

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 407

27 February 1948

UNITED STATES)

v.)

Josef MUELLER)

Case No. 000-Buchenwald-5

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 12-15 September 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

CHARGE I: Violation of the Laws and Usages of War.

Particulars: In that Josef MUELLER, a German national, did, at or in the vicinity of Weimar, Germany, in or about July 1943, wrongfully encourage, aid, abet and participate in the killing of approximately 10 non-German nationals, inmates of Buchenwald Concentration Camp, who were then in the custody of the then German Reich, the exact names and number of such persons being unknown.

CHARGE II: Violation of the Laws and Usages of War.

Particulars: In that Josef MUELLER, a German national, did, at or in the vicinity of Weimar, Germany, in or about August 1944, wrongfully encourage, aid, abet and participate in the killing of an unknown non-German national, an inmate of Buchenwald Concentration Camp, who was then in the custody of the then German Reich.

CHARGE III: Violation of the Laws and Usages of War.

Particulars: In that Josef MUELLER, a German national, did, at or in the vicinity of Weimar, Germany, in or about September 1944, wrongfully encourage, aid, abet and participate in the killing of approximately 10 non-German nationals, inmates of Buchenwald Concentration Camp, who were then in the custody of the then German Reich, the exact names and numbers of such persons being unknown.

III. SUMMARY OF EVIDENCE: The accused was a criminal inmate of Buchenwald Concentration Camp near Weimar, Germany, from December 1939 to April 1945, and capo of the crematory detail from 1943 until the liberation of the camp. The evidence under Charges I, II and III and the particulars thereunder will hereinafter be referred to as Incidents Nos. 1, 2 and 3, respectively.

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Incident No. 1. On 23 June 1943 the accused participated in the execution by hanging of 37 Polish officers at the crematory at Buchenwald by lifting up the victims while the nooses were applied.

Incident No. 2. In August or September 1944 the accused took part in the public hanging of a Polish inmate on the roll call square of Buchenwald. He erected the gallows and raised up the victim so the noose could be placed around his neck.

Incident No. 3. The accused participated in the execution by hanging of 16 inmates in the basement of the crematory at Buchenwald, some time between July 1943 and October 1944. He lifted the inmates up to the hook.

IV. EVIDENCE AND RECOMMENDATIONS:

Josef MUELLER

Nationality:	German
Age:	49
Civilian Status:	Criminal Inmate
Party Status:	Unknown
Military Status:	Unknown
Plea:	NG Charge I; NG Charge II; NG Charge III
Findings:	G Charge I; G Charge II; G Charge III
Sentence:	Death by hanging

Evidence for Prosecution: The accused testified that he was a criminal inmate of Buchenwald Concentration Camp near Weimar, Germany, from December 1939 to April 1945 (R 65, 66). He was made capo of the crematory detail in 1943. As capo he was responsible for the furnaces, for the cleanliness of the crematory, and for filling and shipping urns of ashes (R 66, 78). Witness Zgoda, a former inmate and member of the crematory detail, testified that after accused became capo he was present at all executions (R 9, 21, 22). The accused stood under the gallows and lifted the victims while SS men put the nooses around the necks of the victims (R 9, 11). After five or ten minutes the victims were taken down by th

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accused and his assistants (R 11). If the victim was not dead, the accused clubbed him to death (R 9). The witness did not see or hear that the accused objected to participating in the hangings (R 22).

Incident No. 1. Witness Zgoda testified that on 23 June 1943 he looked through a key hole and through a window over a door and saw the accused participate in the execution by hanging of 37 Polish officers at the Buchenwald crematory (R 11, 23, 30). The accused lifted up the victims, and later helped an SS first sergeant take the rings and watches from the dead bodies (R 12).

Incident No. 2. One witness, Zgoda, testified that he saw the accused participating in the public hanging of a Polish inmate on the roll call square of Buchenwald in September 1944 (R 20). The accused erected the gallows, and lifted the victim while an SS technical sergeant put the noose around his neck (R 21). A second witness, also a former inmate, testified that he stood about 50 meters away from the gallows, and saw the accused put the noose around the neck of the Pole and then kick a stool out from under his feet (R 40, 42). The execution took place during the evening roll call at Buchenwald, in July or August 1944, and was viewed by the entire camp (R 40). In an extrajudicial sworn statement, a third witness, a former inmate, stated that a Polish inmate was publicly hanged at Buchenwald on 20 August 1944 upon orders from Himmler because of an attempt to escape. The noose was placed around the victim's neck by an SS man. The accused then raised the victim by his legs while an SS man put the rope over a hook (R 56; P-Ex 2A).

Incident No. 3. Witness Zgoda testified that the accused took part in the execution of 16 inmates in the basement of the Buchenwald crematory. The accused lifted them up to the hook where they were hanged (R 13, 16). The witness was told by comrades that five or six of the victims were American soldiers (R 13, 14, 32). The crematory detail was locked up during executions and witness did not see this execution in the basement (R 23, 24, 26). The witness gave the date of the incident variously as in August or September 1943 (R 13), July or the beginning of August 1944 (R 16), September or October 1944 (R 16, 17).

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or three or four weeks after the execution of the Polish officers in June 1943 (R 36).

Evidence for Defense: The accused testified that he was assigned to duty in the crematory and had no choice as to his work (R 76). He was made the capo because he was the only one on the detail who knew how to operate the coke and oil furnaces (R 87). He attempted to get transferred to other duties without success (R 66, 81, 82). He received his orders from two SS detail leaders who controlled everything (R 67). The accused further testified that there was ill feeling between himself and witness Zgoda arising out of a dispute over Red Cross packages (R 70, 81). This was confirmed by Zgoda (R 28). One witness, the former protective custody camp leader at Buchenwald testified that he attended 10 to 15 executions there after 1942 and never saw the accused actively participating in them (R 59). A sentence was read by a court officer, and a doctor was always present to certify as to the deaths at these executions (R 60). The accused, as an inmate, was subject to the orders of the SS (R 61). A second witness, Zgoda, testified that the camp adjutant read a sentence before each execution (R 10) and that a doctor was present to determine that death had occurred (R 29). The accused had no control over who was executed nor over the method of execution. The orders came down from headquarters (R 29, 30). Zgoda further testified that as an inmate, the accused was subject to the orders of the SS detail leader (R 24).

Incident No. 1. The accused testified that he was present at the execution of a group of Polish officers in the summer of 1943, but he denied that he took any part in the execution (R 79). The officers were brought to the crematory by SS guards and handcuffed there by a master sergeant from the camp prison (R 79). The camp adjutant read from a paper that the victims were sentenced to death by order of the Reichsmarshal of the SS, Himmler (R 80). Witness Zgoda testified that at this execution the camp adjutant read an order from Himmler from Berlin, stating that the officers were sentenced to death by hanging because they had escaped from a prisoner of war camp and had hidden in the woods to be ready for a revol

in Germany (R 12).

Incident No. 2. The accused testified that in August 1944, under the direction of an SS technical sergeant, he set up a gallows on the roll call square for a public hanging. He and another inmate were ordered to help with the hanging, but refused (R 68). Accused stood near the gallows, and merely assisted the victim, a Pole, to mount the stool (R 84). The SS technical sergeant put a noose around the victim's neck and pulled the stool away (R 69, 84). A sentence was read before the hanging (R 69). One witness, the former protective custody camp leader, testified that the inmate was hanged in a public execution because he had committed murder and robbery while escaped from Buchenwald (R 60, 63, 64). The Camp Commander and other SS officers were present (R 62). The execution was performed by an SS man. The accused had nothing to do with it (R 63). A second witness, Zgoda, testified that the Polish inmate was hanged because of his escape and as a deterrent to other inmates (R 21).

Incident No. 3. One witness, the former protective custody camp leader, testified that no Americans were ever executed at Buchenwald (R 60).

Sufficiency of Evidence: The allegations under Charge III are not established. With regard to the evidence offered in support of superior orders, the Court might well have concluded that under all the circumstances the desire of the accused to cooperate with and to please his SS superiors was very strong; but that he met the burden of proof required by pertinent authorities discussed in Section V, post, showing that he may have acted under immediate compulsion to a very minor extent. Likewise, the Court might well have concluded that the accused failed to establish as an affirmative defense that the killings were legal executions and thus justifiable. For discussion see Section V, post. The findings of guilty as to Charges I and II are warranted by the evidence. However, in view of the fact that he may have acted to a minor degree under the immediate compulsion of the SS personnel who supervised his work, it is believed that the sentence is excessive.

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Petitions: A Petition for Review was filed by defense counsel, Donald J. Ross, 25 September 1947. Petitions for Clemency were filed by Max Klein, 30 October 1947; the accused, 10 November 1947; Peter Mueller, Anna Weitzel, Elizabeth Mueller, Ida Mett, Josef Mett, and Friedrich Weitzel, brothers and sisters of the accused, 1 December 1947; Herman Patzwald, 1 December 1947; Heinz Schaeuble, 7 December 1947; German defense counsel, Lothar Steiner, 21 January 1948; and by Herbert Hiller, undated.

Recommendation: That the findings as to Charges I and II be approved; that the findings as to Charge III be disapproved; and that the sentence be approved, but commuted to imprisonment for life.

V. QUESTIONS OF LAW:

Jurisdiction: It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

Superior Orders: The accused sought to justify his actions by offering evidence to show that he was acting in compliance with "superior orders". Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJAWC, February 1946; and French Republic v. Wagner, et al., Court of Appeals, (France) July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U. S. Army", 1928, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was a war crime.

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contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandovery Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945. United States v. Thomas, supra; and United States v. Beck, et al., opinion DJAWC, December 1946.)

Justifiable Homicide: The accused attempted to prove that the killings in which he participated were legal executions. A killing by unavoidable necessity and in discharge of a duty, as by one executing a criminal pursuant to a death sentence, is justifiable, and the accused is deemed not guilty of an illegal killing. However, such killing must be strictly in accordance with law and with the judgment and sentence. Likewise, a sentence or warrant that is without authority is no defense. Thus, if there is no jurisdiction in the court by which the warrant is issued, it is no defense, even though the executioner honestly believes the warrant valid. Justification being an affirmative defense, once the killing has been proved, the burden is on the accused to prove such justification, or at least go forward with the evidence so as to raise a reasonable doubt in his favor. (Volume I, Twelfth Edition, "Wharton's Criminal Law", pages 667, 770, 875; 28 American Jurisprudence, pages 228, 352, 491).

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

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VI. CONCLUSIONS:

1. It is recommended that the findings as to Charges I and II be approved; that the findings as to Charge III be disapproved; and that the sentence be approved, but commuted to imprisonment for life.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

RICHARD A. SCHNEIDER
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this 25th day of March 1948.

C. E. Straight
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Lieutenant Colonel, JAGD
Deputy Judge Advocate
for War Crimes

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