

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

GENERAL COURT-MARTIAL ORDER  
NUMBER 6

10 February 1978

Before a general court-martial which assembled at Nellingen, Germany, pursuant to Court-Martial Convening Order Number 93, Headquarters, 1st Infantry Division Forward, APO New York 09137, dated 28 October 1977, as amended by Court-Martial Order Number 96, Headquarters, 1st Infantry Division Forward, APO New York 09137, was arraigned and tried:

Private El Allan L. Brown, (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 Private E-1 Allan L. Brown, United States Army, Company A, 1st Battalion, 26th Infantry, did, at 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 the Charge: Guilty.

SENTENCE

To be confined at hard labor for two years, to forfeit all pay and allowances, to be discharged from the service with a bad conduct discharge. (No previous convictions considered.)

The sentence was adjudged 9 December 1977.

ACTION

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

10 February 1978

In the foregoing case of Private El Allan L. Brown, (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 and allowances becoming due 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/Robert M. Elton  
/t/ROBERT M. ELTON  
Brigadier General, USA  
Acting Commander

BY COMMAND OF BRIGADIER GENERAL ELTON:

DISTRIBUTION:  
1-Accused  
1-TC (CPT EARL) DC (CPT ARNOLD)  
1-DC (MR BELLEN) MJ (COL DONAHUE)  
1-CDR, A 1/26th; CDR, 1/26th; CDR, 1st ID FWD  
10-TJAG AND EA ROT  
8-CMOT, USDR  
8-USFCF, APO 09028  
2-USAERC  
2-CRD, USACIDC  
2-AEFSBAC-AS  
2-SJA VII CORPS  
5-FIN & RPC APO 09137  
1- Ref File

  
JOHN J. FOY  
CW2, USA  
Acting Asst AG

436896

REVIEW OF STAFF JUDGE ADVOCATE <small>(Para 85b, Manual for Courts-Martial, United States, 1969, (Revised Edition))</small>						DATE 30 JAN 1978
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 BROWN, Allan L.		RANK PVI/E-1	SSN (b) (6)	ENLISTED STATUS RA	ARMED FORCE Army	
ORGANIZATION Company A, 1st Battalion, 26th Infantry		DATE OF BIRTH (b) (6)	MARITAL STATUS Single	CONTRIBUTION TO QUARTERS NA	PAY \$374.10	
CURRENT SERVICE 6 May 1975 for three (3) years		EDUCATION High School				
PRIOR SERVICE (Inclusive Dates) None		INTELLIGENCE GT: 100		PSYCHIATRIC REPORT None		
		CREDITABLE SERVICE 2 years, 4 months	CHARACTER OF SERVICE Excellent	PREVIOUS CONVICTIONS None		
DAYS IN ARREST OR RESTRICTION	00	TRIED AT Goeppingen, Germany		DATE SENTENCE ADJUDGED 9 December 1977		
DAYS IN CONFINEMENT	00					
TOTAL AWAITING TRIAL	00					
B. SENTENCE						
	DISCHARGE	CONFINEMENT AT HARD LABOR	FORFEITURE			
			(Amount per Month)	(How long?)		
MAXIMUM SENTENCE BASED ON CORRECT FINDINGS	Dishonorable	Life	Total			
SENTENCE ADJUDGED BY COURT	Bad Conduct	Two (2) years	Total			
PRETRIAL AGREEMENT	NA	NA	NA	NA		
RECOMMENDATION OF STAFF JA	Bad Conduct	Two (2) years	Total			
PLACE OF CONFINEMENT OR TEMPORARY CUSTODY	<input checked="" type="checkbox"/> XX	Transferred US Disciplinary Barracks on 4 January 1977.				
C. CHARGES						
CH	ART UCMJ	SPEC	GIST OF OFFENSE	PLEAS	FINDINGS	CORRECT
	120		O/A 8 Jul 77 did rape PFC Donna M. Adams.	Not Guilty	Guilty	Yes

Copy sent 14 MAR 1978  
HQ USDB (PMDB-CL-PC)

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3. EVIDENCE ON THE MERITS:

For the Government: SSG Fletcher William (R-82) testified that the accused is a member of C Company 1st of 26th, United States Army. On the evening of 8 July 1977, he observed Donna Adams with PFC Lastra. Adams and Lastra were being harassed by a group of men which the accused was with. They were asking if Adams was going to give Lastra some. Later he saw Adams talking to Gilmore, one of the men who had been harassing her. Adams stood outside Camp Tunisia and Gilmore came in. Gilmore, Coleman, the accused and himself had been BS'ing about screwing Adams. Gilmore told them that she was looking for her boyfriend, but if he did not come then she would give Gilmore some. Mundy asked if she would give them all some and Gilmore indicated yes. Williams went to the latrine and when he returned he saw some people running into the woods so he followed. As he got into the woods he saw the accused and others kneeling down. He got down and observed Gilmore and Adams talking in the edge of the woods. Adams and Gilmore left the woods but later returned. Adams saw him and moved into the woods, suddenly a jeep came and they grabbed Adams and went further into the woods to avoid the jeep. Adams stood and he pulled her back down and she fell on her back, at that time the accused and three or four others came from behind and started pulling on her clothes. Adams said "No, no, this would be rape". They removed her clothes and she made a partial scream and Mundy put his hand over her mouth. Gilmore got on top of her. Adams was moving around and made another partial scream and Mundy said to Adams that he would cut her fucken throat if she made another sound. Gilmore finished and he was next, he only made a slight penetration because she was moving too much. As he walked around Adams to get on her he observed the accused kneeling at Adams' head, right shoulder area and the accused's hands were on Adams' arms. He could not tell if the accused was applying any pressure to Adams' arms. He was sure that the accused had his hands on Adams. Gilmore and Mundy were more or less holding her down. He acted like he finished and got up and left the area as Mundy was getting on top of Adams. He did not really think Adams was raped by himself or anyone. He thought she was doing it freely. He is testifying pursuant to a pre-trial agreement. He must testify truthfully. The accused did not say anything during the time Williams was there with Adams. There were never any more than two or three persons of the six touching Adams at any time. It was very dark. He saw the accused kneeling next to Adams' shoulder. The next day at the MP Station the accused said that Lacey was the one that squealed on them. On cross-examination he stated that he could not positively say if the accused did or did not have his hands on Adams. On redirect examination he stated that when he went around Adams to get on her the accused was touching Adams.

Appellant Exhibit 5, William pretrial agreement was entered into the record.

PFC Donna Adams (R-120) testified that she went to the movies with a friend (Lastra) and was returning to Camp Tunisia to see her boyfriend about a letter Prosecution Exhibit 1 which he had written to her. On the way to Camp Tunisia she was harassed by a group of about six persons. She waited outside the gate while Lastra went to get her boyfriend. The same group came by while she was waiting and one of the men, Mundy, left the group and came to her saying that he wanted to fuck her, she said no way and Mundy struck her and left. Lastra did not return so she had another man, Gilmore go to get her boyfriend. Gilmore returned and said her boyfriend was coming, they waited then Gilmore left. She was grabbed from behind by two men, one an E-6, and pulled into the woods. She tried to resist but the men were too strong and one man was covering her mouth. She was put to the ground and then a man with a knife arrived

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and then two other men. She believes two men held her while three men removed her lower clothing. She screamed several times and was hit twice. The man with the knife held it to her throat and told her not to move or yell. Four of the men only partially penetrated her vagina because she was constantly moving away. She believes that she was held by four men when one was on top of her. After the fourth man finished, two of the men left and three stayed. The one with the knife said to her not say anything or she would not live to talk. She left the woods and caught a ride with an M.P. back to her billets, where she told Specialist Reagen that she had been raped and to get SGT Mac for her. It was very dark in the woods and very hard to see what everyone was doing. She cannot identify nor does she recall seeing the accused that night. All five men were black. She had had sexual intercourse with two persons prior to this night. She has incorrectly identified some men as being involved. She was very dirty as a result of the incident, and she never said anything to the M.P. even though she was upset. She denied ever telling different versions of the alleged rape incident to PFC Whitman (Military Policewoman), Mr. Beightol (CID), Joseph Howard, Captain Maby or Special Agent Tarley. She denied ever telling anyone that one of the men who raped her was from C Company. She denied saying to anyone that Lacy was one of the men who raped her.

PFC Michael J. Lastra (R-181) testified that on 8 July 1977 he was with Donna Adams, when Adams was being pulled from the rear by Gilmore who had his arm around her. The accused and Mundy were also there. After the group harassed he and Adams, they left the area and returned to Camp Tunisia. Adams waited in front of the gate while he went to get her boyfriend. He woke her boyfriend and then went to bed. He was awakened shortly to pull his guard duty. While on duty about 23:30 to 24:00 hours he heard a scream but did not know where it came from. He only heard one scream and if there had been more of the same quality he would have heard them.

SP4 Gregory H. Dockins (R-198) testified that on 8 July 1977 he was with SSG Williams when they met the accused, Coleman, Gilmore and Mundy. Mundy made a gesture towards Adams who was across the street and said "We are going to get the pussy".

A Stipulation of Fact (R-210) that the accused is a member of the U.S. Army and subject to the UCMJ and that he weighs 156 pounds and is five foot eight inches was admitted.

Mr. Robert L. Beightol (R-212) testified that he interviewed PFC Adams about 0140 hours on 8 July and Adams stated that she was near Camp Tunisia when she was dragged into the woods by four or five Negroes and raped. Adams was emotionally upset and had leaves and dirt in her hair.

For the Defense: The following stipulations of expected testimony were introduced into evidence: Captain Donna M. Maby (R-215) would testify that PFC Adams said that after the movie in Grafenwoehr, she was raped by a Negro male. Special Agent Paul J. Farley (R-215) would testify that PFC Adams was interviewed by him and stated that while returning to her company area she was grabbed by 5 male Negroes and that all 5 raped her. PFC Susan B. Whitman (R-216) would testify that PFC Adams said a friend went to look for her boyfriend, returned saying that her boyfriend was on guard duty. Adams, walking toward her camp, Algiers, was approached by the same five black males somewhere near the entrance of Camp Tunisia and they forced her into the woods. Adams was raped by, she believed,

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four of the five and two of the men had knives. SA Paul J. Farley (R-218) would testify that during his interview with Adams on 8 July 1977, Adams stated that she believed one of the men was a member of C Company, 1st and 26th Infantry.

The following stipulations of fact were entered into evidence: A lineup Defense Exhibit B (Exhibit 16 at Article 32) was held at an Article 32 investigation conducted on 25 August 1977, at which time Adams stated the following (R-217) that she was unable to identify the first man or the second man who had intercourse with her, nor could she identify the E-6. She identified number 2 (Gilmore) as the fourth man to have sex with her and the man with the knife and the man who hit her. She identified number 10 (Mundy) as the first or second man to have intercourse with her, and one of the men who held her legs. After leaving the lineup she identified number 11 (Dockins) as the E-6 who had intercourse third. She stated that she knew number 6 (Lacy), and he was not involved in the rape. She was unable to identify the fifth man, who had told the others to remove their hands from her mouth so she could breathe. She thinks that he was only a bystander. She was not sure if number 11 (Dockins), was one of the men who raped her (R-217-218). On 15 July 1977, Adams, looking in a mug book containing pictures of Mundy, Williams, Gilmore, Lacy and the accused; Adams identified, Mundy as the man with the knife and one who raped her. She positively identified Williams and Lacy as raping her. She did not identify the accused (R-219). These stipulations Defense Exhibits A and B were entered into evidence.

#### 4. DISCUSSION:

a. Court: Upon his written request the accused was tried by a court consisting of enlisted members. At least one-third of the court members were enlisted senior to the accused and from units other than that of his own. He was advised of his right to request trial by military judge alone but elected to not exercise this right (R-21-23, 43, 44). The defense peremptorily challenged Colonel Hansen. The Government peremptorily challenged SP5 Hayes.

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 Captain Arnold, the detailed defense counsel, and Mr. Bellen (R4-16, 29-45).

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:

(1) That on or about 8 July 1977, at the Grafenwoehr Military Training Area, 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 (or the wife of any of the other alleged rapist); and (3) That the act of sexual intercourse was done by force and without her consent; (4) That the accused was a member of the United States Army subject to the UCMJ; and (5) That the offense took place on a US Military Training Area, located outside of the territorial limits of the U.S.

d. Correction: Convening Order #96 (R-21) was corrected by changing the spelling of the accused first name and a digit in his social security number.

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e. Judicial Notice: The military judge (R-46) took judicial notice that Grafenwoehr is outside of the territorial limits of the United States. The accused was not prejudiced by this ruling.

f. Challenge for Cause: The military judge (R-74) denied a defense challenge for cause against Colonel Hansen. In my opinion the ruling of the military judge was correct for there was not a showing that Colonel Hansen would give more credibility to the testimony of the victim.

g. Changes to Charge Sheet: The accused's pay was changed to read \$397.60.

h. Instruction: The defense requested (R-222) that the court be instructed as a matter of law that the testimony of SSG Williams was uncorroborated. The military judge denied this request and left for the court to determine whether SSG Williams' testimony was corroborated or not, and in my opinion the ruling of the military judge was correct.

i. 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. An 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)).

j. Aiding or abetting: The Government's theory of the case is that the accused was an aider or abettor. Now, you are advised that any person that commits an offense is a principal, likewise, any person who aids or abets in the commission of an offense is also a principal and equally guilty of the offense. To constitute one an aider or abettor, and hence guilty as a principal, he must share the criminal intent or purpose of the active perpetrator of the crime and must aid, encourage, or incite the active perpetrator to commit it. In order for an accused to be found guilty on the theory of aiding or abetting, the proof must show that the alleged aider or abettor did in some way associate himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his action to make it successful. Mere presence at the scene of the crime is not enough, however, if there is a concert of purpose to do a criminal act, and such act is done by one of the parties, all probable results that could be expected from the

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act are chargeable to all parties concerned.

k. 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, weight of the evidence, the credibility of witnesses, aiding or abetting; Judicial Notice; force and lack of consent; accomplice testimony; Stipulations of Expected testimony; Stipulations of Fact; Uncharged Misconduct, fresh complaint 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.

l. Sentence: The sentence imposed by the court 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.

5. OPINION: The court had jurisdiction over the accused and the offense 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. Military Background: The accused enlisted into active duty on 6 May 1975. He completed basic training and Advanced Individual Training at Fort Polk, Louisiana. His MOS is 11B10. His CT Score is 100. He arrived in Germany on 30 September 1975 and was assigned to his present unit.

b. Civilian Background: The accused is a 20 year old male, born in Indiana. His home of record is Gary, Indiana, where he graduated from high school in 1974. The accused is single and has no dependents.

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

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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.

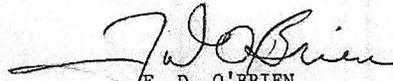
9. Disqualification of the Convening Authority: The Commander, Headquarters, 1st Infantry Division forward, who convened the court-martial herein and who normally would take action in this case, has disqualified himself. Prior to the trial of the accused, the convening authority entered into a pretrial 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.

3 Incl

1. Action
2. Receipt from Defense
3. Authenticated ROT

  
F. D. O'BRIEN  
LTC, JAGC  
Staff Judge Advocate