

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
APO 178, U.S. Army

UNITED STATES)

vs.)

Case No. 12-2283)

Reinhard MÖLLER, and)
Gustav ENGELHARDT, German)
Nationals.)

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused Reinhard MÖLLER and Gustav ENGELHARDT, were tried at Dachau, Germany on 28, 29 and 30 August 1946, by a General Military Government Court, appointed by paragraph 2, Special Orders No. 238, dated 26 August 1946, Headquarters, United States Forces, European Theater, APO 757, US Army.

2. FINDINGS: The offense involved was:

	<u>Pleas</u>	<u>Findings</u>
	<u>as to each accused</u>	
CHARGE: Violation of the Laws of War	NG	G

Particulars: In that Reinhard MÖLLER and Gustav ENGELHARDT, German Nationals, did, at or near MÜNCHEN, Germany, on or about 30 November 1944, wilfully, deliberately, and wrongfully, encourage, aid, abet, and participate in the killing of a member of the United States Army, believed to be Forrest PETERSON, who was then an unarmed, surrendered prisoner of war, in the custody of the then German Reich.

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 both accused to death by hanging. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (paragraph 8d, letter, Headquarters, United States Forces, European Theater, File AG 000.5 JAG-AGO, subject: "Trial of War Crimes Cases," dated 14 October 1946.

4. DATA AS TO ACCUSED: The accused Reinhard MÖLLER is a German national, 41 years old. He is a railroad worker and

resides at KUECHEN, Germany (R 4, P. Ex. 10), is married and has three children.

The accused Gustav ENGELHARDT is a German national, 52 years old, a teacher, and lives at HESSE-LECHTENAU, Germany (R 4). ENGELHARDT was drafted in the German Army in 1939 and discharged in August 1942 because of an injury (Pros. Ex. 11). He joined the Nazi Party in 1937, and membership was made retroactive to 1933. At the time of the occurrence for which he was tried ENGELHARDT was a Kreisabfuhrer in the Volksturm (Pros. Ex. 12).

5. RECOMMENDATIONS: That the sentence of the Military Government Court be approved as to each accused and ordered executed.

6. EVIDENCE:

a. For the Prosecution. On or about 30 November 1944, a soldier parachuted to safety in the vicinity of KUECHEN, Germany. He surrendered to a German national named Otto REUSS, and announced that he was an American (R 13, 14). The two proceeded on a path toward the village, the American soldier walking ahead and REUSS following with his horses (R 14). On the way to the village, the two met accused MÖLLER, together with some other people. Without provocation, MÖLLER struck the American flyer twice on the head with a stick, knocking the flyer down on an embankment (R 17, 18). Accused ENGELHARDT arrived from the village with one Heinrich PRESSIER and ordered or urged that the flyer be shot. One witness testified that he used the exact words "Upon my responsibility that man will be shot" (R 19); another testified that the words used were "Shoot the pig dead" (R 40). In a pre-trial statement, ENGELHARDT admitted that he called out "Shoot and kill him, I shoot and kill him!" (Pros. Ex. 11).

MÖLLER in a pre-trial statement declared that ENGELHARDT cried out "That man will be shot immediately" (Pros. Ex. 9). MÖLLER then shot at the American flyer, using the rifle he had taken from PRESSLER, and which was an old infantry rifle (R 20, 41, 33, 37; Pros. Exs. 9, 10, 11, 12). At the time MÖLLER shot he was about six or seven meters away from the flyer, who was standing erect with his hands at his side facing MÖLLER (R 42, 43). After the shot was fired, the flyer collapsed, falling on his right side, but immediately raised his head approximately a half meter from the ground (R 44; Pros. Ex. 12). ENGELHARDT took a small caliber revolver or pistol which had been fastened to his belt and shot at the flyer, who was then lying on the ground (R 45, 46, 79, 81, 88, 89, Pros. Exs. 9, 10, 12). One witness testified that ENGELHARDT held the pistol directly against the flyer's head (R 40). ENGELHARDT, in a pre-trial statement said that he stood at a distance of three to four meters from the flyer and fired one shot at the flyer (Pros. Ex. 12). The body of the flyer remained at the scene of the incident until the following morning, when REUSS, PRESSLER, and two others picked up that body, and the body of another flyer who had been killed while landing, and took them to the Community House (R 22, 47). The flyer who had been shot was dressed in a full leather flying suit (Pros. Exs. 10, 12). The next day, these two bodies were taken to an airfield at MESSE-LICHTENAU. Georg KOKOR, a soldier stationed at MESSE-LICHTENAU, received two bodies from PRESSLER a day or two after 30 November 1944, and was told that they came from KUECHEN. These bodies were buried in a common grave with two other bodies; only one of the four bodies bore gun shot wounds. These wounds were in the chest and back and it could be assumed that both wounds were caused by one missile. Prior to interment, the

body with shot wounds was examined by MOHOR but no identification tags or papers were found (R 96, 98). MOHOR later pointed out to an American officer the grave in which he had buried the four bodies. He was present when the bodies were exhumed and pointed out the body with the gun shot wounds. When the officer examined the body he found identification tags of the United States Army standard type, showing the body to be that of one Forrest PETERSON (R 98, 99; Pros. Exs. 4, 6).

A pathologist's report discloses that the exhumed body identified as that of Forrest PETERSON was dressed in a uniform of the type usually worn by the Royal Air Force, and that the outer garment was a combination flying suit of dark blue elastique wool cloth. According to the report, death was caused by a bullet fired from the front, traversing the right chest from the front to the back, and no bullet entered the cranial cavity. Further, it was stated that the wound was caused by a bullet from a weapon of rather small caliber, possibly a 7.65 mm pistol, although a rifle could not be excluded, and that the shot was fired from a distance of more than 50 cm (Pros. Ex. 4).

There is evidence in the record that MÖLLER was a member of the Volksturm and that ENGELHARDT was in charge of the Volksturm Battalion at WITZENHAUSEN, and was superior to MÖLLER (R 61, 62, 75, 76, 90, Pros. Ex. 10, 11).

The pre-trial statements of the accused were introduced over the objections of Defense Counsel. Accused ENGELHARDT made three pre-trial statements under oath (Pros. Exs. 7, 11, 12). He admitted shouting "Shoot and kill him" or "shoot him dead" (Pros. Exs. 7, 11, 12). He admitted the possibility that he had used the words "upon my responsibility that man will be shot", however, he stated that

his words could not be considered as an order because he had no right to give orders to PRESSLER as a Landwachtmann, or to HÖLLER, who was not a member of the Volksturm (Pros. Ex. 11). In one statement ENGELHARDT declared that he could not say whether HÖLLER fired a shot (Pros. Ex. 7); in the second, he stated that HÖLLER shot and killed the flyer and that he (ENGELHARDT) later fired a shot down a slope (Pros. Ex. 11); and in the third, ENGELHARDT averred that HÖLLER shot the flyer, who fell to the ground but was not dead immediately, and that he (ENGELHARDT) fired a shot from a distance of 3 to 4 meters at the flyer as he was lying on the ground. ENGELHARDT further stated that he did not know what part of the flyer's body was hit by the bullet he fired (Pros. Ex. 12).

Accused HÖLLER likewise made three pre-trial statements (Pros. Exs. 8, 9, 10). In each of these statements he admitted firing a shot at the American flyer. In one, he denied hitting the flyer (Pros. Ex. 8), and in another stated that he did not know whether he hit the flyer (Pros. Ex. 9). HÖLLER declared that after he fired the shot the flyer sat down on the slope and laughed (Pros. Exs. 8, 10). HÖLLER indicated that after shooting he walked away from the scene and heard a shot that could only have been fired by ENGELHARDT (Pros. Exs. 8, 9, 10), that he turned and saw the flyer lying on the ground (Pros. Ex. 8), and that later that afternoon he saw the dead flyer with a bullet wound in his temple (Pros. Exs. 9, 10).

b. For the Defense. At the time the Prosecution rested, the Defense Counsel moved for a directed verdict on the ground that the Prosecution failed to offer proof to support the particulars of the charge. It was urged that the prosecution had failed to prove that a member of the United States Army had been killed by the two accused. It was further urged on behalf of

ENGELHARDT: first, that the pathologist's report showed that only one bullet had entered the body of the flyer and that was in the chest, whereas a witness for the prosecution had testified that ENGELHARDT held his pistol directly against the flyer's head when he fired; and secondly, that there was no proof that ENGELHARDT gave a direct order or urged that killing but only uttered words in the excitement of the moment in the chase after the flyer. The motion was denied, the Defense rested, and the court announced that both accused had been found guilty of the Charge and Particulars. Defense Counsel for both accused then expressed a desire to introduce evidence of extenuating circumstances.

Reinhard MÖLLER took the stand and testified in substance as follows:

MÖLLER did not take the rifle from PRESSLER but PRESSLER handed it to him. After ENGELHARDT first said "The man will be shot." MÖLLER waited a moment and ENGELHARDT again gave the order: "Immediately, the man will be shot." MÖLLER fired the shot but does not know whether he hit the flyer; however, after MÖLLER fired, he saw "how the man stretched himself." As MÖLLER left, some soldiers standing there said to him: "You are a coward." He supposed that they meant that he was a coward because he had not really shot to kill (R 120). ENGELHARDT had the whole Volksturm under him and was MÖLLER'S superior, and therefore MÖLLER shot under orders. MÖLLER hit the flyer on the head and across the shoulder with a stick when he first met the flyer and REUSS. He did this in excitement because he had lived through attacks in KASSEL, had seen many dead, and his brother had been killed by partisans (R 121). Later in the evening MÖLLER passed the dead flyer and saw that the flyer had a shot wound in the head (R 122).

The accused ENGELHARDT voluntarily made a statement in sub-

tance as follows:

At a conference held on 8 November 1944 an order was given that no future Allied flyer was to be delivered alive. At this meeting, the Gauleiter threatened that if the order was not carried out, the punishment would be two years in a concentration camp. This order was to be disseminated by the Kreis Staff Leaders to the Volksturm; however, the order was not repeated in the battalion at Witzzenhausen. On the day of the incident, ENGELHARDT came on a motorcycle from a conference and on the way was strafed by low flying aircraft. As ENGELHARDT approached the scene of the incident at a distance of about 100 meters, he saw the flyer run down an embankment and suspected that he was trying to escape. He was overcome by high temper and shouted: "Shoot him dead! Shoot him dead!" These words were a sudden exclamation and not well thought out words (R 123, 124). He was at the scene of the incident as a simple civilian, as the teacher ENGELHARDT, and not as a Kreis Staff Leader, and did not give an order in his position as the Volksturm leader. He had neither the intention nor the authority to issue such an order. He could only issue orders after the Gauleiter had ordered the Volksturm to action. Further the men on the search were Home Guard men and they had an order to kill all Allied flyers, that order having been issued in writing by the police. ENGELHARDT did not have to give any orders if he wanted the flyer killed. He had a pistol in his possession but did not draw the pistol. He did draw the pistol later after he had gone up the hill, because he knew that three flyers were still at large (R 125).

7. JURISDICTION: The particulars alleged a violation of the laws and usages of war which were committed before 9 May 1945 by enemy nationals against a member of the United States

Armed Forces at a time when a state of war existed between Germany and the United States of America. Accordingly, the court which was specially appointed to hear the case had jurisdiction of the persons and subject matter in accordance with previous decisions of this office in similar cases. (SEE UNITED STATES v. CLINTS WIEGAND; UNITED STATES v. RICHARD D. HUZ, November 1943 and April 1948, respectively.

8. SUFFICIENCY: Evidence before the Court was sufficient to establish beyond a reasonable doubt that the two accused are guilty as alleged in the Charge and Particulars. The testimony of an eyewitness to the incident, corroborated by the testimony of two other witnesses who were near the scene at the time of the incident, together with the pre-trial statements of the two accused admitting participation in events resulting in the death of the American flyer, presents clear and compelling evidence of the guilt of these two men. The two accused did not take the witness stand in their own defense but after having been found guilty made statements in an effort to prove extenuating circumstances. These two statements, however, only corroborate evidence already presented to the Court. The Court was clearly justified in believing that ENGELHARDT urged the death of an unarmed surrendered American flyer; that HOLLER, incited by the exhortations of ENGELHARDT, if not in obedience to an order, fired a shot at the flyer; that within a few minutes thereafter, ENGELHARDT fired another shot at the flyer; and that the flyer died solely as a result of the combined deliberate and willful actions of these two men.

The question as to whether or not accused ENGELHARDT ordered that the flyer would be shot is not important. There was clear evidence before the Court that he at least urged the death of the flyer. Those who advise, encourage, aid, or

abet the killing of another are as guilty as though they took his life with their own hands. Section 34, 14 American Jurisprudence, Section 30, 26 American Jurisprudence, Criminal Law from American Jurisprudence.

The statement of ECKELHARDT that he had received orders from Col. Guleitzer that all airmen would be killed offers no reason for mitigating the sentence. ECKELHARDT clearly had a moral choice.

IF the court believed that the words uttered by ECKELHARDT were tantamount to an order and that KOLLER considered them as such the evidence was such as to warrant the belief of the court that KOLLER had a moral choice; therefore the court would have been justified in not considering the plea of "Superior Orders" either in defense or in mitigation. See page 15000, Decision of International Military Tribunal.

Further, it is not important to determine whether or not the body identified as that of Forrest PETERSON is that of the flyer killed at HUSCHKE on or about 10 November 1944; it is enough that the court was presented with sufficient evidence to establish beyond reasonable doubt that an unarmed surrendered American flyer was killed in HUSCHKE on that day and that death was caused by a criminal agency. It is clear that the two accused constituted the criminal agency. See Sec 332, 371, Vol. 11th Ed. Wharton's Criminal Evidence. Nor was it necessary to determine which bullet killed the flyer. The evidence is clear that both accused participated in events resulting in the death of the flyer, that they both possessed the necessary intent and that they were co-actors in bringing about the death of the flyer. They were not acting independently but were voluntarily united in the commission of this offense and each is responsible for the killing. See Sec 35, 25 American Jurisprudence,

Criminal Law from American Jurisprudence.

Defense Counsel introduced a motion for severance on the ground that the interest of the two accused were so antagonistic and conflicting, that it was impossible for each of the accused to present an adequate or full defense without implicating the other, thereby denying the other substantial rights. The motion for severance was denied and it was brought out that both accused were represented by separate counsel. It was the prerogative of the court to determine whether or not a motion for severance should be granted. However, grounds for severance very rarely exist in war crimes trials. The true test is not whether purported substantial rights of the accused would be denied if severance were not made, nor whether defense counsel would be hard put properly to defend all accused as stated in United States v. Anton SCHLESER, December 1945. On the contrary the true test is whether to try the accused together would result in an injustice. It does not appear that any injustice resulted to either accused.

Defense Counsel objected to the introduction of the several pre-trial statements, of the accused on the ground that they were sworn statements, whereas accused could not be sworn when appearing in person before a War Crimes Tribunal. Rules and procedures governing the conduct of cases before Military Government Court trying War Crimes cases, make it clear that such statements are admissible. (Letter, Deputy Theater Judge Advocate for War Crimes, File AG 00045, subject: "Admissibility of Reports of Investigation in the Trial of Suspected War Criminals" dated 3 October 1945).

The proceedings satisfied all the requirements of a fair trial. The accused were provided with American counsel; competent interpreters were used; challenges for cause were

allowed; and a vote of two-thirds of the members of the court was required for conviction and sentence. There were no errors or irregularities that affect any of the substantial rights of the accused. The appointment of a General Military Court, and proceedings thereof, were in compliance with the provisions of letter, Headquarters, United States Forces, European Theater, file AG 000.5 JAC-100, subject: "Trial of War Crimes," dated 14 October 1944, and letters superseded thereby, and with Military Government Directives and instructions. There was substantial compliance with the requirements of the principles of International Law recognized as applicable to the trial of such cases.

9. SENTENCES: A General Court Martial may impose any lawful sentence including death or imprisonment for life in proper cases. The maximum punishment for all war crimes is death, although a lesser punishment may be imposed. The court was presented with facts sufficient to warrant the sentences imposed.

10. CLEMENCY: Accompanying the record of trial are two petitions for clemency filed on behalf of accused Reinhard HÖLIER. One of these petitions dated 9 September 1943, signed by W. KEMER, parson, and E. F. LUE, mayor of the community of BUCHTEN, plead for mercy on behalf of accused HÖLIER because of the misery of the mother of the accused who lost a son in the war and because of compassion for the wife and three minor children of the accused. In a petition dated 31 October 1943, Mrs. Elisabeth HÖLIER, wife of accused HÖLIER, states that at the time of the occurrence for which her husband was convicted, he was suffering as a result of an attack of meningitis in 1923, when he was hospitalized for four months. She states that in later years he has suffered from weakness of memory, headaches,

and dizzy spells. Accompanying this letter is a statement dated 5 September 1946 from the Service Manager, Office of the Railroad Inspector, WILBURG, R.V., who states that HÖLLER was an employee of the railroad during the war, that his duties to supervise foreign workers repairing damages caused by bombs on railway installations; that he was on good terms with these laborers; that after 23 September 1944, accused HÖLLER was permanently attending to damages on the KESSEL railway stations; and that he had gone through twenty- heavy air-raids by bombings. Also, attached to letter from Mrs. HÖLLER, is a statement dated 30 October 1946 from Dr. WEPFER, WILBURG, District of KESSEL, stating that accused HÖLLER was hospitalized with meningitis in January 1928, for a period of four months, and that during the following years, doubtlessly as a result of this illness, HÖLLER suffered from headaches, weakness of memory, excitement, sleeplessness, and dizzy spells. These petitions for clemency present no new evidence and afford no ground upon which recommendation for clemency may be based.

In a Petition for Review, dated 7 September 1946, filed by Emanuel Lewis, Capt., Inf., Defense Counsel, on behalf of accused ENGELHARDT it is urged that the Court erred in not granting a severance. It is further urged that ENGELHARDT did not do the actual killing and did not participate in the crime as a superior or instigator. Both of these questions have been considered elsewhere in this review. Further, pages of the record are cited as containing evidence that the witnesses who appeared at the trial gave testimony in an attempt to cast all responsibility on ENGELHARDT and the theory is advanced that these witnesses were life long friends of HÖLLER and "in their perverted minds, they hoped to free their friend HÖLLER by

casting the blame on the accused E. GEHARDT." It was the province of the Court as a fact finding body to accept such evidence as it found worthy of belief and a careful examination of the record does not disclose any reason for disturbing the findings of the Court.

11. CONCLUSION: It is recommended that the findings of sentences be approved as to each accused. Forms of action, designed to carry the foregoing recommendations into effect, should they meet with approval, are submitted herewith.

HOMER A. SPRINGFIELD,
1st Lt., ^{USMC},
Post Trial Section

Having examined the record of trial, I concur:

W. D. STANLEY,
Colonel, ^{USMC},
Deputy Theater Judge Advocate
for War Crimes

HEADQUARTERS
UNITED STATES FORCES
EUROPEAN THEATER
OFFICE of THE THEATER JUDGE ADVOCATE

UNITED STATES)

v)

Reinhardt MÖLLER and
Kirstva ENGELHART,
German nationals)

RECOMMENDATION

of)

THE THEATER JUDGE ADVOCATE

I have examined the record of trial, and I concur in the
view and recommendations of the Deputy Theater Judge Advocate for
Crimes and in his recommendation that the sentence be approved.

13 March 1947

/s/C.B. Mickelwait
C.B. MICKELWAIT,
Colonel, JAGD,
Theater Judge Advocate
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I concur:

/s/ H.G. White
Deputy Chief of Staff

I concur:

/s/ C. Huebner
Chief of Staff