

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 207-1

6 August 1947

UNITED STATES }

v. }

Case No: 12-1203

Siegfried SCHOLZ }

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 15-17 April 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

PARTICULARS: In that Siegfried SCHOLZ, a German national, did, at or near FALLING, Germany on or about 22 September 1944, wilfully, deliberately and wrongfully kill a member of the United States Army, believed to be Sergeant Rubin F. HARKEY, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: Following a bombing attack on Munich, Germany, eight American flyers parachuted to earth from their disabled plane, landing near Falling. A detail of soldiers, under the command of the accused, promptly captured and properly treated seven of the flyers. When the eighth flyer, Rubin F. Harkey, 34772202, was found, he fled into the woods and was shot and killed by the accused. A painstaking investigation and trial shows that a war crime was not committed.

IV. EVIDENCE AND RECOMMENDATIONS:

1. SIEGFRIED SCHOLZ

Nationality: German

Age: 36

Civilian Status: None

Party Status: None

Military Status: German Army, Captain

Flee: NG

Findings:

NG

Sentence:

None, Acquitted

Evidence for Prosecution: On 22 September 1944, at about 1300 hours, at least eight United States airmen parachuted from a disabled bomber in the vicinity of IALLING, Germany. Seven of the airmen were promptly captured by German soldiers under the command of Captain Siegfried SCHOLZ, and were taken to IALLING (R 21, 22, 105; I-Ex 2a). Captain SCHOLZ, with Lieutenant Johann SCHALLER and a civilian named HAUER, got in a car and with the aid of the troops started a search for the airman who was thought to be in the vicinity (R 106, 128; I-Ex 2a). As they drove down the road, they observed an American soldier in the custody of another German civilian, both of whom were walking down the road approaching the car (R 41; I-Ex 2a). However, the American soldier, upon observing the car being driven by the German captain, ran across the road up over an embankment and into the woods (R 41, 52, 53; I-Ex 2a). Captain SCHOLZ stopped the car and both he and HAUER jumped out and started in pursuit (R 68, 107; I-Ex 2a). Testimony of SCHOLZ and HAUER shows that HAUER and a German soldier, who had approached on a motorcycle, shouted "Halt" several times before the fleeing soldier stopped (R 68; I-Ex 2a). SCHOLZ, in a pre-trial statement, and HAUER and SCHALLER in court stated that when the American stopped he assumed a defensive attitude (R 108; I-Ex 2a). HAUER testified that he was of the opinion the American was in the act of surrendering (R 85). SCHOLZ further stated in his pre-trial statement that in the dim light of the woods he was unable to tell that the American was unarmed. Whereupon SCHOLZ fired a single shot with his service pistol while HAUER hit the ground. The single shot penetrated the back of the American's hand and then entered his body and apparently entered his heart as he died in a few minutes (R 71, 108; I-Ex 2a). The dead soldier was then taken to IALLING where he was subsequently buried (I-Ex 9). His identification tags indicated that he was Rubin F. Harkey (Harcey) 34772208. The affidavits

of fellow crew members, who viewed the body in FALLING, are to the effect that his face was so mangled and bruised that recognition was impossible except for his identification tags, however, no proof was offered that the accused mistreated Harkey in any manner except for the one shot fired while he was attempting to escape (R 101, 110; R-Ex 2a). The other flyers were at FALLING safely delivered to a German Air Corps major. After being transferred from one prisoner of war camp to another, they were finally liberated and returned to the United States (R-Ex 2a).

Evidence for Defense: The defense proved the same set of facts as set out above (R 52, 68, 105, 107).

Sufficiency of Evidence: The actual shooting was witnessed by three people, HAUER, SCHALLER and SCHOLZ, the perpetrator. Their stories are in substantial agreement on most points. HAUER and SCHALLER corroborate the story of SCHOLZ to the effect that the American soldier ran into the woods when he witnessed the approaching car, and that both HAUER and SCHOLZ jumped out of the car and started in pursuit of the fleeing airman. HAUER claims, however, that Harkey, the fleeing airman, stopped and turned around in a gesture of surrender before SCHOLZ shot. SCHOLZ claims, however, that there was not enough light in the woods to determine whether Harkey had a weapon and that his position was not one of surrender but a defense position from which Harkey could shoot if he had been carrying a weapon. The story of SCHOLZ is supported by the fact that the bullet penetrated Harkey's left hand and also his body, apparently his heart, so that his hands were in front of his person and not above his shoulders in a position of surrender. It is significant to note that HAUER, while he states that Harkey was surrendering, throw himself to the ground after SCHOLZ fired the shot. His action in so doing is not clear unless he expected the shot to be returned by Harkey.

The civilian with whom Harkey had been proceeding down the road prior to the approach of the car, did not witness the actual shooting

as it took place in the woods beyond the embankment along the road, but arrived on the scene after the shot was fired and substantiates the assertions of HAUER, SCHAIER and SCHOLZ that the bullet penetrated the left hand and the body of Harkey.

It should be noted that the entire occurrence took place in a matter of seconds and in a woods where the light may well have been poor as claimed by SCHOLZ. He was pursuing a fleeing and uniformed member of the enemy forces and it is scarcely incumbent upon him to wait until his adversary fires the first shot where his position is not clearly one of surrender. In turn, the actions of SCHOLZ prior to this time, in handling of the other prisoners, had been circumspect in every way so that it is not possible to impute the intent to murder from anything which had happened prior to the shooting. To the contrary, his actions prior to this would indicate a fair and reasonable state of mind.

It is unfortunate that Harkey saw fit to flee at the approach of the car, but the subsequent actions of SCHOLZ, even in retrospect cannot fairly be construed as a war crime.

The prosecutor, by way of argument, very properly and frankly admitted that he had failed to prove the accused murdered the flyer as alleged.

V. QUESTIONS OF LAW: No questions of law arose at the trial which require discussion.

VI. CONCLUSIONS: No formal approval is required. It is recommended that the record of trial and this Review and Recommendations be filed without further action and that a copy hereof be forwarded to the Judge Advocate for his information.

/s/ D. S. Furl
/t/ D. S. FURL
Major, Cal. G.
Attorney
Post Trial Branch

Having examined the record of trial, I concur.

/s/ C. E. Straight
/t/ E. E. STRAIGHT
Lt. Col., JAGD