

HEADQUARTERS THIRD ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
WAR CRIMES BRANCH
APO 403 US ARMY

29 April 1946

THE UNITED STATES

vs

Adolf Weger
and
Julius Schulze,
German nationals.

Case No: 12-926

REVIEW AND RECOMMENDATION OF STAFF JUDGE ADVOCATE

1. TRIAL:

The two accused, both German male civilians, were tried at Ludwigsburg, Germany, on 29 November 1945, 1,3,4,5,6,7: and 8 December 1945, by a General Military Government Court appointed by par. 12 Special Orders #332, Headquarters 7th United States Army (Western Military District) APO 758, 28 November 1945.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charge:	Plea	Finding
Violation of the Laws of War.	NG	G
Particular:	NG	G
	(as to both accused)	

In that Adolf Weger, Julius Schulze, and Karl Neuber, German nationals, did, at or near Hanau, Germany, on or about 17 February 1945, wilfully, deliberately and wrongfully encourage, aid, abet, and participate in the killing of Charles B. Goldstein, a member of the United States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

Sentence: The court by at least two-thirds vote of the members present at the time the vote was taken concurring therein, sentenced the accused Weger to death by shooting at such time and place as higher authority may direct, and sentenced Schulze to life imprisonment commencing forthwith, at such place as may be directed by higher military authority.

3. JURISDICTIONAL MATTERS:

e. It is settled law that civilian nationals of one belligerent nation may be tried and punished by the duly constituted tribunals of another belligerent nation for violations of international laws governing land warfare. When a civilian wrongfully kills enemy persons who have fallen into his hands as prisoners of war, or aids, abets, or participates in such wrongful killing, it is an offense falling within the scope of this rule. (par. 348, F.M. 27-10).

b. This General Military Government Court was duly and legally appointed by the Commanding General, 7th United States Army. The charges and particulars were properly referred for trial to this court. The required jurisdictional number of five (5) members of the court were present throughout the trial. Each accused was properly represented by counsel and each announced ready for trial. (R2&3) This court was vested with full power to try these accused for the offense. The sentence was legally within the power of this court to impose. (art.3, M.G.O. # 2).

4. EVIDENCE:

a. For the Prosecution: During an a raid on the City of Hanau, Germany, which occurred during the late morning hours on 17 February 1945, three American airmen were forced to parachute from their disabled plane in the vicinity of the harbor area of Hanau. These American airmen were taken into custody and turned over to the Security Police. (R 16-22). When taken into custody, one of the airmen wore a bandage indicating that he had been injured (R 16). During the early part of the afternoon of 17 February 1945, a police vehicle from the Criminal Police Headquarters of Hanau came to the Security Police Headquarters and took the three American airmen to the Criminal Police Headquarters in Hanau. On arrival at this headquarters the airmen were seen by the accused Weger in the custody of several civilians and soldiers. They were then turned over to the Criminal Police who kept them downstairs and placed them in separate rooms for safe-keeping (R 18, 43, 115, 163). Later in the afternoon Police Director Fehrle called Oelschlaeger, an interpreter, and proceeded to interrogate each of the fliers individually. This interrogation was conducted in the office of Criminal Commissar Weger, one of the accused. (R 115 and 165). The investigation of the fliers was conducted by Fehrle in the presence of both accused, Weger and Schulze, and Security Commissar Geggengerger. (R 115, 164, 176, 218) During the course of the investigation it was discovered that one of the fliers was named Goldstein and another Warren Hammond. When Fehrle discovered that one of the fliers was a Jew named Goldstein he flew into a rage, cursing and shouting. He slapped Goldstein, crying out "Murderer!" (R 115, 165, 218) During the interrogation of all of the fliers Fehrle was very abusive and continued to handle his pistol in front of the fliers and constantly used the expression: "Gangsters and murderers". (R 218) After completing his interrogation Fehrle called for the Police Doctor Fritz Hochapfel. (R 111 and 218). Hochapfel was told that a wounded American flier at the police station required medical attention (R 111). On seeing the American flier was injured Dr. Hochapfel suggested that he be removed to a base hospital, inasmuch as he was a prisoner of war, whereupon Fehrle replied that Allied fliers were no longer to be delivered to the Wehrmacht but were to be retained by the police, and he explained that these Allied fliers were to be exterminated. (R 111 & 112). Fehrle then asked Dr. Hochapfel if he had any means whereby these fliers could be made not to wake up, to which the doctor replied that he had no such means. (R 113). Accused Schulze was present when Fehrle made the request upon the doctor. (R 114 and 219) Fehrle then proceeded to the next room where he found accused Weger, to whom he said in substance: These men are criminals and gangsters. You are familiar with the orders that they are not soldiers but murderers. You will have to have these people shot immediately or shoot them yourself immediately. He added that Geggengerger will help or assist you. (R 166). Soon afterwards Fehrle was seen to leave the office of Weger. (R 69) Weger then passed on the instruction that the fliers were

were present when Weger gave Schulze these instructions. (R 219) After dusk, at approximately 7 o'clock in the evening, accused Weger proceeded into the court yard behind the police headquarters and directed Schulze to bring in the first flier, whereupon Guggenberger, who was also present, said to Schulze and Neuber, who were then protesting, "Come along". (R 220 and 221) Schulze and another man were then seen coming through the gate leading into the court yard with an American flier between them, by Ruppel, a driver who was standing near his vehicle in the court yard. As Schulz passed Ruppel he told him to turn off the lights of his vehicle and to get a shovel. (R 44) As the flier came into the court yard, accused Weger also entered came up behind him and proceeded to shoot him in the head. (R 169, 210). Weger then told Guggenberger and Neuber, whom he saw standing in the court yard, to bring in the other two fliers. (R 169) As the second flier was brought into the court yard Weger spoke to Schulze, saying: "It's your turn now". (R 169, and 179) (also Exh. S 2, p 6) whereupon Schulze complained that his gun had jammed. (R 169) A shot was heard and the flier dropped to the ground. (R 170) The third flier was then brought into the court yard and as the flier came into the court yard Guggenberger passed Weger and then Weger heard a gun shot. (R 170) The bodies of the three fliers were then loaded into the vehicle driven by Ruppel, accompanied by three other men, including Schulze, to the place near the harbor area where an American plane had crashed and the bodies were put with those of the fliers who had died in the crash. (R 19, 45, 193). After the bodies had been loaded into the vehicle accused Schulze admitted that he helped cover up the stains on the ground with sand. (R 224). The next morning ten bodies were removed from the crashed plane and removed to a cemetery for burial. (R 25) At the time the bodies were removed for burial they were examined by members of the Security Police who found that one of the bodies had a bandage around its head and carried identification under the name of Charles B. Goldstein. (R 18 and 24) A report was made up by Ambron, the Security Policeman in charge of the district in which the crashed plane was found to the effect that ten bodies had been removed from the plane found in the harbor area and buried. (R 25) This report, which was introduced as Prosecution's Exhibit B, containing the names of Hammond Warren and Charles B. Goldstein. (R 25 and Exh. G) on 31 July 1945 and 1 August 1945, the bodies of ten American fliers were exhumed from a grave found in the cemetery in Hanau, Germany, by a Capt. Braaf, pathologist with WCIT6827, who performed an autopsy upon all of the bodies and discovered that two of the bodies carried evidence of bullet wounds in the neck and a third carried a bullet wound in the left temple region. (Exh. S 3, p 1, 2, 3)

b. For the accused Weger: The accused Weger admitted that on 17 February 1945 he shot one American pilot and assisted in the execution of two others. (R 6, 168, 169, 170) Weger's defense is best stated in his own words: "because I was forced to do it, and if I had refused to follow the order I would have made myself eligible for the death penalty. I just would have sacrificed my own life and the fliers would have been shot just the same. And besides I would have endangered my family who would probably have been arrested." (R 6) Immediately prior to the commission of the offense charges Weger received a direct order from Fehrle, his superior, to have these fliers shot immediately or shoot them himself. (R 156, 166) This order followed a directive which Weger had received from a man by the name of Girke, his superior, who was Criminal Commissar in Darmstadt, to the effect that Allied fliers were no longer to be treated as prisoners of war but as murderers, and duly executed as such.

Weger was informed that this was a specific directive from Himmler. (R 155) If Weger had refused to obey this order he believed that he would suffer death either before the Standgericht or by being shot on the spot by Fehrle. (R 95, 107, 157) Weger knew Fehrle as a fanatical SS man who would be most likely to take advantage of his authority to put Weger to death for disobedience of his order. (R 159).

c. For the accused Schulze: Accused Schulz admits that on 17 February 1945, he was present and participated in carrying out an order which he had received from Weger for killing three American fliers. (R 7, 221, 224, inc) Schulze claims that when it came to his turn to shoot one of the fliers his gun jammed and someone else actually killed the flier. (R 2) Schulze was convicted that if he had not carried out the order which he had been given, Weger would have reported him to Fehrle who would have had him put before the Standgericht where he would have been given the death sentence. (R 224) Schulze knew that the order given to kill the fliers was Fehrle's order. (R 219) He also knew that this was in accordance with a secret directive from Reichsfuehrer Himmler to the effect that downed American and Allied fliers would have to be shot. (R 219).

5. DISCUSSION:

a. All of the elements of proof of the alleged offense necessary to establish the guilt of both accused were properly adduced into evidence. It was proved by the prosecution and admitted by both accused that on 17 February 1945, both accused willfully, deliberately and wrongfully participated in the killing of Charles B. Goldstein, a flier in the United States Army, and two other American fliers, all of whom were unarmed, surrendered prisoners of war in the custody of the then German Reich. The identity of the victims as being American soldiers was properly established. (R 4, 7, 16, and Pros. Exh. G)

b. Both accused claim that they participated in the offense charged herein only because they had received an order from their immediate superior, Fehrle, to kill the fliers and that they were afraid that in the event they refused or failed to carry out such an order they would suffer death. (R 6, 224) Under the provisions of par. 345.1 of F.M. 27-10 as changed on 15 November 1944, the fact that an accused commits a crime in violation of the accepted laws and customs of war in response to superior orders is not, in itself, an absolute defense. Such fact could, however, be considered by the court in determining the culpability of the accused for the offense of which they were found guilty or in mitigation of punishment imposed by the court for the commission of such offense. In other words the court might properly consider that the accused were not guilty of an offense comparable to being guilty of murder in the first degree, as it is commonly known in the Anglo-American system of law, but rather might have considered them to be guilty of murder in the second degree or manslaughter as these offenses are commonly known in the Anglo-American law. Or the court might consider such defense in imposing its punishment upon the accused for the violation of the rules and customs of warfare. (Circular 110, USFET, 8 August 1945).

c. The accused Weger admitted he killed one of the fliers and assisted in the execution of the other two. (R 6, 168, 169, 170) He admitted that he knew it was wrong to kill these fliers. (R 167) In fact, on 22 January 1945, less than a month prior to the incident herein charged, he had turned over an Allied

airman to the Luftwaffe as a prisoner of war. (R 155, 159) The only reason he gives for not doing the same on 17 February 1945, was that he was ordered to kill these fliers by his superior Fehrle and that he was afraid that if he failed to comply with this order he would have been reported to Fehrle who would have brought about his death. But he admits that he did not know a single instance where Fehrle had brought about the death of a subordinate for failure to carry out his orders. (R 185) Weger had a period of one hour and a half between the time that he received the order from Fehrle and the time in which he actually stepped into the court yard and proceeded to carry out the order. He claims that he could do nothing because Guggenberger was in the outer office (R 167) All of these are facts which the court should properly have taken in consideration in fixing the responsibility of accused Weger the commission of the offense of which they found him guilty. The contention of Weger for the commission of the offense of which they found him guilty. The contention of Weger that he was carrying out superior orders is not the only conclusion which might be derived from the facts and circumstances set out in the record herein. It is just as plausible to believe that because of his disfavor with his immediate superiors accused Weger took this opportunity to carry out this order to better his position in the eyes of his superiors. It was the duty of the court to determine which conclusion was going to be reached from the facts and circumstances of the case. And unless the reviewing authority is convinced that the court abused its discretion the court's findings should stand. A careful examination of the record herein fails to disclose any abuse of discretion by the court.

d. Accused Schulze also admits participations in the offense charged. He denies that he actually fired the fatal shots. (R 7, 221, 224) He admits bringing the first flier into the court yard. (R 221) He admits knowing the reason that the fliers were being brought into the court yard. (R 220, 228) He admits that he helped cover the blood stains after the bodies had been loaded into the vehicle. (R 224) These facts establish Schulze as an abettor in the offense charged and as such is responsible, as a principal, for the offense committed. (Sec. 257 Wharton's Criminal Law, chap. 321, sect. 332, 35 Fed. Statutes 1152). At the time of his participation in the offense charged, Schulze knew that the order to kill the fliers was morally wrong and a violation of international law. If this had not been true he would not have suggested that the fliers be turned over to the nearest airport. (R 220) Furthermore, Schulze states that he was not afraid that Weger would kill him, but rather that he would reported to Fehrle who would bring about his death. These are facts which the court should considered in fixing the responsibility of the accused Schulze for the commission of the offense of which the court found him guilty. In view of these facts it cannot be said that the court abused its discretion in making its findings in this case.

e. Each accused objected to the last five lines as contained in the dossier submitted to the court prior to trial, for the reason that it contained a conclusion of law which was prejudicial to the accused herein. (R 10) The dossier was not introduced into evidence by the prosecution but was merely a summary of the expected evidence, which was presented to the court so that the court might acquaint itself with the facts in order to intelligently interrogate the accused at the beginning of the trial. (Prov. 12, Guide to Procedure in M. G. courts) Inasmuch as the dossier is not in evidence and the prosecution is required to prove its case in the usual way, it cannot be said that any

conclusion contained therein resulted in any prejudicial error in this case.

f. After a careful examination of the record herein it is believed that there are no errors or irregularities contained therein which are so injurious to the rights of the accused as to require either the retrial of this case or invalidating the entire proceedings.

6. DATA AS TO ACCUSED:

a. Weger: The accused is 31 years of age, a German male civilian, married, whose last address was Ingolstadt, Germany. His occupation was that of Criminal Missar of the Gestapo. (R 2) He joined the NSDAP in 1937. (R 180) He served for a short period on the Russian front. (R 202).

b. Schulze: Accused is 41 years of age, married, father of two children, whose last address was Markoebel, District of Hanau, Germany. His occupation was that of a criminal secretary of the Gestapo. (R 2, 215) He served as a soldier on the Eastern front until the end of 1942. (R 216).

7. PETITION FOR REVIEW:

a. Two petitions for review have been filed on behalf of the accused herein. The grounds of error cited in these petitions are as follows:

1. That the court was in error in that the court permitted itself to be influenced by an erroneous statement of law contained in the dossier submitted to the court prior to trial.

2. That the court was in error in that it refused to permit the defense counsel to interrogate the members of the court as to their knowledge of, and the consideration that they would give to, superior orders.

b. The statement in the dossier to which the accused takes exception reads as follows: "His defense will be 'superior orders' and, although it is not suggested that this defense will or should be, accepted, he seems to have established fairly well, both by his own testimony and that of others, that he acted reluctantly and only because he was ordered to do so." This statement, although vague in its terms, cannot be said to constitute a misstatement of the law. As has been pointed out in paragraph b. of the discussion with reference to "superior orders" such would not constitute an absolute defense under any circumstances. However, the court could consider the fact of superior orders in determining the culpability of each accused for the said offense committed or in mitigation of the punishment. The statement contained in the dossier does not prohibit the court from considering such a defense. It merely pointed out that they are required to give such defense consideration. However, assuming that dossier is in error in stating the law applicable to superior orders, the law member instructed the court that they should not consider such statement. (R 10) The dossier was not introduced into evidence but was merely submitted to the court prior to trial so that the court might have some basis for knowing the facts and circumstances of the case to assist them in conducting the interrogation of each accused prior to trial. Paragraph 12 of the Guide to Procedure in Military Government Courts specifically provides: The dossier should be studied by the court prior to its examination of the accused; it should not be regarded as proof of the statements it contains, which will

have to be established in evidence in the usual way, but should merely be used as a basis for examination of the accused." In the absence of any evidence to the contrary, it must be presumed that the court complied with this directive and did not consider the statement contained in the dossier as binding on the court during its deliberations. This contention is further supported by the fact that the law member actually cautioned the members of the court not to consider the statement of law contained in the dossier. Therefore no prejudicial error resulted which would require vacating the proceedings herein.

c. The fact that the court did not permit counsel for the accused to interrogate the individual members of the court as to their knowledge and consideration of the issue of superior orders, in order to determine whether a challenge for cause might lie against any member of the court, did not constitute prejudicial error. The fact that a member of a court does not, at the beginning of a trial, have full knowledge of all the law which may be applicable in the trial of such case does not constitute a ground for challenge for cause. (p 58e MCM 1928). Members of a Military Government Court are not practicing lawyers and therefore cannot be expected to be familiar with all of the rules of law which may be applicable to particular case. It becomes the duty of counsel for the prosecution and defense to present the court with proper citations of law which they feel should be considered by the court during the latter's deliberations. If, after the record is submitted to the reviewing authority, it is found that the court failed to consider or apply the law applicable to the facts in the particular case, it then becomes the duty of the reviewing authority to determine whether the error which resulted prejudiced the rights of the accused, and in the event he is convinced that the accused's rights have been prejudiced he should take the necessary action to correct such errors and irregularities. (Rule 25, Rules of Procedure in MG Courts).

8. PETITION FOR CLEMENCY:

a. A petition for clemency was filed herein on behalf of both accused. The grounds for such petition are as follows:

1. That the court which tried this case signed a letter of clemency stating that the court did not understand just what consideration it would be entitled to give the matter of superior orders in its deliberation in this case.

This ground is supported by a letter signed by all but one member of the court requesting clemency for the accused for the reason that the court felt that both accused had committed the offense of which the court found them guilty under pressure of superior orders and the court did not know what weight and credibility they were entitled to give such superior orders in their deliberations.

2. That since the end of the trial certain new evidence had been discovered which tends to establish that accused Weger was the type of man who would never have committed the crime of which he has been found guilty if it had not been for the great pressure that he was under by reason of the superior order of Fehrle.

This ground is supported by a number of statements of persons who were acquainted with Weger during the years prior to the collapse of the German Reich. Such statements show that on numerous occasions Weger, at great personal risk, had attempted

taken a Jewess by the name of Mrs. Leibert with him to prison to protect her against an order which required that all Jews be sent to work camps. Other statements contain instances of where the accused Weger had protected prisoners of war and as a whole has been a very kind and understanding man and not the type of man usually associated with the Gestapo. The substance of these statements is that from his general reputation it is not believed that the accused Weger was the type of man who would have put the American fliers to death on 17 February 1945, unless he had been ordered to do so by Fehrle.

In support of this ground there is also a declaration made by Ludwig Hiter who states that he was a corporal in the Luftwaffe and was present on 22 January 1945 when the accused Weger had turned over the English flier as a prisoner of war. Hiter also states that he learned from his superior officer that some time later the accused Weger had placed a telephone call to the airport requesting that a vehicle be sent to evacuate three American pilots, but that such vehicle was not sent because of lack of transportation.

b. It is very evident from the letter of clemency signed by all but one member of the court that the court did not fully understand just what weight and credibility they were entitled to give the fact that both accused committed the crime charged under the pressure of superior orders. This is not surprising, for the reason that at the time of the trial of this case the theater policy as to superior orders had not been transmitted to this section and no one was in a position to properly advise the court on this matter at that time. From the letter herein it is evident that the court was convinced that each of the accused committed the offense of which they were found guilty under the pressure of superior orders. The court's request for clemency in this matter is entitled to consideration by the reviewing authority. The only reasonable conclusion which can be drawn from the court's request for clemency is that during its deliberations the court felt that the accused Weger was not responsible for the offense of which he was found guilty to the extent that he would be guilty of an offense equivalent to murder in the first degree, as it is known in Anglo-American law. It therefore is clear that the court fixed the responsibility of Weger for the offense of which he was found guilty so that he would be guilty of the offense of second degree murder, as it is known in Anglo-American law, and had they been properly advised would have fixed the punishment accordingly. From a careful consideration of the court's letter of clemency, coupled with the actual sentence imposed by the court, it would appear that the court during its deliberation had no question in its mind but that the accused Schulze was guilty of an offense which was the equivalent of second degree murder as it is known in Anglo-American law. There is no definite rule applicable in this type of case which would determine the actual sentence that should be imposed upon each of the accused for the offense of which the court found them guilty. However, if we take the Federal Criminal Code as a guide, and bearing in mind the intention of the court, it would seem that a punishment of life imprisonment as to the accused Weger and a sentence of imprisonment for the period of 25 years for Schulze would adequately punish each for the offense of which the court has found them guilty. (Section 454, title 18, USCA).

b. The letters submitted herewith, referring to accused Weger's reputation, merely substantiate the facts as found in the record of trial and do not indicate that the court in making its findings herein abused its discretion. The declaration of

that possibly on the date in question accused Weger did call the airport in an attempt to have the fliers removed as prisoners of war. However, the fact still remains that the accused Weger did make the final decision to comply with Fehrle's order and in so doing took the lives of three innocent men. This fact does not indicate that the court abused its discretion in making its findings herein but merely supports and substantiates the court's position that the accused Weger at the time of the offense charged was acting under the extreme pressure of superior orders. Inasmuch as due consideration had been given by the court to all of the facts and circumstances and the court has arrived at a decision and inasmuch as this reviewer has tried to point out the punishments which can be imposed for the offense of which the accused have been found guilty, it is felt that no further clemency is warranted by the facts as contained in the record including the petition for clemency hereinbefore discussed.

9. RECOMMENDATION:

It is recommended that the findings of the court be approved and upheld but that the sentence in the case of the accused Weger be reduced to life imprisonment and the sentence in the case of accused Schulze be reduced to imprisonment for a period of 25 years. Orders on review which carry out these recommendations are attached for the signature of the reviewing authority.

/s/ M. C. Setzekorn
/t/ M. C. SETZEKORN
Capt., Inf
Chief, Trial Section

I concur.

/s/ Charles E. Cheever
/t/ CHARLES E. CHEEVER
Colonel, JAGD
Staff Judge Advocate