

CONFIDENTIAL
HEADQUARTERS
EUROPEAN COMMAND
Office of the Judge Advocate

Case No. 5-150 (5-92)
U.S. vs. Fritz THALER and Walter Bockhorni

18 May 1951

Accused: Fritz THALER

REVIEW OF THE WAR CRIMES BRANCH JUDGE ADVOCATE DIVISION
HEADQUARTERS EUROPEAN COMMAND, APO 403, U.S. ARMY

TO: THE WAR CRIMES MODIFICATION BOARD, EUROPEAN COMMAND, APO 403, U.S. ARMY

1. THE RECORD OF TRIAL BY A MILITARY COMMISSION, LEGALLY CONSTITUTED FOR TRIAL OF WAR CRIMES CASES, of the following named accused, together with all petitions and supporting documents, filed by and in behalf of said accused subsequent to the trial, having been examined and reviewed by me as to whether or not any modification of the sentence of said accused as heretofore approved should be made, I submit herewith my review summary, as specially authorized in War Crimes cases.

2. SYNOPSIS OF THE RECORD

a. Personal Data:

THALER, Fritz, Czechoslovakian, Male Tried at Salzburg,
(Last Name) (First Name) (Nationality) (Sex)
Austria, on 16-24 July 1947 Date of original confinement under charges:
12 May 1945 Present Age: 40 Married (Yes or No) Divorced Children: None
Other dependents: None Employment record: Engineer Education: 4 years
College Religion: Believes in God Prior Convictions: No record
Reputation in home community: Not known Military Record: SS 2nd Lieutenant
Nazi Party record: Not indicated Health: Fair

b. Sentence:

Sentence adjudged by court :	24 July 1947 imprisonment for 25 years
Recommendation of WGB Austria :	September 1947, recommended re- duction to 13 years imprisonment, NOTE: This reviewer is not in the file but referred to in Defense Petition.
Recommendation of SJA US Forces in Austria :	September 1947, 23 years imprison- ment effective 24 July 1947
Action of Review Authority :	Not indicated in file
Recommendation of subsequent WCR Board and Appraisals :	None
Present recommendation :	Remission of unexecuted portion of sentence

3. EVIDENCE

CLASSIFICATION CANCELLED
By authority of JAG lu
dtd 4 Aug 1950.

a. Concerning the Case in General:

(1) The accused was charged with participating in the killing of a member of the U.S. Army at or near Muerzsteg, Austria on 23 August 1944, under Charge I, and with participating in the killing of a member of the U.S. Army at or near Frein a.d. Muerz, Austria, on 23 August 1944, under Charge II.

(2) The accused, Fritz THALER, was a 2nd Lieutenant in the SS and in temporary command of an SS unit stationed at Frein, Austria. This SS unit was engaged in technical research at a former paper factory which was being converted into an experimental laboratory in August 1944 and was still in the process of construction. Bockhorni, the other accused in the case was a 1st Sergeant of the SS unit. However, since Bockhorni was exonerated at the conclusion of the trial, references to this man other than in clarification of the case against THALER will be omitted in this review.

b. Evidence Directly Concerning the Accused Fritz THALER:

(1) Prosecution witness Anton Wachauer (R 6), testified he was a forester living in Frein on the Muerz and knew the accused. He recalled seeing an American flyer in the spring of 1944 "April or May"; that he had delivered several American flyers to Frein, and recalled seeing one Maria Reichart present when he took over a captured American flyer from a forester and another man and delivered the prisoner to the Gasthaus Fasching in Frein. That he telephoned the gendarmerie and was instructed to turn the flyer over to the SS unit in Frein, which he did, to "Oberscharfuehrer Irmer". That the SS personnel were to take the prisoner to Muerzsteg (R 7). That on that night at about 10:00 or 10:30 he heard a shot near his home and took his flashlight and walked to the former paper factory where he saw the accused and Irmer standing by the body of the American flyer who had been shot; that the accused and Irmer said the flyer had been confined at the factory and had attempted to escape when they opened the door; that "they shot him to death". Witness stated the flyer was later buried in the Frein cemetery (R 8).

(2) Prosecution witness Johann Gamsjaeger (R 10), testified he was a forest worker living in Frein. That on a day in August 1944 he and forester Wachauer went to the top of a mountain where one Johann Schweiger told them a flyer had come down, and that he and Schweiger found the flyer. That when Wachauer arrived he searched the flyer and took away a map. That Wachauer then sent the witness and Schweiger to bring additional help for the flyer who had had a sling made for his hand by Miss Reichart (R 10-12).

(3) Prosecution witness Hubert Wolfsgruber (R 12), testified he was a forester in Frein in August 1944. That during that month he drove to Taschl with forester Kisielwesky to take an American flyer to the gendarmerie in Muerzsteg but that SS men Bockhorni and Irmer took the flyer away. That he saw the flyer dead near the cemetery the next day and that he received orders from the Buergeomeister to make necessary burial arrangements in the cemetery at Frein, and that the death certificate was to the effect the flyer, whose name was Callahan, was killed while trying to escape. That the burial site was picked by the SS (R 13-16).

(4) Prosecution witness Peter Fasching (R 18), testified he was the innkeeper of the Aumann Inn at Frein in August 1944, and that some of the SS personnel stayed at the inn while others worked at the paper factory making tests. He identified the accused by name and stated that THALER was then an Untersturmfuehrer (2nd Lieutenant). The witness stated that on the August day in question he saw a captured American flyer sitting in a Volkswagen with SS men Bockhorni and THALER. That Bockhorni and THALER drove off in the car in the direction of Muerzsteg which was 9 kilometers away at about 8:00 P.M. That the road passed through a section called Totes

side which was about 200 meters long, and consisted of several sharp curves on one side of which arose a steep stone wall, and on the other side the Muerz River ran about 4 meters below the surface of the road, which was guarded by a wooden fence due to the sharp drop. That upon passing through the Totes Weib section the next day he saw a pool of blood about 40 centimeters in diameter in the approximate center of the road (R 18-20). The witness identified a picture of the Totes Weib area and marked thereon the location where the blood lay (R 21).

The witness on cross-examination stated that in August 1944 the SS headquarters was located in his hotel. He could not remember the difference between an Oberscharfuehrer and an Unterscharfuehrer; but reiterated that the car belonging to the SS personnel was a Volkswagen and believed it was a four-seated vehicle. The witness was asked if he had ever been in the military service and replied in the negative (R 21-24). On further cross-examination the witness admitted that he had been a member of the Wehrmacht for 3 days but was released because of a "heavy stomach and duodenal operation" (R 26).

(5) Prosecution witness, Maria Schmidl, (R 41) testified that she had been living in Frein in August 1944 and saw an American flyer at the Hotel Aumann with Bockhorni, the accused, and Irmer; that the flyer remained in the inn approximately one-half hour. That she saw him leave the hotel in a car with the accused, Bockhorni, and Irmer. That she saw the car drive off but was not sure whether the three named SS men were along; that the automobile headed in the direction of Muerzsteg and that the time was in the evening before dark. That approximately two hours later on she saw THALER and Bockhorni return and that THALER was heard to remark, "Now we have the dead one outside". That the flyer had attempted to escape near Muerzsteg (R 41-43).

On cross-examination, the witness admitted that she did not see Bockhorni, the accused or Irmer drive away in the car, but only saw the car leave; that it was a small three seated car.

(6) Prosecution witness, Maria Grafeneder, (R 48) identified Prosecution Exhibit I, a picture of the Totes Weib section, and stated that in August 1944, she was riding through this area on her way to Frein at about a quarter to eight (PM) and that it was still light when she saw an automobile standing still. That there were two SS men standing next to the engine whom she identified as Bockhorni, with some hesitancy, and the accused (R 48-49). That there was a third man, an American, sitting in back of the car which was a double seater with the top down. That she stayed there for approximately five minutes. That the American "stepped slowly down in back and walked several paces in the direction of Frein. He looked at the walls and turned a little to the side then the shot rang". That the flyer collapsed. That the SS men "They put him on the side and continued working at the engine." That the flyer was in the middle of the road when he was shot and that there was a second shot approximately ten minutes later after the flyer had been put back in the car by the SS men. That she saw blood on the lower part of the flyer's body and on his clothing (R 51). That she rode on to Frein after the accused told her to "take off" (R 52).

On cross-examination the witness stated that the flyer was still alive after the first shot and was moved over to the wall by the SS men, but that he did not mean, scream or make any noise. She further stated that she saw the car drive away ten or fifteen minutes later, after it had been repaired. (R 56). That the flyer when he first walked away from the car walked slowly and had covered a distance of "four, five, or six meters" (R 57). That his hands were tied behind his back. That after the car drove away, she rode her bicycle on into Frein, taking approximately one-quarter of an hour. That she talked to no one of the incident except a Mrs. Nickel. The witness admitted that she stayed an additional ten minutes at the scene in disregard of the direct order of the accused, and that he told her to go away twice. (R 60)

That the SS man who fired the shot was on the ground under the car and sprang up before shooting at the flyer, and that at the time the flyer was shot, he (the flyer) locked back (R 63-64). That when the American was placed back in the car "His head was hanging a little bit from the seat into the car, and his feet were hanging out of the car". That the second shot "might have been on his hand or his breast side". That she was standing quite close at the side of the car (one-half meter) and after the shot was fired "I went again to the car and looked", but that she saw no blood on the car (R 65).

(7) Prosecution witness, Dr. Josef Weingerl, (R 70) stated that he was a doctor in Muerzsteg in August 1944 and that he had examined the body of a dead American flyer (Lt. Pratt) there. That he was notified in the evening after dark to come down and examine the body but did not do so until the next day due to a lack of light. That when he did examine the body "There was a shot in the right arm, one shot in the back of the head, and one shot in the vicinity of the heart." That either the head shot or the heart shot could have caused death and that, in his opinion, the first shot was the "shot into the back of the head" (R 71). The doctor estimated that the shot in the head had been fired from a "larger distance" and the shot in the heart from a "smaller distance" although he admitted that he could not "remember exactly" (R 72).

On cross-examination the witness admitted that he did not examine the body "where the shot came out, I only examined the body where the shot came in and I stated that the shot came in straight". That he might have been forced to alter his opinion had he examined farther (R 74).

(8) Prosecution witness, Dr. Josef Kroepfl, (R 74) testified that he was a minister in Muerzsteg during August 1944, and had performed the burial ceremony for two American flyers. That he was told by the undertaker that the flyers had been shot while attempting to escape, and made entry to that effect in the Record of Graves for the cemetery at Muerzsteg with respect to Lt. Pratt. Dr. Kroepfl testified that the majority of the people in the town felt the flyers were shot legitimately but that certain elements condemned the act (R 75-77).

(9) Prosecution witness, Antonia Weyrer, (R 78) testified that she lived in Frein during August 1944 and was the daughter of the church sexton. That Sgt. Bockhorni talked with her father and objected to the fact that the grave of the American flyer, Callahan, was in that portion of the cemetery reserved for criminals and suicides (R 78-83).

(10) Prosecution witness, 1st Lt. Harris Goldstone, (R 82) 7763 War Crimes Investigating Team, identified Prosecution Exhibit 4, a picture of Lt. Pratt's grave in Muerzsteg, Prosecution Exhibit 5, a picture of the grave of Sgt. Callahan in Frein, and Prosecution Exhibit 6, a statement of a Lt. McClellan, a U.S. medical officer no longer in Europe, who, in the presence of the witness, had performed an autopsy on the bodies of Lt. Pratt and Sgt. Callahan. All three Exhibits were admitted in evidence by the court.

Prosecution Exhibit 6, a medical report of Lt. McClellan's autopsy, was to the effect that the examination of Sgt. Callahan's body disclosed that a bullet of approximately 32 calibre had entered his skull in the "left occipital bone" and emerged from the right temple. That the first and second section of the "sternum" had been separated and indicated possible brutal treatment. Lt. McClellan's findings with respect to Lt. Pratt were to the effect that the skull indicated a bullet had entered the "left temporal bone" of the skull and emerged through the "left parietal bone". No calibre indicated. Another bullet passed through the "right axilla" (arm) on a horizontal plane. A third bullet wound was found in the left chest "horizontal through to the posterior fourth intercostal space" just left of the sternum, range unknown (R 82-84).

c. Defense Evidence:

(1) Defense witness Wasyl Sysak (R 90) testified that in August 1944 he was in Frein making forest measurements. That he had a conversation with one of the fliers (Callahan) and told him that he would assist him in a plan to escape saying, "I intended to send him from the workers' camps located in the woods of Styria to Marburg, Yugoslavia,---that is where the Partisans advanced". That he oriented the flyer on his whereabouts but that the flyer was then picked up by the SS unit which was stationed in Frein, at about 10:30 or 11:00 that night (R 91-93).

(2) Prosecution witness, Maria Grefeneder, was called as a witness for the defense (R 96) and repudiated her previous statement in which she had identified Sgt. Bockhorni as the other man with the accused at the time of the killing of Lt. Pratt in the Totes Weib section (R 96-100). Reviewer's note: Nearly all of Maria Grefeneder's defense testimony was concerning the co-accused in this case who was exonerated by the court.

(3) Defense witness, Wladimir Kisilewski, (R 100) testified that he lived in Frein and was the Forest Master for the Austrian State Forest. That on the day the American plane was shot down in the vicinity of Frein, he and his wife were driving their car through the Totes Weib section toward Frein. That the road at that point was very narrow and his car was pushed to the side by an SS car coming from the opposite direction towards Muerzsteg which was occupied by two SS men, the accused and Irmer. That the SS car stopped and the two SS men helped him get his car on the road again. Kisilewski stated that he did not see Maria Grefeneder on the road when he continued from the spot where the collision occurred to Frein (R 100-101). That upon arriving at home, Forester Wolfsgruber came and told him the SS wanted him to go to Taschl to pick up an American flyer who had been captured there since the SS car was out of order. That they found upon reporting to the SS that the SS car had been repaired and both cars drove to Taschl. That he waited with the cars while the rest of the occupants of both went to the house where the American flyer was and brought him back to the car. That he did not see the flyer due to the darkness and the flyer was brought back to Frein in the SS car by SS personnel (R 101-102).

Witness on cross-examination mentioned seeing a dead American flyer (Lt. Pratt) in the SS car in the Totes Weib section when his car was struck by the SS car. A member of the court later asked: "What time of day was it that you saw this dead American in the SS car?" His answer: "I was driving without lights, but I am quite sure it was rather dark. I believe it was about 8:00, but I am not sure." (R 104). On later direct examination by the defense, the witness stated that the SS men in reply to his query, "What happened to the flyer" replied, "He was shot while trying to escape." (R 108).

(4) Prosecution witness, Hubert Wolfsgruber, (R 109) was called as a defense witness to the stand and testified that he accompanied Forest Master Kisilewski to Taschl to bring the American flyer who had been captured there back to Frein. That he rode in the car with Forest Master Kisilewski. He confirmed the previous witness' testimony to the effect that the prisoner rode back to Taschl in the SS car (R 111) and also that Kisilewski remained in his car while the SS men, accompanied by the witness, went to the house in Taschl for the flyer.

(5) Defense witness, Walter Bockhorni (R 117) co-accused in this case, stated that in August 1944 he was stationed in Frein with the Technical Motor School as 1st Sgt. of the unit. That he functioned as interpreter and interrogated the American flyer Lt. Pratt, at the inn where the SS unit was billeted in Frein (R 119). That when Lt. Pratt was taken away in the SS car by the accused and Irmer, the prisoner was instructed that he was being taken to Muerzsteg, where he would be delivered to the gendarmerie. 18:30 to the inn where he met

them at the door and was instructed by the accused to make out a report relative to the attempted escape and shooting of the flier (R 120). That the next evening he went to Taschl in the car of Kisilewski with Wolfsgruber. That Kisilewski remained in the car at Taschl and that he (the witness) with the accused and Irmer went to the house where the second American (Sgt. Callahan) was being held at about 10:00 that night. That the flier was driven off in the SS car by the accused and Irmer after being told that he would be taken to Muerzsteg (R 121). That upon returning to Frein in Kisilewski's car he (the witness) went to his quarters. That the coffin for Sgt. Callahan's body was built by their workers on the order of the accused (R 124).

On cross-examination by the prosecution, the witness stated that when he first saw the American, Lt. Pratt, the flyer, whose body had been hit or bruised, requested authority to give himself an injection which was granted (R 126). That when Pratt was driven away by the accused and Irmer, he (the witness) stood next to the car and stated to the flyer that in Muerzsteg a doctor would treat his injuries. That when he saw the prisoner his hands were not tied (R 126-127). With reference to the American Sgt. Callahan, Bockhorni stated that the flyer was a Catholic as indicated by his papers and that he made a report of the flyer's death (R 127). That both flyers were shot while trying to escape. That there was a discussion between Fasching and the accused who wanted Callahan's body buried in the first row of the cemetery which was reserved for residents of the town, but that this was prevented by Fasching (R 128).

(2) The accused, Fritz THALER, stated that he was an engineer by profession and had lived and worked in many foreign countries. That he entered the military service in September 1939, first in the Wehrmacht, and was inducted in the Waffen SS in July 1940. That he had served at the western, southeastern and eastern fronts from July 1940 until April 1943 and was continuously with a combat unit until being "buried alive" by a Russian bomb which had resulted in damage to his hearing and equilibrium. That in August 1944, he was stationed with a technical motor unit of the Waffen SS in Frein as an SS Untersturmfuehrer (Second Lieutenant). That during the month of August, he functioned as the commanding officer of the Frein detachment in the absence of the regular commanding officer.

Witness testified that an American bomber was shot down in the vicinity of Frein on or about 23 August 1944 and that six (6) airmen from that plane were taken prisoner and delivered into the custody of his unit on 23 and 24 August. That he delivered these men to the gendarmerie post in Muerzsteg personally, but that two (2) were killed following the capture. That in the afternoon of August 23, Lieutenant Pratt, an American flyer, was brought to the Aumann Inn at Frein where he was questioned and then taken to Muerzsteg by "Irmer and myself" (R 145) between 6:00 and 7:00 P.M. That while driving in the direction of Muerzsteg from Frein, the SS automobile, a small Fiat, developed a crack in the radiator which necessitated a stop for temporary repairs in an area known as Totes Weib. That Totes Weib was a place where the road curved sharply for a distance of approximately 200 metres and was bound on one side by a steep rock wall and on the other by the Muerzsteg River which flowed approximately four (4) metres below the surface of the road which was guarded by a wooden rail fence. That Irmer was on the ground inserting a wooden, pointed splint into the crack in the radiator and that he (the accused) was kneeling next to Irmer "watching him in order to make sure the radiator was well fixed." That the radiator of the Fiat was located in front of the car (R 146). That Lt. Pratt, who was sitting in the back of the car, asked to get out and although he spoke no German and the accused no English, the accused, by gestures of his hands, indicated that he was to stand next to the car, and that the prisoner understood him. That Lt. Pratt did not remain along side the car, but moved away one or two steps at which time the accused got up immediately and drew his pistol. That the flyer "continued running" away from the car toward the bannister in the direction of the river; that the American

turned around only shortly, and then continued running and that he, the accused, "opened fire at Pratt" firing between three and four shots. That the American collapsed at the right side of the road near the bannister and died at once. That he (the accused) with Irmer carried the body back to the car and placed it in the back of the car (R 148). That upon examination of the body, two (2) shots were found; -"one in the head, and one shot only touching the outside... I only heard about the third shot to the heart." That the shot in the head was in the back of it and that the other shot was a grazing shot "on the upper arm, or at the shoulder." That at the time the prisoner collapsed he was "more than five (5) and less than ten (10) metres" away from the car. The witness stated that Maria Grafeneder was not at Totes Weib at the time of the shooting nor did he see anybody else. That after the repairs to the radiator were completed they pushed the car ahead to start it due to a broken starter, and Irmer drove to Muerzsteg (R 149). That enroute they met the forest master whose automobile was forced off the road due to their speed. That it was necessary to push the other car back on the road after which they continued to Muerzsteg and delivered the body of Lt. Pratt to the gendarmerie post. That he described the incident to the commander of the post and stated he would submit a report to higher headquarters. That he also spoke to Dr. Wingerl about an autopsy of the body and was told due to the darkness the autopsy would be performed the following day. After this, the accused, in company with Irmer, returned to Frein reaching there at approximately 8:00 P.M. (R 150-152). Witness stated that upon his return from Muerzsteg he was informed by Bockhorni (the First S/Sgt of the SS unit) that another flyer was "somewhere outside" and that assistance had been requested in picking him up. That he (the accused) and Irmer in the SS car, followed by the car of the forest master, proceeded to the town of Taschl, picked up the flyer and returned to Frein after interrogation of the flyer. That he and Irmer stopped a short while on the road in Frein "and deliberated where to bring the flyer, because it was already too late to bring him to Muerzsteg" (R 153-154). That it was decided due to the lateness of the hour to take the flyer to "an unused paper factory" two (2) kilometers from Frein which was used as "an emergency factory for the technical school, the motor school"; that the factory was still in the process of re-conversion (R 154). At the entrance of the factory was a guard "who saluted" as they arrived. That upon stopping, he (the accused) and the prisoner got out of the car and Irmer drove to a small area in back of the factory to park the car (R 155). That he waited until Irmer returned and then the three of them went to the rear entrance of the factory which was still open and under construction, blocked by "two (2) wooden sticks." That the accused then ordered Irmer to get the guard and when Irmer did not return immediately, he (the accused) took the prisoner into the factory in the "great machine hall", "There I wanted to start the turbine in order to get the generator started in order to get light in the factory." That "There was a small room and then there was an opening without any doors leading to the machine hall" and "From the entrance the room might have been about ten (10) meters long and then there was about six (6) metres again to the turbine." That the American flyer Callahan was close to the left side of the accused (R 156). The accused stated "I had my flash-light in the left hand, and had my pistol in my right hand. A little in front of the turbine, Callahan put a leg in front of me so I almost fell and besides that I was sliding in some water on the floor." That he fell to one knee and the flyer "jumped away at that very moment from me", to the left front. That there were openings on the wall on the left side covered only by wooden sticks. The accused stated that "I aimed at Callahan and opened fire, and the shot of Irmer happened before." That I (the accused) had not noticed that Irmer had come back. That I (the accused) fired between three and four shots. That Sergeant Callahan had been struck by two shots and that Irmer fired one shot with his carbine. The accused stated that upon falling after being tripped by the flyer the flash-light fell out of his hand and "the beam of the flash-light went against the ceiling instead of straight ahead, and Callahan could not be seen exactly on account of the bad light." That Callahan's body fell approximately four to five meters from where the accused stood and he was quite dead (R 157). The witness stated that after five to ten minutes, Forester Tachauer came and was told what happened. That

the guard then came and was reproached for leaving his post. The accused stated that he and Irmer then returned to Frein to their quarters (R 158). It was testified that upon their return to Frein, the accused directed Irmer to take the necessary steps toward burial of the flyer in the cemetery and that he had the grave dug by his non-coms and ordered the coffin upon refusal of the civilians to furnish one. That there was some difficulty in having the flyer buried in the local cemetery until they found that he was a Catholic (R 159).

Accused stated that on 24 May 1944, eleven (11) American flyers were delivered to the Wehrmacht.

Reviewer's Note: The personal diary of the accused was introduced in evidence as Defense Exhibit C. Certain portions are quoted herewith:

"Wednesday, 23 August: Air fights above Frein.
Chasing parachutists and Americans.

Lt. Philip W. Pratt
Sgt. Michael Callahan (A sign meaning death)

Pratt has 24 flights into the Reich, Attempts to escape. On my way until 11:00;

Thursday, 24 August: Grave for Callahan. In the forenoon another 1st Lt. is brought in and in the afternoon I fetch a S/Sgt. from the Wildalpe. When returning I find Brigadefuehrer (Brig. Gen.) and Hauptsturmfuehrer (Capt.) Meiler. General reprimands to everybody. The Brig. Gen. is slightly perplexed about my report about the Americans which I made to the Staff Company. von Gimborn." (R 164)

On cross-examination by the prosecution the question was asked, "You told the court that you shot this man (referring to Lt. Pratt) because you believed he was trying to escape?" The accused replied, "I did not believe he attempted to escape, I saw he attempted to escape." That the only possibility for escape was to jump into the river which was rather deep and very narrow with a swift current at that point (R 165). That from where their vehicle was parked the next curve toward Muerzsteg was between ten and fifteen meters and that from the car toward Frein the next curve was between ten and twenty meters (R 166).

The accused stated that both American flyers (Pratt and Callahan) were told by Sergeant Bockhorni they would be shot if they made any attempt to escape and that he (the accused) and Irmer loaded their arms in front of the prisoners (R 167). That at the time Sergeant Callahan was shot both he and Irmer were certain that it was Irmer's shot that had killed the prisoner. However, he was no longer certain that it was the shot of Irmer and took full responsibility upon himself (R 170).

On re-direct examination by the defense the accused stated they received instructions from the general that in event American parachutists dropped they were to be collected and delivered to the gendarmerie in Muerzsteg (R 172). It was testified that when Callahan was shot he was hit by two (2) bullets, one in the head and one passed through his body from the back exiting at the chest; that the flyer fell forward on his face; that the whereabouts of Irmer were unknown by the accused (R 178).

(7) Prosecution witness, 1st Lt. Harris Goldstone, (R 179) was called as a defense witness and identified Defense Exhibit D, the records of

evidence. The exhibit gave identifying information with regard to Lt. Pratt and was to the effect that he was shot by Irmer while attempting to escape in Neuwald and that his body had been buried at Muerzsteg on 24 August 1944.

(8) Prosecution witness, Peter Fasching; (R 182) was called as a defense witness and stated that he could not remember whether the hands of the American flyer (Lt. Pratt) were tied when he was placed in the Volkswagen at the Fasching Inn prior to departing for Muerzsteg.

(9) Defense witness, Margarete Koitz, (R 182) testified that she was an interpreter and accompanied the defense counsel to a gast haus where the previous witness, Peter Fasching, was interrogated, and that Fasching had stated at that time that "The hands of the flyer were not tied". (R 183).

(10) Prosecution witness, Dr. Josef Weingerl, was called as a defense witness and testified that he did not perform an autopsy but was a medical officer in the first war and saw many people killed by shots. That he had not had any training in ballistics and was familiar with an Austrian law which required that in conducting an autopsy the doctor, if he found an entrance hole, must find the exit hole or the bullet in the body being examined. That he did not comply with that law inasmuch as he was only performing an examination of the body and not an autopsy. He reiterated his previous testimony that there was a depression around one of the wounds in the body and that he assumed the shot had been fired from a distance of one-half meter to one meter. That the wound was smooth at the bullet entrance and showed indication of the edges being pressed and was of a slightly bluish color. That, in his opinion, a body would retain such a depression until rigor mortis "is solved and deterioration starts." Reviewer's note: The preceding testimony was in regard to the examination of the body of Lt. Pratt (R 183-185).

(11) Prosecution witness Captain Arthur Mernit, medical officer of the 57th Field Hospital, testified that he had performed several autopsies. Prosecution Exhibit 6 was brought to the attention of the witness and the defense endeavored to rebut previous medical testimony to the effect that the body wound in the body of Lt. Pratt indicated the bullet as having entered from the front rather than through the back. Captain Mernit also testified quite at length on the head wound as described in the medical report. It appears to this reviewer that the doctor was inclined to accept Prosecution Exhibit 6 in its entirety and hesitated to make any positive statements of a contradictory nature in spite of the efforts of the defense. One question by the defense and the reply thereto substantiates this statement.

Q: "Is it not possible, Doctor, that a body which has lain in the earth for a period of twenty-three months would be so decomposed that no changes from behind could be detected?"

A: "I can only base my statements on the report."
(R 192)

(12) Defense witness, Helga Gertrude Wilke, (R 192) stated that in August 1944 she was engaged to the accused, THALER, and that upon one of her visits to Frein to see the accused, he had described the shooting of Lt. Pratt when he endeavored to escape and that he had arranged "a dignified burial for the flyer and had taken care of a beautiful decoration of the grave." That the car belonging to the SS was a small Fiat and that the starter did not work (R 194).

(13) Prosecution witness, Wladimir Kisilewski (R 197) was called back by the court and examined further. No new evidence was elicited

except a statement by the witnessⁱⁿ reply to a question about the testimony of Maria Grefeneder "At that time, she was a very young girl, and she keeps saying that the man she saw at the Totes Weib was more blond" (R 199).

(14) Prosecution witness, Peter Fasching, was called back by the court (R 200) and questioned further. No definite information was obtained; however, the witness reiterated that the car used by the SS was a Volkswagen although he admitted that the radiator in a Volkswagen is in the back. In reply to a question by the defense as to where the radiator was, he stated, "I do not remember; I had to suffer too much during that time." Defense counsel retorted: "I can imagine" (R 203). This witness changed his testimony several times and his credibility is very questionable.

d. Post-trial Reviews and Petitions:

(1) Karl Irmer, former SS Sergeant who was with the accused when the American flyers Lt. Pratt and Sgt. Callahan were shot, was tried by the Peoples Court of Vienna on 25 April 1950, and found not guilty. However, in a signed statement, dated 3 May 1950, Irmer described the circumstances surrounding each shooting in substantially the same manner as testified to by the accused THALER, and placed stress upon the fact that both prisoners were warned that any attempt to escape would cause them to be shot.

(2) An undated petition for review was submitted by the trial defense attorneys of the accused, in which it was alleged that the court in awarding a sentence of twenty-five (25) years imprisonment did not in actuality find the accused guilty of murder, but rather of manslaughter. Reference was made to a previous Review made by the Judge Advocate, U.S. Forces in Austria, in which two years' credit for pre-trial imprisonment was granted the accused thereby reducing the sentence to twenty-three (23) years imprisonment. (Reviewer's Note: The Review referred to is not contained in the file; however, a certified true copy of a memorandum by the Staff Judge Advocate U.S. Forces in Austria, is appended to the petition, and makes a distinction between the crimes of murder, manslaughter, and "that of killing an unarmed prisoner, in violation of the Laws and Usages of War"). Petitioners allege a fallacy in the reasoning of the Staff Judge Advocate and base their allegation on their interpretation of War Crimes Memorandum No. 3, dwelling quite at length on the "while attempting to escape" angle of the case, plus the fact with regard to Charge II that the accused's own testimony, although self-serving, cannot be disbelieved in the absence of other evidence to the contrary.

An Article written by the accused and published by the Christian Science Monitor, entitled "Advocates of Democracy" was also attached to the petition as an indication that THALER could become a useful member of society.

(3) Personal data report on the accused as of 12 April 1951, signed by Colonel W.R. Graham, Prison Director, states that since his initial imprisonment in May 1945, there has been no record of violations or forfeiture of good conduct time; that the accused would make a good citizen if released; that his conduct has been excellent.

(4) See also letter and affidavit from Mr. Dewan dated 7 May 1951 as mentioned in paragraph IV and marked as petitions 4 and 5 respectively.

4. CLEMENCY

a. Civilian Background:

The record indicates that the accused is a well-educated man and a graduate engineer; and has traveled widely in foreign countries. There is no indication of Nazi membership and he apparently was highly thought of by

his defense counsel as is indicated by the content of a petition for clemency submitted by his counsel. It might also be added that the accused since beginning his sentence has taught himself the English language and is apparently doing all in his power to rehabilitate himself.

b. Sentence:

This reviewer is struck by the fact that the accused apparently gave a straight-forward account of his participation in the killings of which he is charged, not only in his pre-trial statement, but under oath during the actual trial. He did not evade or attempt to shift responsibility for the acts on his subordinate, Sergeant Irmer. Inasmuch as Irmer was not available during the trial to either strengthen or weaken the story of the accused, there was but one witness, Maria Grafeneder, who gave testimony the nature of which might be considered damaging. Miss Grafeneder's testimony was proven by the defense counsel to be somewhat unreliable during the trial. If Miss Grafeneder's testimony is doubted then there remain no other eye-witnesses as to what actually took place at either shooting, and it appears that it is only upon the admission of the accused that he himself shot the victims that the case hangs.

It was the theory of the defense that the decomposition of Lt. Pratt's body before his internment was such as to make it impossible to tell with certainty that the shot into the heart entered from the front or the rear, and he advanced Dr. Weingerl's admission of such a possibility had the body been more thoroughly examined. That had the accused fired the third shot as Lt. Pratt's body lay upon the ground (the first was in the head and the second in the arm), it would have been necessary for him to have turned the body over and to stand directly over it, or to stand the body against the wall and then fire directly into it at right angles. That if, as testified to by Maria Grafeneder, the third shot into the heart had been fired after the flyer had been placed back in the car (with head hanging down off the seat into the car and legs hanging over the back of the car), it would have been necessary for the accused to have climbed up on the car directly over the flyer's body.

It was brought out in the evidence that four additional flyers who also could have been killed by the accused, were delivered safely by him to the gendarmerie, and that Sgt. Callahan prior to his death had entered into a plan of escape which was frustrated by the arrival of the SS.

This case is not cluttered up with a number of compassionately worded petitions. It was well tried by both prosecution and defense and the only additional correspondence in favor of the accused is, as mentioned before, the post-trial petition of the defense counsel. It is believed that the accused did what any other soldier would have done in attempting to stop the escape of his prisoners and did not commit the crimes alleged with any criminal intent whatsoever. He has thus far served his sentence well and honorably as is indicated by the personal data report from War Criminal Prison No. 1.

(Reviewer's Note: Mr. J.T. Dewan, an American citizen and an attorney who was a T/Sgt. in Intelligence during the war defended accused. He is presently employed by the Judge Advocate Division, EUCOM, as a reviewer of Courts Martial Cases and has expressed his continuing belief that the accused is not a criminal and that his shooting of the American flyers was done in an effort to prevent their escape. However a copy of a letter from Mr. Dewan dated 7 May 1951 addressed to Lt. Col. T.L. Borom, War Crimes Branch, Subject: Case of Fritz THALER, and also an affidavit from Mr. Dewan dated 7 May 1951 are mostly of note and are attached.)

CLASSIFICATION
By

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5. RECOMMENDATION:

It is recommended that as an act of clemency, the sentence of twenty-five (25) years imprisonment of the said Fritz THALER be commuted to the time served.

J.A. JOHNSON, Jr.
Maj. Ord Corps

CONCURRING:

Milton Gordon
MILTON GORDON
DA Civilian Attorney

Harry D. Pitchford
HARRY D. PITCHFORD
DA Civilian Attorney

~~CONFIDENTIAL~~