

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
WAR CRIMES BRANCH
UNITED STATES FORCES, EUROPEAN THEATER

18 June 1946

UNITED STATES

v

Case No. 12-1814

Justus Gerstenberg,
a German National.

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried on 17 and 21 January 1946 at Ludwigsburg, Germany, by a General Military Government Court appointed by paragraph 9, Special Orders No. 353, Headquarters, Seventh US Army, Western Military District, APO 758, US Army, dated 19 December 1945.

2. <u>FINDINGS</u> : The offense involved was:	<u>Pleas</u>	<u>Findings</u>
CHARGE: Violation of the Laws of War	NG	G

Particulars: In that Justus GERSTENBERG, a German national, did, in the vicinity of GUTTFREUDENTHAL and GERTEMBACH, Germany, on or about 16 July 1944, wilfully, deliberately and wrongfully kill an unknown member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich; by shooting him with a gun.

NG G

3. SENTENCE:

The court by at least a two-thirds vote of the members present at the time the vote was taken concurring, sentenced accused to death by hanging. The sentence was approved on 6 June 1945 by the Commanding General, Third United States Army, who had succeeded to the functions of the Commanding General, Seventh United States Army, on 1 April 1946. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (paragraph 5e, Letter, Headquarters, United States Forces,

European Theater, AG 000.5-2 G.P., 16 July 1945, subject: "Trial of War Crimes and Related Cases"; MGR, Title 5, Section 5-312.1; Letter Headquarters, United States Forces, European Theater, AG 000.5 JAG-AG0, 12 March 1946, subject: "Assumption of War Crimes Responsibilities Previously Exercised by Seventh US Army Area").

4. DATA AS TO ACCUSED:

Accused is a German National, residing in Gartenbach; he is 49 years of age and a painter by trade. He served as a soldier in the first World War, and entered the rural Gendarmerie in 1931, later becoming a Haupt-Wachtmeister. He has been a member of the Nazi Party since 1933, and belonged also to the Sturm Abteilung. He has a public school education, is married, and has three sons, aged, respectively, 25, 21, and 17 years.

5. RECOMMENDATION:

That the sentence of the Military Government Court and the action of the Reviewing Authority be confirmed.

6. EVIDENCE:

a. For the Prosecution: On 16 or 17 July 1944 there were several air battles over the villages of Gutfreudenthal and Gartenbach, Germany, and several airplanes were shot down. One American pilot landed by parachute in the vicinity (R 4, 5, 8, 10). One of the first Germans to arrive at the scene was Richard Nestler, a local farmer (R 5). One Franz Kistella, a Polish national who was working in the neighborhood, started for the scene on foot, and while en route was passed by accused on a motorcycle (R 10).

Nestler testified that he found the flyer lying on his back smoking a cigarette. He had been injured in the left hand but was conscious and otherwise appeared to be uninjured (R 5).

Accused appeared and said to Nestler and the other persons present, "Now, haven't you beaten him to death yet?", or "Have you not yet killed the flyer?" (R 5-7). Meanwhile, Kistella arrived, but was prevented by accused from approaching closely, while Nestler walked away. Accused examined the flyer to see if he had a weapon, and then pulled a pistol from his own right pocket and shot the flyer through the head between the eyes as the man lay on the ground (R 6, 7, 10, 11).

Later in the day accused told witness Wilhelm Seibert, a German civilian, to bury the flyer, saying that he had died "because of his wounds" in his left hand and leg (R 12). On the following day Seibert procured the body from its place in the field, put it in a coffin, and carried it in a wagon to the village of Armschard or Ermeschward (R 13). At the time Seibert picked it up, the left leg appeared to be broken (R 14). On the day after that accused opened the coffin and removed from the body two "dog-tags", one of which he gave to Seibert (R 13). The body was then buried in the village cemetery. Seibert had a wooden cross placed over the grave and screwed on the cross the dog-tag he had received. This dog-tag, introduced in evidence as Prosecution's Exhibit 1, read, "WILLARD M. HOLDEN, 37559251, T43-44" (R 13, 14).

b. For the defense: Accused was properly instructed in open court concerning his rights, and took the stand as an unsworn witness in his own behalf. One Georg Schwerbach, a German civilian, and a fellow member of the local Gendarmerie, also offered sworn testimony for accused. Their testimony will be summarized together.

The local Gendarmerie was a branch of the police under the control of Reichsfuehrer Himmler. Its members had been told they were subject to military law and that stern punish-

ments, including death sentences, would be given for disobedience of orders (R 16, 23, 24, 25). At one time the Gendarmerie had been instructed "that in taking prisoners we had to go through the usual formations and turn them over to the Wehrmacht" (R 17). But at a meeting of the Gendarmerie in accused's district, held in March or April 1944, a Colonel von Oberbeck gave instructions that all pilots who parachuted down were to be killed. No discussion of these orders was had, and, in fact, the Gendarmes were forbidden to discuss them among themselves (R 18, 23, 28).

On two occasions prior to receipt of von Oberbeck's orders, accused had captured three pilots and had turned them over to the Wehrmacht (R 18). But in the instant case accused believed that he must follow the new orders, and so shot the pilot with one bullet from his 7.65 pistol, firing from a distance of 5 or 6 meters. Accused knew how prisoners of war were supposed to be treated, and that what he was doing was not proper, but heared the consequences if he did not (R 19, 21, 22). The pilot made no attempt to attack accused (R 21).

Accused's reputation was that of an industrious and kind man. He was not a fanatical Nazi (R 24).

The defense also introduced in evidence, as its Exhibit B, a Pathologist's Report of the exhumation of the body of a Willard M. Holden from the cemetery at Ermschwerd, Germany. This report while not showing how it was determined that the body exhumed was that of Willard M. Holden, nevertheless assumes that it was. The body showed marked decomposition. It was impossible to determine whether there had been any bodily injuries, but the right leg was found to be "in marked external rotation". Nothing was left of the head but the skull, which showed "no evidence of fracture or gun shot wound". (Defense Exhibit B).

c. Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Seventh US Army, dated 24 April 1946, and appended hereto, is adopted in its entirety.

7. JURISDICTION:

The Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and the accused. When a civilian or enemy soldier wrongfully kills a prisoner of war who has fallen into his hands, it is an offense against the international laws governing land warfare and as such may be tried and punished by the duly constituted tribunals of an occupying belligerent nation. A general discussion of the jurisdiction of such military government courts, with appropriate citation of authorities, is contained in prior reviews of confirmation cases written by this branch and need not be repeated here (See U.S. vs. Clemens Wiegand, November 1945).

8. DISCUSSION:

a. The evidence clearly establishes, and accused admitted, despite his plea of not guilty, that he deliberately and intentionally fired a bullet into the head of a surrendered, disarmed, and possibly injured American airman on the date and at the place set forth in the Particulars of the Charge.

The evidence introduced by the defense casts some doubt upon the question whether the body which was exhumed as that of Willard M. Holden was actually that of the victim of accused's deed, for no evidence of a gunshot wound in the forehead was found. Assuming for the sake of argument only that it was not, nevertheless, a corpus delicti is fully proved. There is competent and uncontradicted evidence that accused did kill an American soldier, and that that soldier was Willard M.

Holden. The Particulars did not allege the identity of the soldier, and it was not necessary to sustain a conviction that his identity be proved, so any possible confusion over the identity of the body exhumed cannot be said to have hindered accused in his defense or to have prejudiced any substantial right he possessed.

It was suggested by defense counsel that the prosecution failed to prove a murder by accused in that it did not show conclusively that the victim died as a result of the wound inflicted by accused; that the flyer may have, or would have died in any event, as a result of injuries he supposedly already had when accused arrived on the scene. There is no clear proof of any such fatal injuries, and even the facts set forth in the Pathologist's Report indicate a possible injury to the right leg, rather than to the left leg, as claimed by the defense. In addition, if, as is suggested by the defense, the report covers a body other than that of Willard M. Holden, then its evidence is of no value as to proof of other injuries which might have caused the victim's death. Finally, it is well established law that until the moment death occurs, no private individual has the right to cause it or hasten its advent without legal sanction. A man under pending sentence of death or afflicted with an incurable disease may be the victim of a murder equally as well as a man in the best of health and innocent of any crimes.

Finally, accused raises the defense of superior orders. This office has repeatedly ruled that obedience to palpably and flagrantly illegal orders such as accused claims to have obeyed here, is no defense to murder of captured and unarmed enemy fliers. (See discussion in cases of United States v. Dominikus Thomas and United States v. August Kobus, and

authorities there cited). Accused admitted that he knew what treatment he should have afforded his victim, and that he was doing wrong in not affording it. The compulsion upon which he replies was far from an immediate one. He took charge of the situation, committed an illegal act, and now seeks to rely upon orders given at a previous time and at another place. At best, such orders would constitute only mitigating factors, and the court did not see fit to be influenced by them. The findings must be sustained and the sentence is legal.

b. From an examination of the entire record it appears that no error or omission, technical or otherwise, by the court resulted in injustice to the accused. All the evidence introduced at the trial was admissible under the rules of procedure applicable to Military Government Courts, and, in fact, under the strictest rules of our own civil courts and courts-martial. The essential facts were established by the direct testimony of eye-witnesses. Despite his plea of not guilty, accused admitted his act from the witness stand. Accused was represented by German Counsel of his own choosing and by American civilian defense counsel appointed for the court, and expressed himself satisfied with both. The right of confrontation of witnesses and cross-examination were fully allowed. A competent interpreter was supplied. The proceedings satisfied all the requirements of a fair trial. The court was properly constituted, and had jurisdiction over the subject matter and of the accused. It was authorized to impose the death penalty. Both findings and sentence were approved by at least a two-thirds vote of the members of the court present. There were no irregularities in the proceedings which prejudiced any substantial rights of the accused. He received a fair trial, consistent with Anglo-American standards of justice and with the

general principles of international law recognized as applicable to the trial of such cases.

9. CLEMENCY: The offense of which accused stands convicted is a war crime. All war crimes are subject to the death penalty, although a lesser penalty may be imposed (par. 357. PM 27-10, Rules of Land Warfare). While it was not shown that accused was an unusually brutal man, there is, nevertheless, no legal or moral justification for his act in the present case. He disregarded his plain duty toward his victim, and relied solely upon superior orders which were both illegal and remote in time and locale.

Two petitions of clemency have been received in behalf of accused, and are attached to the record. One is written by Wilhelm Roth, Minister of the Gospel, Gertenbach, Kreis Wittenhausen, who is apparently the pastor of accused and his family. He states that he has "very little knowledge of the incident" but pleads for mercy on behalf of accused and accused's wife. The petition contains no new evidence.

The other appeal for clemency is in the form of a petition for review by accused's defense counsel. He reiterates the defense put forward by accused at the time of trial, to the effect that "the offense of the accused was committed pursuant to superior orders". It is believed that this petition raises no questions of law or fact not disposed of in the previous section of this opinion. No extenuating circumstances are disclosed in the record and no clemency is recommended.

10. CONCLUSION:

It is accordingly believed that the sentence of the court should be confirmed. A form of action prepared to accomplish this result is attached hereto.

SAMUEL SONENFIELD
Chief, Post Trial Section

MILITARY GOVERNMENT COURT
Order on Review

Case # 12-1814

Order # _____

WHEREAS JUSTUS GRESTENBERG was convicted of the offense of wrongfully killing a prisoner of war, by a General Military Government Court at Ludwigsburg, Germany, and was sentenced to death by hanging, by a judgment dated 21 January, 1946.

AND WHEREAS this case has now come before me by way of review and after due consideration and in exercise of the powers conferred upon me, I hereby order:

THAT the findings and the sentence be Upheld and that the record of the trial be forwarded for confirmation of the sentence.

Dated 8 June 1946

s/Geoffrey Keyes
(Signature of Reviewing Authority)
GEOFFREY KEYES
Lieutenant General, U.S. Army
Commanding

GERICHT DER MILITARREGIERUNG
Revisionsanordnung

Strafsache # 12-1814

Verfuegung # _____

IN DEM JUSTUS GRESTENBERG wegen der folgenden strafbaren Handlung, unrechtmassiges Töten eines Kriegsgefangenen, vom Oberen Gericht der Militärregierung in Ludwigsburg, Deutschland, fuer schuldig erkannt und zum Tode durch den Strang verurteilt wurde, laut Urteilspruch vom 21. Januar 1946

UND IN DEM diese Strafsache mir jetzt zur Ueberpruefung vorgelegt wurde, und nach entsprechender Erwägung des Sachverhalts und in Ausübung der mir uebertragenen Befugnisse, verfuege ich hiermit:

DASS das Untersuchungsergebnis und der Schuldspruch aufrechterhalten sind, und dass die Abschrift des Gerichtsverfahrens zur Bestaetigung des Urteils weitergegeben wird.

Gegeben am _____ 1946

(Unterschrift der Revisionsbehoerde)

Having examined the record of trial, I concur.

C. E. STRAIGHT
Colonel, JAGD
Deputy Theater Judge Advocate