

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
UNITED STATES FORCES, EUROPEAN THEATER

23 December 1946

UNITED STATES)

v.)

Case No. 12-1937

Richard WEGMANN, a German
National.)

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried on 10 and 11 June 1946 at DACHAU, Germany, by a General Military Government Court appointed by paragraph 11, Special Orders No. 12, Headquarters, Third United States Army, APO 403, dated 7 June 1946.

2. FINDINGS: The offense involved was: Plea FINDING
CHARGE: Violation of the Laws of War PG G

Particulars: In that Richard WEGMANN, a German national, did, at or near ELZ, Germany, on or about 28 May 1944, willfully, deliberately and wrongfully kill a member of the United States Army, believed to be Lt. Roy D. GUNSE, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by shooting him with a gun.

PG G

3. SENTENCE:

The court by at least a two thirds of the members present at the time the vote was taken concerning, sentenced the accused to death by hanging until dead at such time and place as higher authority may direct (1235).

4. DATA AS TO ACCUSED:

According to accused's own statements in his pre-trial affidavit dated 28 September 1945 he was then 25 years old, a resident of Gut Harigshof, near SCHWARTZ, Germany, and a farmer. The same document contains his allegation that he had become a member of the German Wehrmacht in the fall of 1936, that he received a shot wound in the skull during the campaign in Poland and was on account of that injury discharged from the

Wehrmacht in the spring of 1941 (Plea, Exh. No. 1). He is a German national (E 4).

No data on his family status or on his relation to the Nazi Party appear in the aforementioned affidavit, nor were they given by accused during the trial. He was not interrogated by the Court nor called as a witness by either Defense or Prosecution (E 7, 117, 118). However, other persons heard as witnesses, made allegations substantially to the effect that accused was not a Party member. This as well as the accused's and other persons' statements concerning the effect of his head injury upon his mental competency will be covered in the summary of the evidence hereinbelow.

5. RECOMMENDATION:

a. Guilt: That the Court's finding the accused guilty of the Charge and Particulars be approved. No qualification of the words "believed to be Lt. Roy D. G. USE" appearing in the Particulars need be made in view of the fact that it was proved that the flyer was American, which is adequate to support the finding. No positive charge was made that the flyer was Lt. Roy D. G. USE.

b. Sentence: That the death sentence, meted out to the accused by the Court be commuted to imprisonment for a term of thirty (30) years commencing on 12 June 1946.

6. EVIDENCE:

a. Prosecution in its opening statement (E 7, 8) offered to prove the following facts: On or about 28 May 1941 an American aviator parachuted safely from his disabled plane near Elm, Germany. He surrendered to the civilians who gathered around him. One Alois HOLZE took custody of the flyer and searched him for weapons. None were found on the person of the flyer. Very shortly thereafter, a soldier, a member of the

announced that he was in charge and led the flyer in the direction of the Burgomaster's office in EBM, Germany. The crowd which had gathered around the flyer, by this time, followed along in the direction of EBM. As the group was proceeding there, the accused, Richard WEGMANN, appeared armed with a rifle. He ran up to the crowd, pushed his way through to the flyer and at a distance of five meters from the victim, fired his rifle at him. The victim fell to the ground and then attempted to stand up in further token of surrender when WEGMANN fired a second shot at him. The flyer fell down again. His body was covered with blood and he screamed in great pain. The accused called him an "Air Gangster" and called out that his own name was WEGMANN and that he was settling a score for his brother who was killed in an air raid on Frankfurt. One of the bystanders, seeing that the flyer was still alive and in great pain suggested that since he was in such misery he might as well be finished off. At this, WEGMANN fired a third shot into the head of the flyer, killing him. As WEGMANN left the scene where he had killed the flyer he was heard to say, "Let's go get another one." The flyer was subsequently buried in a cemetery at EBM, Germany.

b. The theory of the Defense was substantially thus summarized by Dr. Wecker (164), that the accused did kill the flyer in question by three shots, but that at the time of his deed he was mentally incompetent and therefore not capable of committing a crime.

It may be mentioned, in this connection, that upon special order of the President of the Court (123) both the final arguments of Prosecution and of Defense have been transcribed and form part of the trial record (119-131).

c. Prosecution's Evidence: Before starting with a

summary of Prosecution's evidence, attention must be called to the fact that there appears nothing in the evidence that would bear out the following passage of the Charge Sheet: "believed to be Lt. 'by D. C. USE".

Turning now to a detailed review of the evidence of Prosecution, reference must be made to the testimony of its first witness: Wilhelm SCHMIT, a former's helper of EL, about two years younger than accused. On direct examination, he substantively testified as follows:

Witness remembers 28 May 1944 as the day in EL when he observed a parachutist coming down from an American plane and hitting the ground at a distance of about 200 meters from where witness stood. It was in the afternoon. Witness walked toward the flyer, but before he reached him a group of Polish and Russian workers had already surrounded him. One of the Polish workers, accompanied by the witness, escorted the flyer in the direction of the police station. Meanwhile more people joined them, one of whom was a soldier and who on this ground claimed to be in charge of the flyer. At that time there were altogether ten to fifteen men surrounding the flyer and walking with him toward the police station (1:8, 11). Suddenly a man, unknown theretofore to witness, came jumping along and called out:

"After you have killed a brother of mine at Frankfurt and this to revenge." He furthermore shouted at the people standing around "Get out of my way or I'll shoot every one of you" (1:12). At that time he fired the first shot. The same man shot a short while later, after the flyer had meanwhile attempted to get up and raise his hands. He also fired a third shot, whereupon the flyer was lying on the ground with the top of his skull lifted and his brain mass pouring out over the grass. Witness identified the accused as the man who fired all the three shots (1:13-17).

Accused, on that day, introduced himself as Richard WEGMANN of the Ruhrigshof (Q 14). While he was shooting at the flyer, the crowd uttered their indignation (Q 13). His weapon was a rifle (Q 15). He shot at the flyer from a distance of four to five meters (Q 16). After the perpetration of the deed and before walking away, he said, "We will look for another one" (Q 14).

Prosecution's next witness, Christian DOLLITZ, a technical railway inspector of ERL, 56 years old, upon direct examination substantially testified as follows:

He remembers 28 May 1944 as the Whitsunday of that year and as a very hot day. He did not himself see the plane or a man parachuting down from it, but when he was just taking a walk, he met on his way one Mr. HOLZE, the station superintendent, and a German soldier, with a flyer between them. According to HOLZE this flyer had just come down by parachute. Upon HOLZE's request he came along with the soldier to show the way to the police station, while HOLZE separated from the group to look for another parachutist who had come down. After they had proceeded about 200 meters, and while they were surrounded by a crowd of 20 to 50 people, including quite a few children, witness noticed that this crowd started to laugh. At this time he saw a man with a red face, his hair blowing into his face and with a rifle which he had taken from his shoulder and which he was holding under his arm, pointing to the flyer. Witness started to say "For Heaven's sake don't be a fool. You aren't going to do it?" In the witness's words he looked like a mad man. "If you don't keep quiet I will shoot away and at you". Then he shouted "My brother, my brother, murderer" (Q 23), and shot at the flyer from a distance of about 8 meters. The flyer collapsed after this first shot, and witness immediately ran to the phone to report to the policemen in ERL. After he had covered

about a hundred paces, he heard a second shot, and when he had run another 50 meters, a third one (T 19-21).

On cross-examination the witness added, among other things, that the people were laughing about the accused and the manner of his behaviour which resembled that of a mad man (T 24). The accused had a puffed up, red face, which was almost blue. His hair was hanging into his face (T 25). As the accused ran toward the flyer, one Workmeister HE E. made the following remarks: "This fellow is crazy. He doesn't know what he is doing. There is something wrong with him." Witness himself had the same impression (T 26A).

On redirect examination witness alleged that he had based his assumption of an abnormal mental condition of accused on the appearance of the latter, his saying "If you don't shut up I will shoot all of you," and his actual firing of the shot (T 28, 31).

Prosecution then introduced a further witness in the person of one Konrad SCHWAB of Elm. driver of a locomotive engine about 43 years old. On direct examination he substantially related that he was just observing the crowd which accompanied the flyer, when a man with a gun arrived, asked how many flyers there were, and after being told that it was a single one, shot directly at him from a distance of about four to five meters. The flyer collapsed and screamed. His shirt and trousers were covered with blood (R 35). The man who did the shooting, shouted at the top of his voice: "You air a murderer, you have murdered a brother"; he then shouted: "My name is HENKLE". A short while later he fired a second shot. Thereupon one HENKLE said: "What have you done? How are you going to let this fellow lie there." The perpetrator of the first two shots fired then a third one which went into the victim's back. The second and

third shots also came from a distance of about four to five meters. The flyer was an American (P 36, 37). Upon cross-examination, the witness substantially added: There was warm weather on that day; accused was covered all over with sweat and his face was very red. Nobody was laughing. Witness did not hear anybody saying that the perpetrator was crazy. He himself did not hear but he was later told that the perpetrator had said to the crowd: "If you do not go away I'll shoot every one of you" (P 38). Accused shouted his name after he had shot (P 39).

Prosecution's next witness, Johannes FEHL, of GOMMUTZ, born 1905, 25 years old, a farmer's assistant, gave substantially this version of the incident:

On 28 May 1944 at around noon, witness was on vacation and indulging in a walk when he met accused together with whom he had in 1927 started to go to school and who remained his schoolmate for the next three years. They had a conversation about the war, especially new weapons, and the existence of which nobody believed. In this connection accused said: "... by the time they get their secret weapons out, the whole thing will be over..." After finishing their conversation both of them returned to their respective homes (P 41-42).

When in the afternoon of the same day at around two or three o'clock, a parachutist had come down, he and accused met again and went to see the flyer (P 43). At a certain point accused ran on ahead of witness, who thereupon went to an inn and therefore did not see accused until he approached the flyer. Witness heard three shots, but did not see who fired them (P 49, 50). When he came to the scene of this shooting incident, he saw a crowd on one side, the flyer lying on the other side and accused about in the center with his rifle

pressed against his hip. Saliva was coming out of his mouth. Witness thought he was crazy. When witness arrived, he still heard accused saying "gangster". The flyer's brains were hanging out. Witness asked accused why he had done it. His answer was "Tordon me, my brother also was killed" (R 50). When finally witness walked away with the accused the latter said something to the effect that he wanted to "rub out" every flyer he could find (T 51, 52).

In answering a question of the President of the Court, witness substantially alleged that he did not notice anything extraordinary in accused when he talked with him on that day before the incident took place (T 57, 58).

As further part of Prosecution's evidence Exhibit No. 1, sworn affidavit of accused dated 20 September 1945, was read in Court (T 61). While it is set forth in question and answer form, its substantial contents may thus be summarized:

During the German campaign in Poland, accused's skull was injured by a shot, whereupon he was discharged from the Wehrmacht. This was in 1941. But even now his health is not completely reestablished. He has sometimes spells of unconsciousness, loses his memory for a few seconds and is very nervous and excitable. But upon the question of interrogator, "do you know the difference between right and wrong?" accused answered "Yes." He knows that it is wrong to kill and also knew it in 1944.

On 28 May 1944 he was hunting deer and therefore carried a rifle. He then saw a plane in the air and four to six flyers parachuting therefrom. He ran to the sound, but in the way he saw a German POW, and invited him to come along to see what was the matter with the flyers. POW joined him and was with him until they were about 100 to 150 meters from the flyers. During

at that time accused had no intention of killing the flyer, but

"When I got close to the flyer, I hurried myself along, then I lost my thought and sense and I ran and shot the flyer. He died three minutes. Accused claimed he had lost his mind when he concentrated the killing of the flyer."

Finally Exhibit No. 2, being a medical report of investigation dated 4 May 1948 and signed by Herbert M. WINTER, Captain, MC and Donald W. ILL Jr., First Lieutenant, PC, was received and read in Court as part of the prosecution's evidence. In substantial part it reads:

1. "Richard Wiegand, alleged war criminal, was wounded in action in 1938 with a metal fragment wound in the left occipital region.
2. "With recovery at that time, symptoms of neurologic irritation - headaches, stiffness of neck, etc. - were noted. X-rays showed a metal splinter 1 inch long and 1/8 inch wide in the occipital region.
3. "Operation was performed at Infirmary Hospital, No. 1, Karlsruhe, Germany, on 7 March 1941. The fragment was found, and easily removed with scissors and bone flap in the lower occipital region. An uneventful recovery with subsiding of all symptoms except occasional headaches was noted.
4. "At present, this general condition is excellent. The neurological examination was essentially negative. The patient is found to be of rather limited intelligence, but is well oriented.
5. "No contraindications were found toward his removal to Ludwigsburg or other place by any normal means of transportation."

2. Defense's Evidence: Defense is attempting to prove that accused, at the time he admittedly killed the American flyer by three shots, "was not capable of what he did, nor competent" (R 64) first introduced as witness was Mrs. Anna BOWIE, 57 years old, a helper in the household of accused's parents since the time when he was one year old. She was then a nurse (R 65, 66). The substance of her statements on direct examination may thus be summarized:

The Wegmanns were not Nazi minded. It is customary in that neighbourhood to give a human name to each piece of cattle and to make it visible on a board over the stall. Accused's father called one of his oxen "Hitler" and was therefore punished with imprisonment for eight days (R 66). The accused was a diligent, gifted student, never repeated a class, and had good school certificates up to his final examination (Matura) which he passed (R 66).

In the fall of 1938 accused entered the army and in September 1939 he was wounded in Poland (R 66, 67). Thereupon he was hospitalized, first in Breslau and then in Schluscha, the place next to his home. From the hospital he was sent home on leave (R 67).

While in the hospital and while on leave at home, he made upon witness the impression that he was distorted and tired, and a different person from the man who had joined the Army in 1938 (R 67). He always complained about headaches and also had attacks, during one of which he said: "Go away, go away, my head is splitting, my head hurts, scream, go away." At such times he would also push and shove his mother, but when his attack ended would ask his parents to forgive him. "Sometimes he would sleep days and nights and then he would get up and everything would be all right." Doctor Teeller was often called to take care of him (R 68).

On the day when accused shot the flyer, witness had no opportunity to observe him, but she was told that when he came home after his leave, he said in a regretful way to his father: "I have done something terrible." The day that the incident occurred was a very warm day and accused must have suffered a great deal from the heat (R 69).

On cross-examination, witness substantially added: For years after receiving his wound, namely until 1941, accused was

was hospitalized and then at regular intervals treated in a hospital (R 68-72). Then he began to get better, in that he did not always have attacks (R 72). After being discharged from the army, accused first helped his father in the latter's farm work and then attended an agricultural university at Giessen in 1941. He was there during two terms, but was not capable of continuing and finishing this study (R 73, 74). He thereupon did farm work, mostly on his father's farm (R 75).

Since he was wounded, accused in the witness' opinion, had not known the difference between right and wrong, but witness did not recollect his having committed any offense before his killing of the flyer (R 76, 77).

On redirect examination witness substantially related: At Giessen, accused could not study any longer because of his headaches and he failed an examination there. But until the time of his final examination, he had only good marks, except for one bad one which he received because he had made a slur against the Hitler Youth (R 77). At home he complained that he was no longer able to carry out a simple mental process like counting. While accused, in the period described, would punish his parents, that had not occurred before he received his injury (R 78). The Weimanns were a cultured and well-to-do family (R 79, 80). Accused would at times get excited when told, "Get going, you're crazy." He would get these attacks when there was a great heat or sultry weather and an excitement in the court (R 80). Whenever accused had a disagreement with certain people employed on his father's farm, they would say, "Let him go, he does not know what he is doing." (R 81, 82).

Defense's next witness, Dr. Fritz GOELTER, a Doctor of Medicine, 77 years old, who was allowed to practice under the occupation regime, since he had never been a party member (R 83).

substantially testified:

He had been the family doctor of the Wegmanns for over 20 years (R 83). Between the years 1940 and 1944, he was often called because of the troubles accused had after (according to what his father told the witness) he had received a shot in the head, with a fragment entering the brain (R 84). Witness had known the accused since the latter's childhood. He was, before his head injury, peaceful, quiet, and intelligent (R 85, 86). When, in 1940, accused's mother called witness over the phone to come and see accused immediately, he found the latter very tense, scarcely giving an answer and befuddled. Witness told accused's father that the first symptoms of the brain injury, namely the fact that he could not read, write, or speak, would sometimes return (R 86). In such cases as that of the accused's, weaknesses remain or may remain as a result of the disturbance of the brain mass. The accused in particular lost all knowledge of what he had learned in school and he lost his intelligence (R 87). Between the years 1940 to 1944, accused had such attacks in which he was no longer competent and responsible for what he did. During such attacks his mental status was close to idiosy. Such attacks can be caused by the slightest stimulants, as for instance the heat of the day. The brain is temporarily not capable of work (R 88). "The International Medical Society is unanimous in agreeing that people suffering from this sickness are not capable of judging the culpability of their acts and that they should be treated with this in view." (R 89). When witness was told about the accused's external appearance and conduct at the time of incident, witness would conclude that accused had such an attack and did not know what he did (R 90). Neither accused's father nor accused, himself, was Nazi-minded. Accused's brother lost his life during an air raid attack on

Frankfurt (191). Before accused committed this deed, he had been examined by specialists and put in the Army's wounded class number three, on the basis of an official report stating that he had a severe brain sickness (192). Witness's diagnosis of accused's condition on the basis of observation between the years 1940 and 1944 is thus summarized by the witness himself: "Serious weaknesses as far as the brain's capacity to work is concerned, with effective aberrations, extreme irritability, excitability, and typical sensibility to weather." (193). Witness came to this diagnosis by considering the following facts: "The ability of the brain of the accused to work collapsed because of an upset in the brain mass. Proof: He forgot what he had learned in school. Earlier he had been intelligent and had passed all his examinations. After his head injury, however, he flunked the simplest examination. He was examined by specialists in the brain injury hospital in Frankfurt, as well as by military doctors, and was placed in the class for wounded people, No. 3. That occurred only when a person had severe disturbances" (195, 196).

Upon cross-examination witness made other things admitted that he determined that accused had a head injury and a splintered brain without ever X-raying his head (104), and that he testified him under the assumption of a splintered brain without ever attempting to find out in what part of accused's head this piece of metal was imbedded (105). He relied on such symptoms of a brain injury as the facts that accused, after his injury, could not write, see, speak, or recognize his parents visiting him in the hospital (106). Witness admitted that the accused's inability to read, write, and to do simple arithmetic occurred in 1939 and that he subsequently regained the abilities of learning and reading (113).

On redirect, witness substantially admitted that his task in

treating the accused was not to remove the brain splinter, but to reduce his troubles, and that it was therefore not necessary for witness to have accused X-rayed (R 116).

3. Special Observation on the Failure to Put Accused on the Stand: Defense counsel did not put accused, himself, on the stand but declared that he was ready and willing to testify should the court like to interrogate him (R 118). The court did not make use of this possibility offered to it (R 117, 118). It is submitted that this must be regretted.

Of course, it is elementary that the accused must not be compelled to testify. But if, as in the present case, an express declaration is made on his behalf that he is ready and willing to testify should the court desire to interrogate him, use should be made of this opportunity to obtain a further basis for forming an opinion of his mental status at the time of his d. c. Certain clues thereto might indeed be found in his demeanor and in his own narration at the trial. But it is not believed that this omission prejudiced any substantial rights of accused or defense or impaired the possibility of adequately reaching a finding in the case.

7. JURISDICTION:

The general basis of jurisdiction over enemy civilians concerning war crimes and the continuation of this jurisdiction after the cessation of hostilities, the war crimes jurisdiction of American Military Government Courts and the jurisdiction of these courts irrespective of the localization of the crime outside the American Zone - at least if the victim was an Allied national - all this has been amply discussed by this office in previous reviews. It would therefore seem to be sufficient to refer in this regard to those previous discussions in the light of which it cannot be doubted that the court in the present case had jurisdiction of the accused and of the subject matter.

first one is correct, but that the second and third ones are conclusions which do not necessarily follow from the evidence on record.

b. In his Petition for review, defense counsel substantially says: Whenever a defendant or his defense counsel claims that the accused was criminally incompetent at the time of the alleged crime, it is up to the prosecution to prove the contrary, in other words to prove that he was then in a condition which did not exclude his criminal responsibility. It is believed that this is a sound proposition of law, even though there are certain jurisdictions which place the burden of proof for the criminal incompetency of accused on the defense. Reference is in this connection sometimes made to a so-called presumption of the accused's criminal capacity at the time of his deed, which presumption is said to exist until it is refuted by evidence proving the contrary. However, the word "presumption" used in that connection would seem to be a misnomer. What is really meant is that the so-called burden "of going forward" with the evidence of accused's mental incompetency is generally believed to rest upon the defense, in other words, that it is up to accused or his counsel to challenge accused's criminal responsibility. The latter is rather taken for granted in the case of an adult person. However, this burden "of going forward" can be discharged by a mere allegation. It does not amount to a burden of proof proper. The latter must rest with the prosecution, since criminal responsibility is one of the substantial elements of the commission of a crime and since all the substantial elements of a crime must be proven by prosecution. That is a corollary of the fundamental principle of criminal justice in any civilized country, which is called "the presumption of innocence". It is however believed that it will be

8. DISCUSSION OF THE MERITS:

a. The final argument of defense counsel, which forms part of the record, substantially admits, and it also appears from the evidence, that apart from the debated issue of the accused's mental competency at the time of the alleged crime, he certainly committed the deed of which he is accused in the charge sheet, with the qualification that there appears to be nothing on record to justify the following words in the particulars: "believed to be Lt. Roy D. Gruse." It can therefore not be doubted that, apart from the issue of accused's criminal capacity at the time in question, he should have been found guilty of the war crime of murdering an unarmed, surrendered prisoner of war in the custody of the then German Reich. Hence, the only problem to be discussed is as to whether or not the court was justified in the assumption naturally inherent in its findings, that accused was mentally competent insofar as his capacity to commit the crime was concerned. German defense counsel in his final and rebuttal arguments (p. 129-131), as well as in an elaborate Petition for Review (dated 1 July 1946) forcefully submits that the question of accused's criminal responsibility in view of his state of mind at the time of his deed should be answered in the negative. In his able reasoning he rests this result on three main grounds, which may thus be summarized, that prosecution has the burden of proof with regard to the mental competency of accused at the time of his deed, or of his criminal capacity in general; that prosecution in the present case failed to discharge this burden of proof; and what defense on the contrary proved the mental incompetency of accused at the time when he perpetrated the killing of which he is charged. All these three propositions will be discussed in the following paragraphs. It will be attempts to show that only the

shown that prosecution in the present case discharged its respective burden of proof. Before further discussion of this, some preliminary points must be briefly taken up.

c. To begin with: What is the test for deciding the question as to whether or not accused at the time of his deed was criminally competent? It is believed that the applicable criterion is whether or not he was mentally able to distinguish between right and wrong and to know the wrongful nature of the deed he was about to commit - in other words, the so-called "right-and-wrong test". It follows from the foregoing that it is up to the court and not for the medical expert to decide this question even though the medical expert will by his testimony or opinion, as the case may be, help the court in reaching his finding. It is for the medical expert to state whether the accused at the time in question was or was not mentally sick and in the first case to disclose the symptoms of the respective insanity with particular reference to its impact upon the mental condition of the person affected thereby. However, whether such mental sickness in the individual does and at the given time prevented the affected person from distinguishing right and wrong remains still a judicial problem to be solved by the court in application of its discretionary power to weigh the probative value of the evidence produced on trial. It is believed and will be further elaborated herein below that in the present case the court did not make an unreasonable use of its discretion in weighing the evidence and that the latter justified the belief that accused at the time in question was able to distinguish between right and wrong and to know that he was committing a wrongful act.

d. The evidence on record does not prove, but rather supports the conclusion that accused at the time of his killing of the American flyer was able to distinguish between right and wrong

and also knew that the deed he was doing was wrong. This appears even from the testimony of the main witness of the defense, Mrs. Lina BOLJE, and more specifically from her statement that upon coming home after his deed, he said to his father, "I have done something terrible." True, she only knew it from hearsay, but hearsay testimony is in principle not excluded before American Military Government Courts in Germany and there was no reason to disregard this particular hearsay-statement which fits very well into the general picture of accused and his deed. Accused's action, though atrocious, was not senseless, but rather in a logical way determined by his motive to take revenge for the death of his brother, who had been one of the victims of an allied air-raid over Frankfurt. Nor was it senseless as a symptom of an unawareness of the character of his action that he threatened the crowd to shoot at them if they would not let him have his way. This attitude was not crazy but rather symptomatic of the fanatic energy with which he carried out his obvious purpose to seek retaliation. Similarly, the physical appearance of accused at the time he shot at the victim can well be explained without taking recourse to the theory that it was the symptom of the recurrence of one of those pathological attacks of a temporary nature to which accused had allegedly been subject on previous occasions. It is the fact that he disclosed his name after this victim was lying on the ground necessarily the action of a man who of his own free will introduced himself to the dead/^{body} of the one he had killed. It is more logical to explain it as self-identification of accused, implying that he was well aware of the nature of his deed in order to take the consequences thereof. The utterance which he made after the first victim was killed, that he was looking for another one, is likewise logically connected with his motive and his action. The court could therefore well reach a contrary result from the statements

of part of prosecution's witnesses who on the basis of accused's behaviour on the scene of the shooting had gained the impression that he acted like a crazy man and who also referred to similar impressions which allegedly other eye witnesses had then and there received from him. The testimony of both defense witnesses, Mrs. Lina KOLL and Dr. Fritz F. HILL, though possibly made in good faith, was undoubtedly influenced by a desire to aid the accused and accordingly cannot be considered as being completely objective. Only those parts of their respective statements which represent opinions rather than observations would be conclusive in favor of the theory of the defense if they were taken at their face value. However, the court was free to use its discretion in weighing the probative value of evidence with regard to the testimony of these two witnesses and thus to reach a conclusion of fact different from the opinion expressed by the witnesses. Of course, if the foregoing proposition be true, prosecution did prove and defense did not disprove the existence of mental competency of accused at the time of the alleged crime.

c. One of the two defense counsel in part of his final argument (1129) referred to the Outline of Procedure for Trial of German War Criminals by General and Intermediate Military Government Courts by quoting from its page 18 the following passage:

3. Action in Case of Insanity of Accused.

"a. Whenever the Court is satisfied that substantial issue has been raised on the question whether the accused, either at the time of the commission of the offense was insane, or at the time of trial is insane, the Court should suspend further proceedings in the case and commit the matter to the appointing authority for appropriate action."

It must be recalled that there was in the present case "a substantial issue" on the accused's sanity at the time of the commission of the alleged crime. Likewise, it should be noted

the Court's action was proper and that it correctly exercised its discretionary power to weigh the evidence with regard to its bearing on the question of accused's criminal responsibility and to reach itself the corresponding conclusion rather than to refer it to another authority for action outside the courtroom. The above-quoted provision is ineptly worded and is not in harmony with the general practice concerning the judicial function with regard to an issue of the accused's contemporaneous insanity raised in a criminal trial and it is not clear that it was intended that it be at variance with the following provisions contained in RGR 5-335:

"Wherever a Court is satisfied that the accused is unable by reason of insanity to understand the nature of the charges against him or the proceedings of the Court, or that the accused committed the offense for which he is being tried but was insane when he committed it, the Court shall record a finding of either such fact and may make an order providing for temporary custody pending direction by the Judicial Authority for permanent custody or other disposition."

Identical provisions appear in Section 35 of "Manual for Trial of War Crimes and Related Cases," 11 July 1946, as amended, and now in use.

f. The same defense counsel, in his final argument (129), also referred to page 117, paragraph 51 of the Technical Manual for Legal and Prison Officials (2nd Edition) which under the heading "Defenses in Criminal Prosecution" provides:

"The criminal deed is committed if the actor is incompetent at the time of commission as a result of unconsciousness, or on account of mental impairment or feeble-mindedness which makes him incapable of understanding the wrongfulness of the deed or of acting in accordance with this understanding."

Even though this quotation contains several terms not of

"Outline of German Criminal Law and Procedure", Section 7, Technical Manual for Legal and Prison Officials, 2nd Edition, for the purpose of argument, it will be assumed that it is declaratory of general principles. It is applied in the same procedure,

too. However, it supports rather than bears the conclusion reached by the reviewer. The evidence, in the light of its reasonable interpretation, would seem to leave no doubt about the fact that at the time when he shot against his victim the accused was capable of understanding the wrongfulness of his deed and of acting in accordance with this understanding, that is abstaining from his assault on the flyer. That his capacity was materially lessened will be submitted hereinbelow and is the reason for the reviewer's recommendation to commute the death sentence pronounced by the Court.

Dr. WACKER, who was the German Defense Counsel of the accused during the trial, filed a supplementary Petition for Review dated 26 July 1946 and another supplementary Petition for Review dated 9 August 1946 was filed by Dr. Karl WEGER, a member of the Bar of Wiesbaden. To both these petitions there was attached an opinion by Dr. Med. Hans Joachim SCHULZ, a specialist for nerve diseases, dated PULDA, 19 July 1946. The supplementary Petition for Review of Dr. WACKER submitted in addition an expert opinion by the Doctor of Theology and philosophy, Dr. Franz SMIT, Director of the State College (Gymnasium) in PULDA, dated 12 July 1946. While Dr. WACKER's petition merely refers to the two above mentioned expert opinions attached to it, Dr. WEGER's petition also contains an argument of his own, destined to prove that the accused was not mentally incompetent at the time of his deed.

Dr. SCHULZ's expert opinion is in its assumptions of facts based on the information received by him from "Dr. Hel. SMIT", apparently identical with the witness Dr. Franz SMIT. After at length stating the symptoms and other facts which he thus takes for granted Dr. SCHULZ arrives at the following conclusion: it must be believed on a probable degree

of probability which in medical matters amounts to certainty: that the accused at the time of his action was subject to such mental defect which made him unconscious of what he did.

Dr. LAMPT's opinion does not reach such a definite and concrete conclusion, but suggests ~~rather~~ in a similar direction as way of certain observations which he as a Catholic priest made with regard to the accused, and as a school-teacher made with regard to Nazi Youth in general.

It is believed that this supplementary material does not deprive the discussion contained in the foregoing subsections a to f of so much force as may be inherent in it, especially in view of what has been set forth hereinabove at c, concerning the Court's prerogative in passing the final judgment on the mental capacity of an accused.

Dr. WEBER substantially argues that the court should not have reached the final decision in this case before ordering an investigation into the mental capacity of the accused by a commission of medical experts. It is not believed that it was necessary for the court to do this, as on the basis of the evidence it felt fully satisfied of the existence of such a mental condition of the accused at the time of the crime which made him responsible for what he then and there did.

h. Examination of the charge sheet discloses that while the charge and particulars and the indorsement referring the case to trial, were properly signed, the blank spaces in the printed indorsement were not filled up to state more specifically the court which was to try the case. It has already been decided by this office that such an omission is technical in its nature, and does not prejudice any substantial right of accused. (United States v. Druse "TULLEY", 60 Misc.2d 567, 392 S.2d 915).

9. QUESTIONS:

A Reasoned Petition for Review, dated 1 July 1946, was submitted by Dr. Richard WACKER, a German civilian, a member of the Bar in STUTTGART, who served as special defense counsel for accused. Dr. WACKER filed also a supplementary Petition for Review and Dr. WACKER an additional Position for Review which both are covered herewith at subject herein Bg.

It is not believed that the original mind of accused was of such a nature as to be devoid of any mental capacity. There is enough in the case to justify the recommendation of commutation of the death sentence to imprisonment of the 10-year-accused for a term of 30 years commencing 14 June 1946. In this connection, reference must in the first place be made to the fact that accused, at the time of his crime still had a mental fragment which in the left cerebral region which was removed by operation on 7 March 1946 (Proc. Exp. 8) and that it is therefore credible that the description of the state of mind of accused and the condition of his mental faculties, as given by the defense witnesses, though probably somewhat exaggerated, contained substantial elements of truth. While it is not believed that the respective evidence could reasonably prevent the Court from concluding that accused knew that he was doing what he did, it cannot be excluded that his faculty of deliberation was diminished by the impact of that pathologic condition.

10. CONCLUSION:

In view of all these circumstances and other, which similarly be involved to other cases, a commutation of the death sentence is case seems reasonable. With a commutation of the death sentence in his case and with the fact that he is a severe prisoner of such condition. It is believed that a commutation of a term of 30 years would seem to be a reasonable decision in

