

DEPARTMENT OF THE ARMY
Headquarters, 3d Infantry Division
APO New York 09036

GENERAL COURT-MARTIAL ORDER
NUMBER 1

10 January 1978

Before a general court-martial which assembled at Goepfingen, Germany, pursuant to Court-Martial Convening Order Number 94, Headquarters, 1st Infantry Division Forward, APO New York 09137, dated 28 October 1977, as amended by Court-Martial Convening Order Number 95, Headquarters, 1st Infantry Division Forward, APO New York 09137, dated 2 November 1977, was arraigned and tried:

Specialist Four (E4) James W. Mundy, (b) (6) US Army, Company A, 1st Battalion, 26th Infantry, 1st Infantry Division Forward, APO New York 09137.

Charge: Violation of the Uniform Code of Military Justice, Article 120

Specification: In that Specialist Four James W. Mundy, United States Army, Company A, 1st Battalion, 26th Infantry, did, at the Grafenwoehr Military Training Area, a training area controlled by the United States military forces, Grafenwoehr, Germany, on or about 8 July 1977, rape Private First Class Donna M. Adams, United States Army, while said service persons were then participating in a field training exercise.

PLEAS

To the charge and its specification: Not Guilty.

FINDINGS

Of the Specification and Charge, Guilty.

SENTENCE

To be reduced to the grade of E-1, to be confined at hard labor for seven years, to forfeit \$265.00 pay per month for seven years, and to be dishonorably discharged from the service. (No previous convictions considered)

The sentence was adjudged 8 November 1977.

ACTION

DEPARTMENT OF THE ARMY
HEADQUARTERS 3D INFANTRY DIVISION
APO NEW YORK 09036

10 January 1978

In the foregoing case of Specialist Four James W. Mundy, (b) (6) United States Army, Company A, 1st Battalion, 26th Infantry, 1st Infantry Division Forward, APO New York 09137, the sentence is approved. The forfeitures shall apply to pay becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a Court of Military Review. Pending completion of appellate review the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as competent authority may direct.

/s/R. Dean Tice
/c/R. DEAN TICE
Major General, USA
Commanding

BY COMMAND OF MAJOR GENERAL TICE:

DISTRIBUTION:
1-Accused
1-TC (CPT EARL) DC (CPT SPITZ)
1-MJ (LTC MORRISON)
1-Cdr, A 1/26th Inf
1-Cdr, 1/26th Inf
1-Cdr, 1st ID FWD, APO 09137
10-TIAG AND EA ROT
8-USYCF, APO 09028
8-CMDT, USDB
2-USAERC
2-CRD, USACIDC
2-SJA, VII CORPS
2-AETSHAG-AS
5-RFC, APO 09137
5-FIN, APO 09137
1-Ref File


JOHN J. TOPY
CW2, USA
Acting Asst AG

REVIEW OF STAFF JUDGE ADVOCATE
(Page 82b, Manual for Court-Martial, United States, 1969, (Revised Edition))

DATE
19 DEC 1977

TO: Commander
3d Infantry Division
APO New York 09036

FROM: Staff Judge Advocate
3d Infantry Division
APO New York 09036

1. The record of trial of the accused named below has been referred to me for review and advice prior to action by the convening authority. I submit herewith my review, with opinion and recommendation and reasons therefor, as required by paragraph 85b, MCM, US, 1969 (Rev Ed).

2. SYNOPSIS OF THE RECORD AND OF THE OPINION AND RECOMMENDATION:

A. PERSONNEL DATA

LAST NAME - FIRST NAME - MI	MUNDY, James W.		RANK	SP4/E4	SSN	(b) (6)	ENLISTED STATUS	RA	ARMED FORCE	ATMY
ORGANIZATION	Company A, 1st Battalion, 26th Infantry, 1st Infantry Division Forward		DATE OF BIRTH	(b) (6)	MARITAL STATUS	Single	CONTINUATION PAY TO QUARTERS	NA	PER DAY	\$503.70
CURRENT SERVICE	30 March 1976 for four (4) years		EDUCATION	High School Graduate						
PRIOR SERVICE (Inclusive Dates)	Two (2) years, one (1) month Exact period(s) unknown		INTELLIGENCE	GT: 70		PSYCHIATRIC REPORT	None			
DAYS IN ARREST OR RESTRICTION	00	TRIED AT	Goeppingen, Germany		DATE SENTENCE ADJUDGED	8 November 1977				
DAYS IN CONFINEMENT	00									
TOTAL AWAITING TRIAL	00									

B. SENTENCE

DISCHARGE	Discharge	CONFINEMENT AT HARD LABOR	Life	FORFEITURE (Amount and Date?) (How long?)	Total
MAXIMUM SENTENCE BASED ON CORRECT FINDINGS	Discharge				
SENTENCE ADJUDGED BY COURT	Discharge		Seven (7) years		\$265.00
PRETRIAL AGREEMENT	None				
RECOMMENDATION OF STAFF JA	Discharge		Seven (7) years		\$265.00
PLACE OF CONFINEMENT OR TEMPORARY CUSTODY					7 years

C. CHARGES

CH	ART UCMJ	SPEC	GIST OF OFFENSE	PLEAS	FINDINGS	CORRECT
I	120		o/a 8 JUL 77 rape PFC Adams	Not Guilty	Guilty	Yes
II	134		o/a 8 JUL 77 communicate a threat to PFC Adams +Withdrawn by the convening authority prior to trial.	Withdrawn		

Copy sent 10 FEB 1978
HQ USDS (PMD-B-CI-POJ)

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3. EVIDENCE ON THE MERITS:

For the Prosecution: SSG Fletcher J. Williams (R-58) testified that on 7 July 1977, he left the late movie with Specialist Dackins, returning to Camp Tunisia when they observed PFC Donna Adams and PFC Lassiter being harrassed by a group of persons of which the accused was one. A few minutes later he met the accused and some others and the group was BS'ing about screwing the girl if she came down there. At Camp Tunisia he observed the girl with PFC Gilmore talking to a guard. Gilmore left with Adams but later returned saying that the girl was looking for her boyfriend, but he was not trying to find him because he, Gilmore, wanted to make the girl. The accused and others wanted to know if Adams would also give them some. Gilmore indicated she probably would. Gilmore went back to the girl who was across the road in the woodline. When the witness returned from the latrine he saw someone running into the woods, so he followed. He was stopped in the woods where he knelt down with the accused and others and observed Adams and Gilmore talking. Gilmore and Adams left but later returned deeper into the woods at which time she saw the witness, stating that the witness was not a very good infantryman. He put his arm around Adams and they moved further into the woods. They ducked down to avoid being seen by a jeep. Adams rose and was pulled back down on her back. The accused and two others came to them. Adams wanted to know what was going on and the accused said, "You know what we want to do 'cause you're out here in the woods with us and you know what's going to happen". They started pulling off her clothes and Adams said, "You know this could be rape." Adams said, "No, no", so someone put their hand over her mouth and he held one of her legs. Gilmore got on Adams but she was moving too much and Gilmore requested that they hold her still. Then the accused reached in his pocket and took out something placing it next to Adams' neck saying, "If you move again, I'll cut your fucking throat". When Gilmore finished, the witness got on her but never got it in but acted like he did. Then he got up and the accused got on Adams while Gilmore held her. At that time the witness left the area. He originally denied being involved in a rape, knowing of any threats or a knife. He is testifying pursuant to a pretrial agreement in which the Convening Authority guarantees only three years confinement at hard labor. He was sentenced to forty years by his court.

Private Donna Adams (R-118) testified that on 7 July 1977 she went to a movie with a friend and while returning they were harrassed by a group of people of which the accused was one. She was at Camp Tunisia, which was off limits to females, looking for her boyfriend. Her friend went to look for him but didn't return. She was again approached by a group of people and the accused stated that he wanted to fuck her. She responded, "No way, get lost." She had another man (Gilmore) try and find her boyfriend while she waited across the street from the gate. Gilmore returned and said her boyfriend was coming and then Gilmore left. Suddenly she was grabbed from behind by two men, one an E-6. They held her mouth and dragged her into the woods. Three people including the accused arrived while she was being pushed to the ground. She was held by two men while two others took off her fatigue pants and underwear. She fought back and tried to scream, but a hand was over her mouth. One man got on her and had sexual intercourse while she was being held and while the accused held what she believed to be a knife to her throat. Statements were made about a knife by the men. Three men had sexual intercourse with her, then the accused got on her and had sexual intercourse. At that time she saw the knife in the accused's hand. When the accused finished, he and two others stayed behind. The accused pointed the knife at her and said that if she talked to the proper authorities that

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he would cut her throat. She ran out to the road and caught a ride with an MP but didn't report it to him because she was scared. She returned to her billets, cleaned up. She was quite dirty, and was crying. One of the girls heard her and she told the girl, Paula, to get her NCOIC. Her NCOIC arrived and she reported what had happened. At the Article 32 Investigation she stated mistakenly that Gilmore was the man who had the knife. During a lineup in which the accused participated, she also identified Gilmore as the man with the knife. She also identified Gilmore as the man who hit her, but today said it was the accused. She is not married and has had prior sexual experience.

SP4 Paula M. Reagan (R-152) testified that ^{late} on the night of 7 July 1977 she saw Adams who was crying. Adams became more hysterical and wanted her NCOIC, who she got.

For the Defense: SP4 Gregory H. Dockins (R-157) testified that on 7 July 1977 he saw Adams with some guy who was being joked with by a group of which Gilmore was a member. He had seen the girl three times before with a T-shirt (bra-less) and cut-off pants with a group of guys hanging around her.

The accused testified (R-161) that he did have sexual intercourse with Adams but it was consensual. He at no time threatened Adams with a knife or otherwise, nor did he hit her. Other individuals had sex with her before him. He and some other guys were talking with Adams and her friend but left the area. Later he was talking with Gilmore, who told them that the girl, Adams, was going to give him some if her boyfriend didn't come out. He asked Gilmore to see if Adams would also give them some. They saw Gilmore talking with the girl and they, the girl and Gilmore looked pretty close. They went to the wood line where Gilmore and the girl were. Sergeant Williams and Gilmore went into the woods with Adams, and Gilmore returned and said Adams was going to consent so we went to her. Gilmore was first, then Sergeant Williams, then the accused and then Brown. Not at any time did Adams fight or act like she wanted to quit. Gilmore and the accused stayed behind and helped Adams get her clothes and things. They asked if she had money for a taxi and the accused gave her \$1.50. They walked her to the road and she left the area. The accused did have a knife with him. He is quite sure Adams enjoyed the sexual intercourse.

Government Rebuttal: Specialist John E. Copeland (R-180) testified that shortly after the summer field problem he had a conversation with the accused; at which time the accused was discussing sexual intercourse with Private Adams, and stated "You got it one night and we took it the next night". He knows both the accused and Adams. The accused wanted him to say that he had had sexual intercourse with Adams.

Private Donna Adams (R-184) testified that her boyfriend Danny Barr had given her a letter just prior to going to the movie on 7 July 1977 and that was the reason she was trying to see him at Camp Tunisia. She wanted to talk to him about the contents of the letter.

Defense Rebuttal: The accused (R-192) testified that he never had a conversation with Specialist Copeland about anything to do with Adams.

Court Witness: SSG Fletcher Williams (R-194) testified that he entered into a pretrial agreement with the Convening Authority to testify truthfully in other courts-martial. In return for this testimony the Convening Authority agreed to approve only three years confinement at hard labor, regardless of what the court adjudged at his trial. The court at his trial sentenced him to forty years confinement at hard labor. Appellate Exhibit I is SSG William's pretrial agreement.

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4. DISCUSSION:

a. Court: The accused was tried by a court consisting of at least five officers. He was advised of his rights to request trial by military judge alone and to request enlisted members from units other than his own, but elected to exercise neither of these rights (R-6). The defense peremptorily challenged COL Brown, who was excused and took no further part in the proceedings.

b. Counsel: The military judge properly inquired as to whether the accused had been informed of his rights to counsel under the provisions of Article 38(b), UCMJ. It was determined that the accused was fully aware of his rights concerning representation by CPT Terry L. Spitz, the detailed defense counsel (R-3).

c. Charge and Specification: To establish the accused's guilt, the government had to prove by legal and competent evidence beyond a reasonable doubt, the elements of the following offense:

Charge: Violation of the Uniform Code of Military Justice, Article 120

(1) That, at Grafenwoehr Military Training Area on or about 8 July 1977, the accused committed an act of sexual intercourse with a female, namely PFC Donna Adams;

(2) That the female was not the accused's wife; and

(3) That the act of sexual intercourse was done by force and without consent.

d. Defense: The defense of lack of force and consent by PFC Adams was raised by the accused.

Force and Lack of Consent: Paragraph 199, MCM 1969 (Rev), sets forth the essential principles of law governing the crime of rape: "Rape is the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent. Any penetration, however slight, is sufficient to complete the offense. Force and lack of consent are indispensable to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances the inference may be drawn that she did in fact consent. Consent, however, will not be inferred if resistance would be futile or when resistance is overcome by threats of death or great bodily harm, nor will it be inferred if she is unable to resist because of the lack of mental or physical faculties. In such a case, there is no consent and the force involved in the act of penetration will suffice. All surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm." "Mere verbal protestations and a pretense of resistance are not sufficient to show lack of consent, and the victim of an alleged rape must have taken such measures to frustrate the execution of her assailant's design as she is able to take under the circumstances..." (DA Pam 27-9, Military Judge's Guide, paragraph 4-89(a)).

You as the convening authority must closely examine the testimony of the witnesses to determine the issue of force and lack of consent. The

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government has the burden of proving beyond a reasonable doubt that PFC Adams was forced and did not give her consent to sexual intercourse. If you are not convinced of this beyond a reasonable doubt, then you can not approve the findings and sentence.

e. Instructions: Prior to the court's deliberation on findings the military judge instructed the court as to the presumption of innocence, the burden of proof, elements of the offense, evidence of good character, judicial notice, prior inconsistent statements, fresh complaint and possible lack of fresh complaint, reasonable doubt, unchaste character, weight of the evidence, the credibility of witnesses, and the procedural voting rules. Prior to submission to the court of evidence in extenuation and mitigation, the military judge instructed the court on their responsibilities. Prior to sentence deliberation, the military judge instructed the court on the maximum permissible punishment, punitive discharges, evidence in extenuation and mitigation, and the correct voting procedures. In my opinion, the military judge's instructions were correct.

f. Sentence: The sentence imposed by the court with members was below the maximum authorized. But, I believe the sentence is appropriate and would neither reduce nor suspend any portion of the punishment. I say this after carefully considering the nature of the offense, the record of trial and allied papers, the background and needs of the accused, the welfare of society, and the ends of good order and discipline.

g. Judicial Notice: The military judge properly took judicial notice that Grafenwoehr Military Training Area is a United States military installation (R-18)(R-57, 58).

h. Objections: The defense objected to showing SSG Williams his prior statement, Prosecution Exhibit 1 on the basis of no proper foundation by the government showing that his memory needed refreshing. The military judge properly overruled this objection for the witness was having difficulty specifically recalling what was said at a point during the incident.

The defense objected on two different occasions to testimony by the victim, PFC Adams (R-122, R-124), as matters of uncharged misconduct. The military judge properly overruled these objections. Both acts considered with the statements made by the accused and PFC Adams during these periods go to show the accused's plan to have sexual intercourse with Adams against her will.

The defense objected (R-11) to the convening authority's having detailed an assistant trial counsel to the case. The defense stated that there was only one detailed defense counsel and that Paragraph 60 MCM provides it is desirable that as many assistant defense counsels as assistant trial counsels be detailed. The military judge properly overruled the objection. It is clear from the record that just prior to the trial the accused also had civilian defense counsel. Furthermore the Manuel says it is desirable, this does not mean mandatory.

The defense objection (R-26) to SSG Williams' testimony as to the sentence given by his court. The military judge properly overruled the objection. This testimony of SSG Williams was relevant and in no way materially prejudiced the substantial rights of the accused.

Motion: The defense motion for a mistrial (R-206) was properly denied by the military judge. During cross-examination of the accused (R-177, 178), the prosecution asked the accused, "Haven't talked to CID?" (R-177). A few questions and answers followed before the defense objected.

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If there was Constitutional error it was harmless. After review of the entire record it is obvious that there is no reasonable possibility that the error might have contributed to the conviction.

The defense objected to the military judge's instructing the court on fresh complaint, stating that there had been no showing of fresh complaint. The military judge properly overruled the objection. The instruction given by the military judge was a tailored instruction using both fresh complaint and lack of fresh complaint. This instruction was proper and did not materially prejudice the substantial rights of the accused.

The defense objected (R-267) to the trial counsel's argument on the basis that he was misstating the evidence. The military judge properly overruled the objection. Based on review of the record the statement by trial counsel accurately reflected the evidence.

The defense objected (R-268) to the trial counsel's argument on the basis that he was arguing the crime's effect on the community. The military judge properly instructed the court. The trial counsel's argument in no way materially prejudiced the substantial rights of the accused.

5. OPINION: The court had jurisdiction over the accused and the offenses charged. In my opinion:

- a. There were no errors which materially prejudiced the substantial rights of the accused.
- b. The findings of guilty are correct in law and fact.
- c. The sentence is within legal limits.

6. CLEMENCY: The following has been obtained from the record of trial, allied papers, and personnel records of the accused:

a. Extenuation and Mitigation:

For the Defense: 2LT William L. Bates (R-256) testified that he has been the accused's platoon leader with daily contact for one year. The accused does an average to excellent job, requiring little supervision and exhibiting leadership potential. He has never had any problems with the accused and knowing that the accused has been convicted of rape he still wants the accused in his platoon. The accused should be retained in the Army.

SSG Olentha Johnson Jr. (R-259) testified that he has been the accused's platoon sergeant for 16 months with daily contact. The accused is a good worker, with good job knowledge and he would rate the accused in the top 50% of the platoon. The accused gets along well with others and has not been a problem. Knowing that the accused has been convicted of rape, he would still take the accused back to the platoon. The accused should be retained in the Army.

1SG Lee S. Rodriguez (R-263) testified that he has been the accused's First Sergeant since March 1977 with daily contact. The accused performs exceptionally well on duty and has not been a problem. The accused gets along well with other members of the unit. Knowing the accused has been found guilty of rape he would still take the accused back in the unit. The accused should be retained in the Army. The accused is in the top 50% of the company.

b. Civilian Background: The accused was born on 1 July 1954, and his home of record is Richmond, Kentucky. He is a high school graduate.

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The accused is single with no dependents.

c. Military Background: The accused entered the service on 19 March 1974, but began active service on 29 March 1974. His MOS is 11B10. He arrived at his present unit on 15 August 1974. The accused has a GT score of 70.

7. DUTY OF THE CONVENING AUTHORITY: The foregoing and the recommendations to follow constitute my opinion of the legality of the proceedings, the correctness of the findings, and the appropriateness of the sentence. It does not bind you, however, for as convening authority, you have the independent responsibility of personally weighing the evidence, judging the witnesses' credibility, and determining any controverted issues of fact. Before approving the findings of guilty, you must personally conclude that they are established beyond a reasonable doubt by competent evidence of record. You may disapprove either the findings or the sentence or both for any reason or none at all. Furthermore, you should approve only that part of the sentence that you, in your absolute discretion, determine just after you have pondered all the circumstances. You may reduce, suspend, or remit any part or all of the sentence and providing that you do not increase its severity, you may change any part or all of the sentence to a different one.

8. ACCUSED'S REBUTTAL: A copy of this review and the authenticated record of trial has been furnished to counsel for the accused, and his receipt and rebuttal, if any, is attached.

9. DISQUALIFICATION OF THE CONVENING AUTHORITY: The Commander, 1st Infantry Division Forward who convened the courtmartial herein and who normally would take action in this case, has disqualified himself. Prior to the trial of the accused, the convening authority entered into a pretrial agreement with SSG Williams, calling in part for his truthful testimony in this case. To avoid any possible prejudice to the accused that might arise in weighing the credibility of this witness, the convening authority has forwarded this record of trial to you for your consideration and action.

10. RECOMMENDATIONS: I recommend that you approve the findings and the sentence. Pursuant to Article 71(c) of the Uniform Code of Military Justice, the order directing execution of the sentence must be withheld pending completion of appellate review. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

A form of action designed to accomplish the foregoing is attached.



F. D. O'BRIEN

3 Incl

1. Charge Sheet w/Allied Papers
2. Receipt from Defense
3. Authenticated ROT

LTC, JAGC
Staff Judge Advocate