19th and discovered that their battalion had departed. They thereupon returned to Montargis where they remained two days "trying to locate ourselves and see what to do. We figured if we could catch the Unit and rejoin it it would be so much better for us".

Witness recounted their efforts to rejoin their unit, during the course of which they made numerous inquiries as to its location. They went to Sens where they stayed for nine days, Fontainebleau (Perry only (R30)), Troyes (three days) (R22,27), Chaumont (three days), St. Dizier, Reims, Chalons, Dijon, Troyes again, and Chaumont again (three days). "About this time we were getting pretty worried as the time was running up". Accordingly they proceeded to Reims where a lieutenant who arranged to take them to their unit failed to appear at the agreed time. Thence they journeyed to Verdun (two or three days) and Nancy where they arrived about 1230 or 1300 (29 October) and surrendered to the military police who turned them over to their (accuseds') battalion (R23). They intended to join their unit (R24). They did not tell the military police in Montargis or Troyes that they were absent without leave because "we wanted to rejoin the unit on our own accord" and "just had it in our minds that we could catch the outfit" (R26,27).

The Articles of War were last read to accused Perry before he left the United States and he did not know the punishment for absence without leave (R26). En route they obtained no evidence from anyone to support their story (R28). When they first left they had about 50 or 60 dollars in francs and when they surrendered they had about 30 francs. They occasionally visited cafes and visited girls during the evenings (R29). They did not visit Paris (R30).

Without objection by the prosecution, the defense introduced in evidence a letter dated 5 October 1944, from Headquarters 603rd Tank Destroyer Battalion (SP) signed by the adjutant for the commanding officer, to The Adjutant General, subject: "Action Against Enemy, Reports After", reading in part as follows (R31; Ex.1):

> "12 - 14 September. Unit moved to Lorris, France (15 miles E of Orleans) via Kerroual and La Fleche. No contact with enemy.
>
> 14 September. Company 'A' reverted to Battalion Control at Lorris.
>
> 15 - 18 September. Remained in vicinity at Lorris. No contact with enemy.
>
> 19 September. Entire unit moved to Colombey-les-Belles (10 miles NE of Neufchateau.) No contact with the enemy.
>
> 20 - 21 September. Remained in vicinity of Colomby. No contact with the enemy".

5. The question presented is whether the evidence in the record is legally sufficient to establish each of the four elements of the offense charged against each accused, namely:

(a) that accused absented himself without leave as alleged;
(b) that his unit was under orders or anticipated orders involving hazardous duty;
(c) that notice of such orders and of imminent hazardous duty was actually brought home to him; and
(d) that at the time he absented himself he entertained the specific intent to avoid hazardous duty (CM ETO 5555, <u>Slovik</u>, and authorities therein cited; CM ETO 5565, <u>Fendorak</u>).

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(a) That accused absented themselves without authority from their organization at the time and place alleged in the specifications and that their absence continued until terminated at the time and place and in the manner therein alleged was amply proved by the testimony of the sergeant in charge of their section, their platoon sergeant, the first sergeant of Company A and the testimony of accused Perry on behalf of both accused. The fact that Perry testified at his own request made him a competent witness for and against both himself and accused Allen, even apart from defense counsel's statement (R21) to the effect that both accused elected to have Perry testify on their behalf (CM ETO 2297, Johnson and Loper, and authorities therein cited).

(b) Several days before accused absented themselves, their tank destroyer unit, in the course of its movement towards the enemy, arrived from Brest at the Lorris area where it reorganized, repaired and cleaned its equipment and awaited the arrival of the remainder of the division. Although this was a rest period, the platoon leader of accuseds' platoon testified that their "future operations would be towards Nancy with the Third Army", the first sergeant of accuseds' company testified that they were awaiting orders to move up to the front and their section sergeant testified that "another drive" was contemplated. The battalion did in fact leave the area on 19 September, three days after accused left, and moved to Colombey-les-Belles, about 20 miles southwest of Nancy. It may reasonably be inferred from this evidence that the unit was under anticipated orders involving active combat duty against the enemy.

(c) There was testimony of a general character that every member of the unit knew that "future operations would be towards Nancy with the Third Army" and that they "were going to the front" at some time in the future. There was not the slightest evidence, however, that any officer or enlisted man in the unit knew when or exactly where the unit was to move. In fact, the platoon leader testified "we did not have too much information ourselves" and the first sergeant testified he did not know where the unit was going to move. The section sergeant's testimony is eloquent on the lack of knowledge of the enlisted personnel: On 16 and 17 September he did not know when the move was coming; the men were not told how long they would remain in the area, but knew that they would move "some time or other"; on 16 September he did not know what was going to happen next. The platoon sergeant was ignorant as to even the approximate time or direction of the future movement. During the rest period men were permitted to absent themselves from the area for the purpose of visiting friends in neighboring units.

The foregoing evidence demonstrates that the prosecution failed in the proof of the vital element of its case that notice of the anticipated orders involving the hazardous duty of active combat with the enemy was brought home to accused. It also failed to prove that such duty was imminent at the time accused departed without authority. Even proof that their unit had been notified of imminent prospective movement does not suffice as to this element in the absence of proof that accused were actually notified thereof (CM ETO 455, Nigg; CM ETO 1921, King, and authorities therein cited); but the instant case also lacks the element of imminence. It is clear that proof or inference of accuseds' knowledge that their unit would eventually move forward in hazardous operations is insufficient (Ibid.).

(d) On the question of accuseds' intent, the following language of the Board of Review in CM ETO 2481, Newton, is significant:

> "The record does not indicate any preparation for forward movements which put the accused on notice that it was imminent and the time of such movements remained indefinite and uncertain. The relevancy of these facts cannot be ignored in searching for accused's intent".

The lack of proof that the accused knew when his unit would leave, even though he knew that he was absent without authority, was one of the elements which led the Board both in CM ETO 564, Neville, and in CM ETO 2432, Durie, to conclude that there was a failure of proof that the accused in those cases intended to avoid hazardous duty (See also CM ETO 2481, Newton). As the Board said in CM ETO 1921, King,

> "the record lacks competent substantial evidence that accused when he absented himself had reason to believe his organization was about to engage in hazardous duty and could therefore have intended to avoid such duty" (Underscoring supplied).

The Board particularly notes its recent holdings in "battle line" and similar cases: CM ETO 5565, Fendorak; CM ETO 5555 Slovik; CM ETO 5393, Leach; CM ETO 5293, Killen; CM ETO 5291, Piantedosi; CM ETO 5287, Pemberton; CM ETO 5117, DeFrank; CM ETO 4988, Fulton; CM ETO 4987, Brucker;

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CM ETO 4743, Gotschall; CM ETO 4490, Brothers; CM ETO 4165, Fecica; CM ETO 3641, Roth; CM ETO 3473, Ayllon; and CM ETO 3380, Silberschmidt. (See also earlier cases cited in CM ETO 2481, Newton, p.9). In those cases the units of the accused involved were actually engaged in combat or in highly important tactical missions either at or shortly after the commencement of his unauthorized absence. The Board of Review is unwilling to hold that there is enough similarity between the facts of such cases and those of the present case to warrant the conclusion that the former are here controlling. There is no evidence as to how long after accuseds' departure, Company A came into contact with the enemy. Evidence that their unit landed on the continent of Europe, proceeded inland some 400 miles, and was expected at some indefinite future time to move forward to a place where it would eventually engage in tactical operations against the enemy is not, in the Board's opinion, per se probative of an intent on their part, concurrent with their absenting themselves without authority, to avoid the hazardous duty of active combat duty against the enemy.

As indicated, however, the evidence clearly establishes accuseds' absence without leave for the period and under the circumstances alleged, but without the alleged intent to avoid hazardous duty.

The staff judge advocate in his review states:

> "It is assumed * * * that at the * * * beginning of the period of absence without leave of these accused, they may not have entertained any intent other than to seek a period of unauthorized recreation for a few days and then to rejoin the unit. * * *. In my opinion the evidence is sufficient to prove beyond a reasonable doubt that, during the course of the period of absence, these accused conceived, entertained and acted upon the positive mental intent to continue the period of their absence without leave for the specific purpose of avoiding combat duty" (p.4,5).

Article of War 58 provides punishment for desertion generally whereas Article of War 28 merely provides in effect that when the offender does certain acts he will be deemed, a deserter (CM ETO 3118, Prophet). The last paragraph of the latter article provides:

> "Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter" (Underscoring supplied).

The Manual for Courts-Martial, 1921, recognizing the possibility that an absentee might for the first time entertain the intent not to return to the military service after the inception of his unauthorized absence, provided that such a state of facts would constitute desertion (MCM, 1921, par.409, p.344), but did not apply the principle to the quoted portion of Article of War 28, whose provisions were unambiguous to the effect that the intent to avoid hazardous duty or shirk important service must concur in point of time with the quitting of accused's organization or place of duty. Nevertheless, the following provision appears in Manual for Courts-Martial, 1928, as one of the elements of proof of desertion:

> "that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place, or to avoid hazardous duty, or to shirk important service as alleged" (MCM, 1928, par. 130a, p.143) (Underscoring supplied).

To the extent that this provision attempts to extend or amplify the unambiguous provisions of Article of War 28 it is unauthorized administrative legislation. It is hardly necessary to rely upon the principle of strict construction of penal statutes to reach this conclusion. Well established principles governing the elements of the offense of desertion under Article of War 28 indicate that the requisite intent must be entertained by the absentee at the time he quits his organization or place of duty in order to be guilty of a violation of that Article (MCM, 1921, par.409, pp.343-345; CM 223300, Manashian, 13 BR 363; CM 227459, Wicklund, 15 BR 299; CM 230826, McGrath, 18 BR 53; CM 231163, Sinclair, 18 BR 153; CM ETO 2368, Lybrand; and authorities cited in those cases). It is noted further that the Specification alleges the intent to avoid hazardous duty as concurring with accuseds' absenting themselves without leave from their organization.

6. Accuseds' unauthorized absence continued for almost a month and a half, during which time they failed to surrender to military police, dyed their hair black, travelled extensively for the alleged purpose of finding their unit, visited cafes and enjoyed the company of young women. Such evidence would have supported the inference that, when they absented themselves without authority or at some time during their unauthorized absence,

they entertained the specific intent not to return to the military service. If the Specification had charged desertion generally without alleging any specific intent whatever, following the model specification appearing on page 238, MCM, 1928, App.4, the evidence would have supported the findings of guilty, the prosecution being free, in the absence of a direct attack upon the Specification because of its vagueness or indefiniteness, to prove absence without leave accompanied by any or all of the specific intents (1) not to return, (2) to avoid hazardous duty or (3) to shirk important service (CM 245568 (1943), Clancy, Bull.JAG, April 1944, Vol.III, No. 4, sec.416(14), p.142, 29 B.R. 215; CM ETO 5117, DeFrank). The evidence in the instant case shows the existence of the first intent but, as above shown, not of the other two. Although desertion may properly be charged without an allegation of specific intent, nevertheless when a certain specific intent is alleged it must be proved (CM 224765, Butler, Bull. JAG, Nov. 1942, Vol.I, No.6, sec.385, pp.322-323, 14 B.R. 179; CM 231163, Sinclair, Bull. JAG, April 1943, Vol.II, No.4, sed. 385, pp.139-140, 18 B.R. 153). The following language from the Butler case is peculiarly applicable here:

> "When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase '* * * in order to avoid hazardous duty * * *', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved".

The necessity for holding the record of trial herein legally insufficient to support the findings of guilty of desertion would have been avoided had the Specification charged desertion generally without alleging any specific intent. Where the expected evidence indicates the likelihood that accused entertained more than one of the mentioned intents or raises doubt as to which of them he entertained, the specification should allege desertion generally without limitation to only one specific intent, particularly when the absence is prolonged.

7. (a) The record shows (R3) that the trial took place only three days after the charges were served on accused. Defense counsel, after consulting both accused, announced that

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they consented to trial at that time. In the absence of indication of prejudice to any of accuseds' substantial rights, the irregularity may be regarded as harmless (CM ETO 4443, Dick; and cases cited in CM ETO 4564, Woods, Jr.).

(b) At the conclusion of Perry's testimony on behalf of both accused, the law member advised Allen that he could still make a sworn statement in his behalf. The following colloquy ensued:

> "Defense (After consulting with Private Allen): Private Allen elects to make a sworn statement in one connection that has not been brought out in Perry's statement.
>
> Law Member: If Private Allen takes the witness stand and makes a sworn statement he can be questioned on anything that is in the Specification.
>
> Defense (after consulting with Private Allen): The accused elects to remain silent" (R30).

The Manual for Courts-Martial, 1928, provides as follows:

> "An accused person taking the stand as a witness becomes subject to cross-examination like any other witness. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses. When the accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination" (par.121b, p.127).

The foregoing language is unambiguous and the ruling of the law member in accordance therewith was proper.

8. The charge sheets show that accused Perry is 22 years nine months of age and enlisted 2 July 1942, at Camp Blanding, Florida. Accused Allen is 21 years ten months of

age and enlisted 25 July 1941, at Houston, Texas, to serve for three years. Allen's service period is governed by the Service Extension Act of 1941. Neither accused had prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that as to each accused the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification against him as involves findings that he did at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until he surrendered himself at the time and place alleged in violation of Article of War 61, and legally sufficient to support the sentence.

10. Penitentiary confinement is not authorized by Article of War 42 for the offense of absence without leave (CM ETO 2432, Durie; CM ETO 2481, Newton; CM ETO 3234, Gray). Confinement should accordingly be in a place other than a penitentiary, Federal correctional institution or reformatory (Ibid.).

B. Franklin Riter Judge Advocate

Malcolm C. Sherman Judge Advocate

Edward L. Stevens Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 FEB 1945 TO: Commanding General, 6th Armored Division, APO 256, U.S. Army.

1. In the case of Privates WILLIAM O. PERRY (14082411) and ROBERT ALLEN (18043470), both of Company A, 603rd Tank Destroyer Battalion (Special), attention is invited to the foregoing holding by the Board of Review that as to each accused the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that he did, at the time and place alleged absent himself without leave from his organization and remained absent without leave until he surrendered himself at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. For the reasons stated in the holding, the designated place of confinement of each accused should be changed to a place other than a penitentiary, Federal correctional institution or reformatory.

3. In view of the reduction of the grade of the offense of each accused, I believe there should be a substantial reduction in the period of confinement. The average period of confinement imposed for absence from actual combat on conviction under the 75th or 58-28th Article of War is considerably less. Accuseds' offense is less serious. There is evidence of only one previous conviction of accused Perry and none as to accused Allen. I do not believe that these accused should be separated from military service and freed from the hazards and dangers of combat by incarceration until all possibilities of salvaging their value as soldiers have been exhaused. The government should preserve its right to use their services in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend in the case of each accused the designation of an appropriate disciplinary training center as the place of confinement for the reduced period with suspension of the execution of the dishonorable discharge until the soldiers' releases from confinement. In the event that you are in accord with this recommendation, supplemental actions should be forwarded to this office for attachment to the record of trial.

4. Attention is invited to paragraph 6 of the Board's holding, in which I concur. In cases where the expected evidence indicates absence without leave accompanied by several specific intents or raises doubt as to which specific intent was entertained by the absentee, the specification should allege desertion generally without being limited to only one specific intent, particularly when

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the absence is prolonged as in this case. Absence without leave, always the most common military offense, still exists even in a combat area. In order to convict of desertion, the specific intent required must be proved. It is not enough to prove only that accused was absent and that his organization participated in battle while he was gone, although in this case the latter fact was not shown by the evidence.

When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 5958. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 5958).

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

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

BOARD OF REVIEW NO. 1

14 JUL 1945

CM ETO 8649

UNITED STATES	)	80TH INFANTRY DIVISION
v.	)	Trial by GCM, convened at APO 80, U. S. Army, 3 March 1945.
Private FRED E. SIGLASKY (36785057), Company A, 317th Infantry	)	Sentence (Suspended): Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years.

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

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings in part. The record of trial 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 said Branch Office.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Fred E. Siglasky, Company "A", 317th Infantry, did, in the vicinity of Erscherange, Luxembourg, on or about 24 January 1945 desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty with intent to avoid hazardous duty, to-wit: participation in operations against an enemy of the United States, and did remain absent in desertion until he surrendered himself at or near Diekirch, Luxembourg, on or about 5 February 1945.

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

All of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentence but suspended its execution.

The proceedings were published by General Court-Martial Orders Number 69, Headquarters 80th Infantry Division, U. S. Army, 9 March 1945.

3. The only witness for the prosecution, the first sergeant of Headquarters Company, 1st Battalion, 317th Infantry, testified that accused was a member of Company A, 317th Infantry (R6). Between about 15 January and 15 February 1945, the battalion was "attacking and holding offensive positions against the Germans". In January they were northeast of Feulen, Luxembourg, and in the latter part of that month they were in Wiltz, Luxembourg. During the first two weeks of February they were "back in Medernach for a rest - I believe it was for one week - and Diekirch for one week" (R7). On 24 January, accused, who was on duty as a "PW chaser" for witness' company, was reported missing. The battalion was then located near Wiltz. Witness and others checked the area but were unable to find him, so witness

> "called Company A for the man on special duty with Headquarters Company - they picked him up on the morning report there" (R7).

Witness did not see accused again until the time of the trial (R7).

Morning reports of Company A were admitted in evidence, without objection by the defense, showing accused absent without leave from his organization at Erscherange, Luxembourg, from 24 January 1945 (Pros. Exs. A,B) until his return to duty at Diekirch, Luxembourg, 5 February 1945 (Pros. Ex. C), where the battalion was then located (R7-8).

4. After an explanation of his rights, accused elected to make an unsworn statement through counsel (R8), as follows:

> "I was sent to the 101st Evacuation Hospital on 17 December 1945. While there I was X-rayed and spots were found on my lung. However, the medical officer told me that they would disappear providing I had a rest. My mother has been troubled with tuberculosis for many years. As I was given no rest and because of the condition of my mother and the results of the X-ray, it has caused me considerable worry" (R9).

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5. The testimony of the first sergeant and the morning reports referred to above establish accused's absence without leave from 24 January to 5 February 1945. With respect to the intent entertained by him at the inception of his unauthorized absence, the record shows merely that between 15 January and 15 February his battalion was engaged with the enemy in Luxembourg, that for two weeks during the first half of February it enjoyed a rest period at Medernach and Diekirch and that prior to the time accused left (24 January 1945) he was on duty as a "PW chaser". Such evidence is legally insufficient to establish that accused absented himself with the intent to avoid hazardous duty. The Board of Review has repeatedly held that where, as here, there is no evidence that accused's unit was in combat at the time the absence commenced, or that combat was then reasonably imminent and accused aware of its imminence, and no evidence of the activity or tactical situation of his unit at that specific time, there is no proof of an intent to avoid hazardous duty (CM ETO 8147, Pierce, and authorities therein cited).

The Staff Judge Advocate in his comment on the evidence states:

> "As a matter of fact the company entered combat before accused joined it 25 August 1944 and continued in contact with the enemy until the present date. There is nothing in the record to disclose that the company would not continue in contact with the enemy until the close of present hostilities. From the evidence introduced, establishing an unexplained, unauthorized absence of 12 days during a period when the unit to which the accused belonged was in active combat with the enemy, the court could and very properly did infer as matter of fact, an intention on the part of the accused to avoid hazardous duty.
>
> The accused's duties, on the particular day he left, were those of Prisoner of War chaser with a battalion headquarters company. This is in itself a hazardous occupation. Operating at less than 500 yards from the actual rifle-firing infantrymen, he must advance and relieve the company PW chasers of their burden and guard the PWs to a collecting point from which they are evacuated to the rear. A reasonable man would certainly believe that this was a hazardous occupation, since it is carried on within easy range of automatic weapons-rifle fire and hostile mortars, to say nothing of rockets and light artillery".

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Had the prosecution properly introduced evidence of the additional facts set forth by the Staff Judge Advocate, and of accused's participation in such hazards of battle at the time of departure, the record would have been legally sufficient to sustain the findings of guilty as charged. But the court could not, nor may the Board of Review on appellate review, take judicial notice of these matters for they are not matters of common and general knowledge to the military establishment (CM ETO 8358, Lape and Corderman, and authorities therein cited). The Board of Review in the last cited case thus analyzed the scope of its judicial notice in a similar case:

> "The Board of Review will take judicial notice that the date of 12 January 1945 was during the closing stages of the great German winter offensive and that there were near that time heavy battles in Luxembourg. Judicial notice will not be taken as to the exact location of enemy troops, their precise movement, nor of the amount, kind and proximity of enemy fire in the vicinity of Niederfeulen, on that date. Such matters are not of common or general knowledge to the world at large, nor to the military establishment, but must have then been learned by presence on the field of battle or from classified communications. They can now be determined only from secret reports. Such knowledge is not common and general, and judicial notice thereof would be improper (CM ETO 6226, Ealy; as to military matters of which such notice may be taken, see CM ETO 7413, Gogol; CM ETO 6637, Pittala)".

There was thus nothing in the evidence to afford a reasonable basis for the inference of the alleged intent. The record, however, is legally sufficient to support the findings of guilty to the extent they find accused guilty of absence without leave.

6. As in the Lape case, supra, tried by the same division as the instant case, the Board of Review views with misgivings the inadequate preparation and conduct of the proceedings in this very serious capital case. The investigating officer reported that he had secured no statements of witnesses (only one six-line statement by the first sergeant who testified at the trial appears in the accompanying papers); the same officer stated that no explanatory or extenuating circumstances were developed; the advice of the Staff Judge Advocate consists of a mimeographed form; a first lieutenant sat as law member of the court; the testimony of the sole witness was reported on two pages; the defense asked him not a single question and offered no evidence upon the issues; the record does not reveal that either the prosecution or defense addressed

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an argument to the court; and the review of the Staff Judge Advocate, as above indicated, is based largely upon facts not in evidence and is most cursory in its treatment of the issues in the case. The following comments of the Board of Review in the Lape case, supra, are appropriate and are reaffirmed:

> "In view of the magnitude of the offenses charged, and the Anglo-Saxon tradition of a fair and full trial, it is thought that the Board of Review can state with propriety that these proceedings are not conducive to the appropriate contribution of justice to discipline in the Army, or defensible under public scrutiny".

7. The record shows (R2) that the trial was held only three days after the charges were served on accused. In view of his express consent to trial at that time (R6) and in the absence of indication of injury to his substantial rights, the error if any was harmless (CM ETO 8083, Cubley, and authorities therein cited).

8. The charge sheet shows that accused is 24 years four months of age and was inducted 7 January 1944 at Chicago, Illinois, to serve for the duration of the war plus six months. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave from 24 January 1945 to 5 February 1945 and legally sufficient to support the sentence.

[signature] Judge Advocate

Wm F. Burrow Judge Advocate

Edward L. Stevens Judge Advocate

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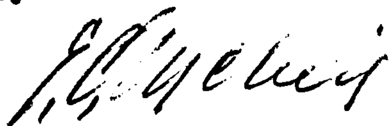
1st Ind.

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

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by the Act of 1 August 1942 (56 Stat.732; 10 U.S.C. 1522), is the record of trial in the case of Private FRED E. SIGLASKY (36785057), Company A, 317th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings of guilty so vacated, viz: conviction of desertion in time of war, be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.



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

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate general. GCMO 313, ETO, 4 Aug 1945.)

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

BOARD OF REVIEW NO. 1 22 SEP 1945

CM ETO 15223

UNITED STATES	5TH INFANTRY DIVISION
v.	Trial by GCM, convened at Deggendorf, Germany, 9 June 1945. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for 15 years. Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France.
Private JOHN SKUCZAS (33490813), Company E, 10th Infantry	

OPINION by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings in part. The record of trial 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 said Branch Office.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John Skuczas, Company E, 10th Infantry did, near Bastendorf, Luxembourg on or about 21 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: combat against the enemy, and did remain absent in desertion until he was returned to his organization on or about 16 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 13 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become

due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentence but reduced the period of confinement to 15 years and as thus modified ordered the sentence duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement. The proceedings were published in General Court Martial Orders No. 165, Headquarters 5th Infantry Division, APO 5, U. S. Army, 12 July 1945.

3. On 20 January 1945 accused, having been assigned to Company E, 10th Infantry, reported with replacements and men being returned to duty to the company rear command post (R4,8). He spent the night there and was seen in the vicinity the next morning at 0700 hours (R5,9). Shortly thereafter when the truck left for the forward positions, he was absent and could not be found by search (R9). On 21 January the forward echelon of the company "had just completed an attack and was occupying a sector of the front line". The tactical command post was three or four miles north of Bastendorf, Luxembourg (R4). Accused was not seen in the company again during the period alleged (R4-5). Extract copies of competent morning reports showed absence without leave from 21 January to 16 February (R11;Pros.Ex.A).

4. Accused, after the defense counsel stated that his rights as a witness had been explained to him, elected to remain silent and no evidence was introduced in his behalf (R11).

5. The difficulty with this case is that there was no showing of existing hazards at the place where accused absented himself, or of hazards then impending of which he must have known. The location of the rear command post was not shown, and the record is silent as to whether it was far removed from enemy fire or well within its range. Under operational tactics in this war, it could have been near or far from the enemy, dependent upon the situation. As to impending hazards, accused was not proven to have been told what his assignment would be, or of any combat, or where the company was. He had just been returned to the company with other replacements. The proof that the company "had just completed" an attack, was no proof that there were, after he reached the trains, signs and sounds of battle from which he must have known of its existence and progress. Exact locations of our own and enemy troops, and the amount, kind and proximity of enemy fire, would have been proper evidence. Unless we are willing to hold that assignment in any capacity to an infantry company during war is hazardous duty, and all who leave it without permission, are guilty of the cowardly offense of desertion, the case must fall. We cannot hold that proof should be so lax. The Board of Review will take judicial notice of well known historical facts, such as D-day, the battle of the Bulge and the Rhine crossing, but it cannot take notice of the day to day location and operations of companies and divisions. It

is therefore our opinion that the evidence is legally sufficient only to support conviction of absence without leave in violation of Article of War 61 (CM ETO 8358, Lape and Corderman; CM ETO 8649, Siglaski). This case is of the exact pattern of CM ETO 7532, Ramirez wherein there was no evidence of circumstances under which accused absented himself from which it could be inferred that he knew his company was exposed to the hazards of battle and that his absence was motivated by a desire to avoid them. The holdings in CM ETO 6637, Pittala, CM ETO 7032, Barker and CM ETO 8955, Mendoza are the antithesis of this and the Ramirez case. In those cases the knowledge of the several accused as to the tactical situation was clearly inferable from the evidence.

6. The charge sheet shows that the accused is 20 years 11 months of age and was inducted 10 February 1943 at Allentown, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave for the period alleged in violation of Article of War 61 and the sentence.

8. The designation of the Delta Disciplinary Training Center, Les Milles, Bouche du Rhone, France, as the place of confinement is proper (Ltr., Hq. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug. 1945).

Wm. F. Burrow, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

Donald K. Carroll, Judge Advocate

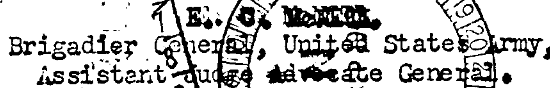
1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater 22 SEP 1945 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by Act 20 August 1937 (50 Stat. 724; 10 USC 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 USC 1522), is the record of trial in the case of Private JOHN SKUCZAS, (33490813), Company E, 10th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings of guilty so vacated, viz: conviction of desertion in time of war, be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.



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

(Findings of guilty of Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, vacated. GCMO 501, USFET, 23 Oct 1945).

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